

**The Crossroads of Justice:
Sudan, the African Union and the International Criminal Court**

Gabriel Martin Gill-Austern, GLLGAB001

Supervisors: Emeritus Professor André du Toit and Mr. Salim Nakhjavani (Law Faculty)

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: _____

Signed by candidate

Date: 1 September 2010

“In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.”

- Kofi Annan, Former United Nations Secretary-General

ABSTRACT

In July 2009, following the issuance of an arrest warrant for President Omar al-Bashir of Sudan by the International Criminal Court (ICC), the African Union (AU) passed a declaration of non-cooperation with the ICC. While all of the other cases in which the ICC had been involved also were located on the African continent, the AU's declaration was the first time any collective of African nations expressed significant dissatisfaction with the ICC.

This thesis examines the reasons the AU reacted so publicly and strongly to the ICC's pursuit of Bashir (and not to the cases already on the ICC's docket). In this effort, it uncovers many of the micro and macro political factors at play in the confrontation between the two institutions, factors that range from geopolitical grievances that stem from inequitable representation and power in major international institutions to personal politics. Given the importance of the African continent to the ICC's work, it is vital to deconstruct these issues if the ICC, a novel project in international justice, is to succeed.

The thesis includes four substantive chapters. The first chapter briefly explores the institutions at the heart of the debate, specifically their defining characteristics in relation to the issue at hand. The second chapter reviews the ICC's prior and ongoing involvement in Uganda, the Democratic Republic of Congo and the Central African Republic, as well as the criticism encountered by the ICC in these countries, to provide the context through which the Sudanese situation can be viewed. The third chapter examines the history of the ICC's involvement in Sudan and the subsequent reactions to it from within the AU and African civil society generally. The fourth chapter analyzes some of the major issues that drive the confrontation and places these issues in the context of the preceding chapters.

The thesis reaches two primary, balancing conclusions. First, that the reaction by the AU, while complex and often based in legitimate grievances, has not provided a constructive influence in terms of achieving the goals (pursuing justice and eradicating a destructive culture of impunity) that not only the ICC but the AU profess to value highly. Second, given the continent's unique importance to the ICC, the Court and the governments that support it need to do more to accommodate African interests and concerns.

Gabriel Martin Gill-Austern
UNHCR Compound, UNHCR Sub Office Dadaab, Dadaab Refugee Camp, Kenya
gillaust@unhcr.org

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Glossary of Abbreviations:

AI	Amnesty International
ARLPI	Acholi Religious Leaders Peace Initiative
AU	African Union
AUDP	African Union High Level Panel on Darfur
AUHIP	African Union High Level Implementation Panel
CAR	Central African Republic
CGP	Center for Global Policy
CSOPNU	Civil Society Organizations for Peace in Northern Uganda
CPA	Comprehensive Peace Agreement
DLN	Darfur Leaders Network
DPA	Darfur Peace Agreement
DRC	Democratic Republic of Congo
FIDH	International Federation for Human Rights
FPLC	Patriotic Force for Congo Liberation
FRPI	Patriotic Force of Resistance
GAO	Government Accountability Office
GoU	Government of Uganda
GoS	Government of Sudan
HRC	Human Rights Center
HRW	Human Rights Watch
ICC	International Criminal Court
ICG	International Crisis Group
ICID	International Commission of Inquiry into Darfur
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
ILC	International Law Commission
ISS	Institute for Security Studies
JEM	Justice and Equality Movement
LRA/M	Lord's Resistance Army/Movement
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organization
NIF	National Islamic Front
NRC	Norwegian Refugee Council
NRM	National Resistance Movement
OAU	Organization of African Unity
OSI	Open Society Initiative
OTP	Office of the Prosecutor
PSC	Peace and Security Council (African Union)
RLP	Refugee Law Project
RPF	Rwandan Patriotic Front
SADC	Southern Africa Development Community
SAF	Sudanese Armed Forces

SCCED	Special Criminal Court for Events in Darfur
SLM/A	Sudan Liberation Movement / Army
SOAT	Sudan Organization against Torture
SPLM/A	Sudan Peoples Liberation Movement/ Army
UCAN	Uganda Conflict Action Network
UN	United Nations
UNAMID	African Union - United Nations Hybrid Operation in Darfur
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission on Refugees
UNICEF	United Nations Children’s Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNHCHR	United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UPC	Union of Congolese Patriots
UPDF	Uganda People’s Defense Forces
USAID	United States Agency for International Development



INTRODUCTION

“We must learn: there is no safe haven for life and freedom if we fail to protect the rights of any person in any country of the world.”
– ICC Prosecutor Luis Moreno-Ocampo¹

The International Criminal Court (ICC) became a reality in July 2002 when the requisite 60 states ratified the Rome Statute approximately four years after 120 states adopted the statute at the Rome Conference. According to the preamble of this momentous document, the purpose of the Court is to end impunity and to ensure 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 cooperation.”² The Court’s headquarters are in The Hague and it has jurisdiction over three types of offenses: war crimes, crimes against humanity, and genocide. Unlike other situation-specific tribunals set up by the international community, the ICC is a permanent institution and therefore is not temporally or geographically limited in the same way as some of its predecessors.³

In the absence of an effective institution of international justice, the creation of the ICC signalled a significant shift in the global community’s approach to the most unconscionable crimes. The Court was hailed as a remarkable achievement in the effort to combat the ‘culture of impunity’ that was so pervasive in the second half of the 20th century, and was initially embraced not only by the international human rights movement

¹ Moreno-Ocampo, Luis. 2003. “The Responsibility of Us All.” *Revista: Harvard Review of Latin America*, Fall 2003. p. 1.

² UN General Assembly. 1998. “Rome Statute of the International Criminal Court.” 17 July 1998, A/CONF. 183/9.

³ Waddell, Nicholas, and Phil Clark. 2008. “Introduction,” in *Courting Justice: Justice, Peace, and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark. Royal African Society. March 2008. p. 7.

but also by many people around the world, particularly in those places that had borne witness to many of the crimes that fall within the Court's jurisdiction. Chidi Anselm Odinkalu, head of the Africa justice programme of the non-governmental organization (NGO) Open Society Institute (OSI), explained: "most people in our continent are, like me, children of war, want and deprivation, caused mostly by bad government. For us, justice for mass atrocities is intimately personal." Unfortunately, in most African countries, Mr. Odinkalu pointed out, dignity, peace and justice have proved illusory: "This is why most of us supported the establishment of the ICC. We believed the court would help to end high-level impunity for mass atrocities, enabling us to attain the best we are capable of."⁴

International courts, and the ICC in particular, however, face a number of unique challenges that have the potential to derail the aims for which they were established. In addition to the normal functions of a court, international courts tend to hold broader ambitions and seek to expand the normative confines of national criminal justice.⁵ This broad horizon of goals is at once commendable and dangerous as such wide ambitions create a larger space for disappointment and failure.

In this vein, the decision by Luis Moreno-Ocampo, Prosecutor of the ICC, to pursue an indictment and arrest warrant against President Omar al-Bashir of Sudan was a bold move. Human rights advocates rejoiced at Ocampo's decision. Gregory Stanton, the

⁴ Kimani, Mary, 2009. "Pursuit of Justice or Western Plot? International Indictment Stirs Angry Debate in Africa." *Africa Renewal*. Vol. 23, No. 3. October 2009. p. 12.

⁵ According to Mirjan Damaska, a professor of international law at Yale University, "at various times, the [international] courts have expressed their intention to produce a reliable historical record of the context of international crime, to provide a venue for giving voice to international crime's many victims, and to propagate human rights values. Courts have also expressed their aspiration to make advances in international criminal law, and to achieve objectives related to peace and security - such as stopping an ongoing conflict - that are far removed from the normal concerns of national criminal justice." (Damaska, Mirjan. 2008. "The Henry Morris Lecture: What is the Point of International Criminal Justice?" *Chicago-Kent Law Review*. Vol. 83, No. 1. p. 332).

president of Genocide Watch, wrote in a letter to the United Nations High Commissioner for Human Rights (UNHCHR), “Advocates of justice around the world are thrilled at the strong action the Prosecutor of the International Criminal Court has taken in issuing a warrant for the arrest of Omar al-Bashir of the Sudan, resulting in finally holding him accountable for the atrocities being committed in Darfur over the last six years. The action that the International Criminal Court has taken in this situation has restored hope to peace and justice loving people, affirming that international human rights law not only exists on paper, but in reality.”^{6 7}

Despite the clear enthusiasm demonstrated by human rights advocates around the world, commentators have also pointed to the major risks for the ICC in deciding to take on this case. While the situation could represent the exact type of case that the ICC needs to catapult itself to international prominence and legitimacy, it also could strike a potentially fatal blow to the Court if it is unable to follow through on its declared intent. Indeed, as Tom Ginsberg, a professor of international law at the University of Chicago, writes, “Ocampo’s decision to indict a sitting head of state of a non-state party to the

⁶ Stanton, Gregory. 2009. “An Open Letter to the United Nations High Commissioner for Human Rights.” Statement by the President of Genocide Watch. March 23, 2009. Available at <http://abbaymedia.com/News/?p=2385>.

⁷ It should be noted from the outset that many advocacy and human rights organizations, such as Genocide Watch and others cited within these pages, have a clear interest in supporting the ICC’s operation and in framing the debate around the issue. Mahmood Mamdani has been particularly critical of the role that the ‘Human Rights lobby’ has played in attempting to frame the situation in Darfur as genocide and the consequences that has had for both the international reaction to the situation as well as the internal dynamics that are affected by it. Mamdani explains that “calling the violence in Darfur genocide has had three consequences. First, it has postponed any discussion of context while imposing the view of one party in the 1987-89 civil war in the name of stopping the ‘genocide.’ Second, it has conferred impunity on those same partisans by casting them as resisters to genocide. Finally, the description of the violence as genocide – racial killing – has served to further racialize the conflict and give legitimacy to those who seek to punish rather than to reconcile” (Mamdani, Mahmood. 2009. *Saviours and Survivors: Darfur, Politics and the War on Terror*. HSRC Press, Cape Town, South Africa. p. 7). He accuses the human rights lobby of distorting figures and publicizing selective information in order to achieve their primary goal – regime change. He argues that “the Save Darfur lobby demands, above all else, the right of the international community – really the big powers in the Security Council – to punish ‘failed’ or ‘rogue’ states, even if it be at the cost of more bloodshed and a diminished possibility of reconciliation” (Mamdani, p. 300).

Rome Statute is a high-risk one. If it succeeds, it will do much to highlight the successful institutionalization of the ICC as an independent player on the international scene. If it fails, it will relegate the enterprise to the marginal position in which it now sits: politically subservient to powerful state interests.”⁸ Despite the obvious risks, however, Ocampo went ahead with the indictment, presumably aware of the challenges ahead. The risks inherent in the decision itself, however, will be decided by the eventual outcome; if the Office of the Prosecutor (OTP) is successful in the prosecution of Bashir, or the indictment leads to some momentous change in Sudan’s political environment, then the decision likely will be heralded as a great achievement.

Africa is of central, almost singular, importance to the ICC. It represents the largest regional bloc of states parties to the Rome Statute, and there is little question that a significant number of crimes that fall within the ICC’s jurisdiction are committed within its territory. Most importantly, however, all four of the Court’s first “situations”⁹ are located on the continent: the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic (CAR) all by self-referral, and Sudan by United Nations Security Council (UNSC) referral. As such, “one can hardly overestimate the importance of Africa to the Court,”¹⁰ and this importance is unlikely to be dissipated anytime in the near future. Yet support from the continent has significantly waned in the wake of the Prosecutor’s announcement that he would seek an indictment of Bashir for the

⁸ Ginsberg, Tom. 2009. “The Clash of Commitments at the International Criminal Court.” *University of Chicago Journal of International Law*. Vol. 9, No. 3. Winter 2009. p. 499.

⁹ The term ‘situation’ is used (see e.g. Article 13 of the Rome Statute as cited below on p.16) rather than words such as ‘case’ because the matters before the ICC are not restricted to a single case. Furthermore, ‘situations,’ not ‘cases’, are referred to the court by states parties and the UNSC, i.e. Bashir’s case was not referred to the OTP, rather it was the situation unfolding in Sudan. ‘Case’ will be used when referring to the individual case of a defendant.

¹⁰ Du Plessis, Max. 2008. “The International Criminal Court and its Work in Africa: Confronting the Myths.” *Institute for Security Studies*. Paper No. 173. November 2008. p. 19.

widespread crimes committed in the Western Sudan province of Darfur. While the ICC had been active in Sudan since 2005 and issued its first arrest warrants for Sudanese citizens in 2007, the case against Bashir provoked a substantively different reaction.

Indeed, when the arrest warrant was issued, the response was swift. The African Union (AU) immediately lobbied the UN Security Council (UNSC) to defer the indictment, arguing that it would damage the prospects for success of the ongoing peace process in Sudan. Unsuccessful, AU members took more forceful measures. Following the AU summit in Libya in the beginning of July 2009, the organization passed a resolution and announced that “AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.”¹¹ The stand taken by the AU is one of the most significant and active moves in opposition to the Court, both legally and politically. It is an issue with deep historical roots, but also one that continues to change on a daily basis. Additionally, it has extensive ramifications both for the Court and for conflict in Africa.

Remarkably, at a juncture in which African leaders have the opportunity to rise to the occasion and give substance to the declaratory intent in the AU’s Constitutive Act to end impunity and ensure that Africa’s citizens enjoy a broad range of rights and freedoms,¹² they instead took the opposite route and, while ostensibly objecting against the ICC’s purported selective focus on Africa, effectively support the continued reign of a leader indicted by an international court. It is, in many ways, an unprecedented assertion

¹¹ See Appendix A for the full text of this resolution: African Union. 2009. “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court.” Addis Ababa, 1-3 July 2009. Doc. Assembly/AU/13(XIII).

¹²In the same resolution that was passed stating the AU’s refusal to cooperate with the ICC, the collective of states also reiterated the “unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union.” The AU’s consistent position that the body does not condone impunity, despite their declaration of non-cooperation, is discussed at greater length in Chapter Four.

of collective determination. As Kofi Annan, former Secretary General of the United Nations, wrote in an op-ed for the New York Times prior to the AU meeting in the beginning of July, 2009, “One must begin by asking why African leaders shouldn’t celebrate this focus on African victims. Do these leaders really want to side with the alleged perpetrators of mass atrocities rather than their victims? Is the court’s failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?”¹³

At the same time, there undoubtedly are a series of intensely felt motivations and valid grievances behind the recent declaration of opposition, and recent evidence has shown that there may be more to the declaration than originally met the eye. In addition, both the AU and the ICC are motivated by political considerations, and both the indictment and the response to it are imbued with strategic calculations. In order to understand the Court, its role in Africa, and its potential role in global affairs in the coming decades, a wider lens is necessary.

As previously mentioned, the Court’s future depends on achieving success in the cases with which it has begun its mission. As a new international institution, and a legal one at that, the ICC has to work hard to establish its legitimacy. As Marlies Glasius, a professor of International Relations at the University of Amsterdam, notes, “while the ICC could not have been established without the support of states, it is a creation of global civil society. As such, it needs to work much harder than national courts to gain legitimacy. In the conduct of each of its early cases, it will be not just the suspect but also the court itself that is on trial.”¹⁴ As a result, the political circumstances that surround the Court in its initial endeavors are of extraordinary importance to its mandate, in the short-term and long-term. The fact that the current attacks against the ICC are largely coming

¹³ Annan, Kofi. 2009. “African and the International Criminal Court.” *The New York Times*, 29 June 2009.

¹⁴ Glasius, Marlies. 2008 (A). “Global Justice Meets Local Civil Society: The International Criminal Court’s Investigation in the Central African Republic.” *Alternatives*. Vol. 33, No. 4. p. 414.

from the very states upon which the Court's work rests has raised many questions (some valid, others not) about the form, structure and content of the institution itself. The danger, Nicole Fritz¹⁵ says, is that "the rhetoric of condemnation – that the ICC is an agent of neocolonialism and neoimperialism, that it is anti-African – may so damage the institution that, like the League of Nations before it, it is simply abandoned."¹⁶ As a result, it is imperative that we seek to better understand the rhetoric, as well as the reasons and realities behind the rhetoric, to ensure that the common goal of holding perpetrators of international crimes accountable.

This thesis sets out to examine and answer two primary questions. First, why did the AU come out in opposition to the ICC and its indictment of Bashir (yet not to the other three cases before the Court)?¹⁷ Second, but closely related, what are the issues at stake in the confrontation between these two international institutions and what role do they play in the complex dynamic that has developed?

To explore these two questions, this thesis is divided into four chapters. Chapter One will review integral elements of the two institutions at the heart of this debate, the ICC and the AU. Chapter Two will briefly lay out the details of the three other situations that are before the Court involving the DRC, Uganda and CAR, as well as outline some of the critiques and backlash encountered in those operations. This is necessary because the reaction to Bashir's indictment cannot be viewed in a vacuum; it must be assessed as part of a larger evaluation of Africa's reaction to the ICC. Chapter Three will discuss the specific situation that has unfolded in Darfur, the ICC's involvement in Sudan, and the AU's subsequent reaction, culminating in an official statement of non-cooperation

¹⁵ Nicole Fritz is the Executive Director of the Southern Africa Litigation Centre.

¹⁶ Fritz, Nicole. 2008. "Black-White Debate Does No Justice to a Nuanced Case." *Business Day*, 13 August 2008.

¹⁷ This first question proved hard to assess on a number of levels due to the fact that it was difficult to uncover the motivations of individual states, though the limited information that was available is enlightening.

following the AU summit in July 2009. The final chapter will frame some of the underlying issues at stake and highlight the opportunities and challenges that confront both institutions, as well as the international community more generally, as the ideal of international justice is pursued.

This thesis will not attempt to resolve the current conflict between the AU and the ICC, but it will try to refocus the way the issue is viewed by examining the different factors in play for a complex set of characters. It will argue that the AU's declaration of non-cooperation with the ICC in pursuit of President Bashir is highly problematic for Sudan, the African continent, and the ICC. In the end, much of the debate that surrounds the ICC's operation in Africa, even when based in legitimate grievances, is counterproductive; it manipulates historical grievances, deflects attention from the places and people that need it most, and fails to address the underlying problems in any substantive manner. Until these issues are resolved and the nature of the discourse changes, full realization of international justice is a long way off.

Limitations

As with most research projects that focus on a current and topical issue in which the dynamics of the situation constantly change, this thesis faced a key challenge. Given that the research for this project had to be cut off at some point to allow for the actual writing and analysis contained in these pages, it was not possible to take into account every development that unfolded over the past year. As a result, this thesis does not take into account developments that occurred after March of 2010. This was particularly necessary given that the author moved to an isolated refugee camp in northeast Kenya

shortly after this cut-off date and therefore had limited access to various resources needed to complete this sort of project.

There was one major event that transpired after this cut-off date: the Kampala Review Conference. This conference was designed as a forum in which all states parties could discuss the operation of the ICC and work together to add to or revise provisions of the Rome Statute. While the event was significant, little that was done or discussed during it dramatically impacts the analysis provided in these pages. Given that this thesis is more interested in examining the various issues at stake in the confrontation between institutions than providing a solution, the Review Conference does not loom large over this analysis or any conclusions made. It is addressed within this document as an opportunity for change, but the segment is forward-looking, not an analysis of its outcome (which would be an interesting separate study).

Certain events after the Review Conference were even more telling than anything that came out of the Conference itself. For example, despite the fact that *all* states parties ‘reaffirmed’ their support of the ICC and their intention to cooperate with the Court during the Review Conference, in July 2010 the government of CAR refused to arrest Bashir when he was on its territory (even though the CAR was one of the states parties that had originally declared it would arrest him even after the AU declaration). Although this development, like the Review Conference, is interesting, it does not undermine the analysis contained in this thesis as the context in which the confrontation started and the key issues at stake remain the same.

CHAPTER ONE

Understanding the Institutions: The International Criminal Court and the African Union

It is important to understand key elements of each institution before we can fully understand the criticism that has been levied at the ICC by African leaders and some members of civil society. The ICC was not created in isolation, and its operation and activities are embedded with the actions and inputs from a variety of actors located throughout the world. This chapter will briefly discuss these various influences.

1.1. The African Union, Its Constitutive Act, and a Professed Continental Quest for the Demise of Impunity

The AU¹⁸ was created with a number of different strategic objectives in mind, but its major overall goal is to promote the cooperation and integration of Africa's diverse states – politically, socially, and economically – and to help Africa play its “rightful” role in global affairs.¹⁹ The AU's Constitutive Act delineates in specific detail the many different structural and operational mechanisms of the organization. Most importantly for the purposes of this thesis, it includes the unanimously agreed upon objectives and principles of the organization and its members. While there are too many to list in full, the objectives that are of meaning for this thesis include Articles Three and Four. The relevant portions of Article Three state:

¹⁸ The AU was preceded by the Organization for African Unity (OAU) as the principal regional organization for the continent. It became an official institution at the Durban Summit of 2002 at the first Assembly of the Heads of States of the African Union. The organization is currently comprised of 53 African nations from every corner of the continent, and its headquarters are located in Addis Ababa, Ethiopia. Bingu wa Mutharika, president of Malawi, is the current chairman. Muammar Gaddafi of Libya was his immediate predecessor and has been one of the longest and most outspoken critics of the ICC and was instrumental, perhaps pivotal, in passing the AU non-cooperation resolution in July 2009.

¹⁹ African Union. 2010. “The AU in a Nutshell.” African Union Web Site. www.africa-union.org/root/au/aboutau/au_in_a_nutshell_en.htm.

- Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;²⁰
- Promote peace, security, and stability on the continent;²¹
- Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.²²

Of additional relevance to this thesis are the core principles that are delineated in Article

Four of the Constitutive Act. In particular:

- 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;²³
- Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.²⁴

These elements of the Constitutive Act are important to keep in mind as we move into the AU's recent actions in opposition to the ICC as it could easily be argued, as many have, that those actions are actually in violation of its Constitutive Act.

While the AU has many internal organs responsible for its operations, there are two major bodies integral to the topic at hand: the Assembly and the Peace and Security Council (PSC). The Assembly comprises the leaders of each of its members and is the "supreme organ" of the union.²⁵ The PSC, on the other hand, was created to serve "as a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council shall be a collective security and early-warning

²⁰ The Constitutive Act of the African Union ("Constitutive Act"), Article 3(e).

²¹ Constitutive Act, Article 3(f).

²² Constitutive Act, Article 3(h).

²³ Constitutive Act, Article 4(h).

²⁴ Constitutive Act, Article 4(o).

²⁵ African Union. 2002. "Protocol Relating to the Establishment of the Peace and Security Council of the African Union." ("Protocol") Durban, 9 July 2002.

arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”²⁶ The fundamental principles of the PSC, *inter alia*, include:

- Respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law;²⁷
- Respect for the sovereignty and territorial integrity of Member States;²⁸
- Non interference by any Member State in the internal affairs of another;²⁹
- 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, in accordance with Article 4(h) of the Constitutive Act.³⁰

As will be demonstrated below when discussing the specific actions of the AU concerning the ICC’s involvement in the Darfur, the PSC has played a significant role in shaping the organization’s positions.

Whether the AU can live up to its professed objectives and principles has yet to be seen. At face value, the AU decision in July 2009 that calls on all member states not to cooperate with the ICC in its pursuit of its mandate in Sudan calls into question the commitment of African leaders to the founding principles of the AU. While the stance appears to violate several of the objectives and principles listed above, there also are other elements that theoretically could support the AU’s stance of non-cooperation. For example, Article 3(b) of the AU’s Constitutive Act states that one of its objects shall be to “defend the sovereignty, territorial integrity and independence of its Member States.”³¹ Article 3(d) calls on states to “promote and defend African common positions on issues of interest to the continent and its peoples.”³² As such, and depending on how one looks at the issue, an argument could be made that the declaration of non-cooperation is

²⁶ Protocol, Preamble.

²⁷ Protocol, Article 4(c).

²⁸ Protocol, Article 4(e).

²⁹ Protocol, Article 4(f).

³⁰ Protocol, Article 4(j).

³¹ Constitutive Act, Article 3(b).

³² Constitutive Act, Article 3(d).

actually in accordance with these provisions of the Constitutive Act, despite its apparent contradiction to the elements outlined earlier.

The issue of non-cooperation with the ICC is an interesting, yet to some, confusing, political question. Before the indictment against Bashir, observers recognized the potential inflammatory nature of the move, but also its importance. Nobel Peace Prize winner Desmond Tutu wrote in an op-ed piece for the *New York Times* that “the expected issuance of an arrest warrant for President Omar Hassan al-Bashir of Sudan by the International Criminal Court tomorrow presents a stark choice for African leaders – are they on the side of justice or on the side of injustice? Are they on the side of the victim or the oppressor? The choice is clear but the answer so far from many African leaders has been shameful.”³³

Yet such a stark view of the situation begs a number of other questions at issue. First of all, as will be discussed in greater detail in later chapters, some of the grievances behind the resolution are real and need to be addressed if the ICC and the international community wish to move forward with this experiment of universal international justice. Additionally, such a perspective also ignores the shrewd political work being carried out by actors within the AU. By its very nature, it is a political organization with a myriad of political considerations to take into account before making any decision. The body’s principle goal is to look out for the well-being of its members and defend the continent’s interests. As will be demonstrated further in Chapter Four, the AU resolution may have had as much to do with a desire to make a collective political assertion about geopolitical representation as it did with any desire to support Bashir or the peace process in Sudan. The signs are conflicting, but there may be some lessons to be gleaned.

³³ Tutu, Desmond. 2009. “Will Africa Let Sudan Off the Hook?” *The New York Times*. 2 March 2009.

1.2. The Rome Conference and the Integral Role of African Participation

African states played a critical role in the creation and development of the ICC. In particular, many states played a crucial part in the process leading up to and during the Rome Conference in 1998. A number of African countries, including South Africa, Senegal, Lesotho, Malawi and Tanzania contributed to discussions in 1993 when the International Law Commission (ILC) drafted a rough ICC statute and presented it to the United Nations General Assembly (UNGA).³⁴ After these discussions, and as momentum towards the creation of the ICC grew, African countries took a variety of steps to ensure that their voices were heard.

Realizing that as individual countries they would hold far less influence, many African countries created collective bodies which were able to make requests and demands from a position of greater power. In particular, there were two major African contributions to the discourse around the ICC prior to the Rome Conference. First, members of the Southern African Development Community (SADC) combined their efforts and released a set of principles in 1997 that they hoped would have a meaningful impact on the negotiations in Rome.³⁵ A substantial number were, in the end, reflected in the Rome Statute. Principles five and eight are of particular interest. In number five, SADC advocated for the independence of the Prosecutor. This provision was included in the Statute, but it is now one of the elements most strongly criticized by African leaders as they believe the Prosecutor has abused his discretion. Principle eight, on the other hand, reflects the belief that the UNSC should not have a significant role in the affairs of the Court. In order to appease some powerful and non-African states, however, the UNSC

³⁴ Coalition for the International Criminal Court. 2009. "Africa and the International Criminal Court." Fact Sheet from CICC. ("CICC Factsheet"). Available at www.iccnw.org/documents/Africa_and_the_ICC.pdf.

³⁵ Refer to Appendix D for the full list of the SADC Principles.

was afforded a major role (discussed in greater detail throughout this thesis). The role of the UNSC remains one of the most contentious aspects of the ICC's operation for African states.

The Dakar Declaration of 1998 represented another collective and concerted action on the part of multiple African states looking to increase their power at the negotiating table in Rome.³⁶ Although some elements in the Dakar Declaration were not incorporated into the Rome Statute, including, most notably, limitations on UNSC involvement, the majority of the input was adopted in the final product.

During the Rome Conference itself, 47 African states participated in the drafting process, and the 'vast majority' of these states voted to adopt the Rome Statute.³⁷ Since the conference, 43 African states have signed the treaty, and 30 have ratified it, creating the world's largest regional bloc of states parties. Following the Rome Conference, the OAU adopted a resolution that declared, "Convinced that by dealing with crimes against humanity, war crimes, crimes of aggression, crimes of genocide and by putting an end to the tradition of impunity, the International Criminal Court will enhance and contribute sensitively to the protection of Human and Peoples Rights; Urges OAU Member States who have not yet done so to ratify the ICC Statute without delay."³⁸ Clearly, at its outset, the Court was widely supported by African states.

African states, however, were not the only active participants in the formation of the ICC. Human rights organizations and civil society played a fundamental role in

³⁶ Refer to Appendix E for excerpts from the Dakar Declaration.

³⁷ CICC Factsheet, p. 2.

³⁸ Organization of African Unity. 2002. "Resolution on the Ratification of the Statute on the International Criminal Court by OAU Member States." The African Commission on Human and Peoples' Rights, meeting at its 31st Ordinary Session in Pretoria, South Africa, from 2nd to 16th May 2002. Available at <http://www1.umn.edu/humanrts/africa/iccrs-2002.html>.

advocating for its creation and in ensuring that their respective governments made contributions in line with their expectations. The Coalition for the International Criminal Court (CICC) is a testament to such widespread civil society support in Africa. The body has more than 800 civil society organizations from Africa, which accounts for roughly one third of its global membership.³⁹ In addition to this wide, generalized support, 21 African states have ‘national coalitions’ that have taken significant measures to incorporate provisions of the Rome Statute into their domestic laws.⁴⁰ In fact, the participation of civil society was such an integral part of the project that one observer has declared that, despite the importance of state involvement, “it is a creation of global civil society.”⁴¹

1.3. The Rome Statute: Key Elements

The Rome Statute is a complex international legal document that was the product of intense negotiations between more than 150 states, culminating in the Rome Conference of 1998. There also were years of preparatory work to make sure that when the opportunity to create the Court actually arose, the moment would not be lost. While the Statute is the founding document of the ICC, it does not need to be reviewed in its entirety within these pages. Rather, a brief exploration of some of its relevant key elements is provided.

One of the most critical elements of the Rome Statute, central to this thesis, involves the mechanism by which a situation may come before the Court; in other words,

³⁹ CICC Factsheet, p. 3.

⁴⁰ *Ibid.*

⁴¹ Glasius, 2008 (A). p. 414.

the means by which the Court exercises its jurisdiction. According to the Statute, the Court can claim jurisdiction over a situation in one of three ways. Article 13 states:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.⁴²

Article 13(c) refers to the Prosecutor's power to "initiate investigations *proprio motu*"⁴³ on the basis of information on crimes within the jurisdiction of the Court."⁴⁴ To date, however, the Prosecutor has never exercised this authority.⁴⁵ As previously discussed, however, Article 13(a) was the mechanism used in the situations of Uganda, DRC and CAR, and Article 13(b) is the provision that allowed the situation in Darfur to come before the Court.

Article 13(b) is one of the more controversial provisions of the statute. A number of states, including many African states that made their desires well known in the SADC Principles and Dakar Declaration, were adamantly opposed to UNSC influence and the political consequences that could result. More powerful states, and the United States in

⁴² The Rome Statute.

⁴³ *Proprio motu* refers to the powers afforded the Prosecutor to initiate investigations under his or her own authority. As Rod Rastan, a Legal Officer in the OTP explained, "faced with the possibility of State or Security Council inaction, many considered it vital for the successful and impartial exercise of the Court's jurisdiction to enable the Prosecutor of the ICC to act also in the absence of a State or Security Council referral. What became known as the exercise of *proprio motu* powers by the Prosecutor was widely seen as a vital test for the independence of the ICC" (Rastan, Rod. 2007. "The Power of the Prosecutor in Initiating Investigations." International Centre for Criminal Law Reform and Criminal Justice Policy. A paper prepared for the Symposium on the International Criminal Court, February 3-4, 2007; Beijing, China. p. 4).

⁴⁴ The Rome Statute, 15(1).

⁴⁵ As this thesis was being completed, however, the Prosecutor did request authorization from the Pre-Trial chamber to open an investigation into the post-election violence in Kenya in 2008.

particular, demanded that some level of UNSC control be included to protect against the possibility of an overzealous prosecutor. As against this, Mahmood Mamdani, a Professor at Columbia University and renowned African scholar from Uganda, argued that “giving the Security Council power to refer cases from a non-signatory country to the ICC was against the Law of Treaties, under which no country can be bound by the provisions of a treaty it has not signed.”⁴⁶ Mamdani further pointed out that “granting powers to the Security Council to refer cases to the ICC, or to block them, was unacceptable, especially if [Council] members were not all signatories to the treaty,” as this “provided escape routes for those accused of serious crimes but with clout in the UN body.”⁴⁷ In the end, the more powerful states won the debate, and unsurprisingly, it was the invocation of Article 13(b) in Sudan that has led to the strongest outcries against the Court.⁴⁸

The next important element of the Rome Statute is the principle of complementarity – the idea that the ICC should complement, not supplant, national

⁴⁶ As found in Kimani, p. 14.

⁴⁷ *Ibid.*

⁴⁸ Article 17 of the Statute also provides the Court with the power to defer investigations or prosecutions for a one year period, and that deferral can be renewed each year indefinitely. The Rome Statute also has a number of mechanisms in place that limit whether the Prosecutor can begin an investigation, safeguards that ensure the Court’s jurisdiction is invoked when specific preconditions have been met. These safeguards include: “a) The personal, territorial and temporal parameters that define such a situation of crisis are included within the personal, territorial and temporal limits of the potential jurisdiction of the Court; b) The available information provides a reasonable basis to believe that crimes within the material jurisdiction of the Court have allegedly been committed in such a situation of crisis; c) The absence of action, the unwillingness, or the inability of national jurisdictions to properly investigate and prosecute the crimes allegedly committed in such a situation of crisis; d) The absence of any Security Council request in accordance with Art. 16 RS not to activate the potential jurisdiction of the Court with regard to such a situation of crisis; e) The sufficient gravity of the crimes allegedly committed in such a situation of crisis; and f) The lack of substantial reasons to believe that, despite the gravity of the crime and the interests of victims, the activation of the potential jurisdiction of the Court with regard to such a situation of crisis would not serve the interests of justice.” (Olasolo, Hector. 2005. “The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor.” *International Criminal Law Review*. Vol. 5. p. 124-125). These safeguards have their origin in states parties’ fear that an overzealous prosecutor could take advantage of his powers and initiate politically-motivated prosecutions that would damage the credibility of the Court or present a disruptive influence in global affairs. In other words, they represent a system of checks and balances.

judicial systems. This issue is covered in Article 17 which, *inter alia*, states that a situation is inadmissible when:

A. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

B. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.⁴⁹

The principle of complementarity is of fundamental importance to the ICC's mission. During the negotiations prior to adoption of the Rome Statute, one of the principal elements of concern was the potential for the Court to breach the sovereignty of individual states. Complementarity was included to try to minimize the potential for problems arising from this concern.⁵⁰ As discussed more fully below, however, many problems regarding sovereignty did arise, and, as with most legal documents, the language is open to differing interpretations.

Article 27 of the Rome Statute is significant in that it attempts to remove a shield from heads of state that has long been part of customary international law. The article provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

⁴⁹ The Rome Statute, Article 17(a)-(b).

⁵⁰ Complementarity was also designed to try and strengthen national judicial systems. Several provisions in the Statute require that the prosecutor inform state parties about the decision to open an investigation, at which point "it is open to both States Parties and non-States Parties to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation" (Du Plessis, p. 14). As a result, according to Anne Marie-Slaughter, "one of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy" (Slaughter, Anne-Marie. 2003. "Not the court of first resort." *The Washington Post*. 21 December 2003).

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁵¹

Clearly, with the indictment of Bashir, Article 27 is of particular relevance, and it is, in this regard, groundbreaking. The indictment of a sitting head of state is a landmark in international law, and the fact that such action is specifically provided for in the Rome Statute speaks to the intentions of its drafters.

Article 86 of the Rome Statute clearly directs that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁵² Article 87 details the authority the Prosecutor has to make requests of state parties, but more importantly 87(7) details the potential consequences if states parties fail to cooperate with the Court pursuant to other provisions of the statute. It states that “the Court may make a finding to that effect [failure to cooperate] and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”⁵³ Thus the Rome Statute makes it abundantly clear that states have specific obligations to arrest those under indictment, and that there are no loopholes in the language of the statute to deny these requests.⁵⁴

In order to understand some of these provisions on a more practical level, attention will now be turned to the first three situations that came before the Court.

⁵¹ The Rome Statute, Article 27(1)-(2).

⁵² The Rome Statute, Article 86.

⁵³ The Rome Statute, Article 87(7).

⁵⁴ Du Plessis, p. 14.

CHAPTER TWO

The Calm before the Storm: The Situations and Cases Preceding Sudan's Referral, and the Seeds of Discontent

There are four situations currently before the ICC. Before any comprehensive understanding can be gained with regards to the circumstances surrounding Bashir's indictment, the other three situations, and the reactions to the ICC's involvement in these countries, must be examined to understand the substantive differences between them, and the Sudan case. The first part of this chapter will be dedicated to that end. The second half of the chapter will examine some of the critiques that have circulated in popular and academic circles to understand how the Court's early operations have affected its mission in Sudan.

The situations involving the DRC, Uganda and CAR were all referred to the ICC by these countries themselves between 2003 and 2005. As the CICC explains, "these governments, all of whom are states parties to the Rome Statute, recognized the inability of their national courts to address the grave crimes at issue and therefore requested the Court to open investigations in accordance with the complementarity principle of the Rome Statute."⁵⁵ The fact that all of these were self-referred by the state involved is of central importance to the overall discussion. To enable a better understanding of what led to the referrals and the current status of each situation, a brief synopsis is provided.

2.1. Northern Uganda and the Crippling Effects of Messianic Insurgency

The Government of Uganda (GoU) referred the situation in northern Uganda, regarding the Lord's Resistance Army (LRA), to the OTP in December 2003. Upon

⁵⁵ CICC Factsheet, p. 3.

receiving this referral, the OTP released a statement that stated, *inter alia*, “the Prosecutor has determined that there is a sufficient basis to start planning for the first investigation of the International Criminal Court. Determination to initiate the investigation will take place in the coming months.”⁵⁶ After several months of investigative work, the OTP determined that there was a sufficient basis for opening a formal investigation. Then, in July 2005, the OTP issued arrest warrants for five of the most senior leaders in the LRA, including its leader, Joseph Kony.

There is little question that the perverse and brutal murders, rapes, abductions, and destruction of life and liberty in northern Uganda are perfectly in line with the ICC’s mandate. Under Kony’s command, the LRA has killed thousands of citizens in Uganda, abducted over 30,000 children to fight his war, and enslaved young women for his soldiers to keep as concubines.⁵⁷ Over two million people were displaced as a result of the violence committed by the LRA, and many of those people still live in Internally Displaced Persons (IDP) camps despite the fact that the LRA has been largely driven out of Uganda.⁵⁸

Despite the conditions that many northern Ugandans still live in, support for the ICC in Uganda can be described, at best, as mixed. There are several reasons for this. First, critics note that at the time the LRA and the GoU were engaged in peace talks, and

⁵⁶ Office of the Prosecutor. 2004. “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC.” ICC-20040129-44. Situation: Uganda.

⁵⁷ Many reports and organizations have previously put the number of abductees between 20,000 and 30,000, but a recent report prepared for several humanitarian and human rights organizations such as UNICEF, Human Rights Center (HRC) and the MacArthur Foundation, “The State of Youth and Youth Protection in the Northern Uganda: Findings from the Survey for War Affected Youth,” published in September 2006, put the number at an astounding 66,000.

⁵⁸ It should be noted that it was actually a policy directive by the GoU that led to the encampment of most northern Ugandans as the government sought a way to choke off supplies and support to the rebels. This fact partially explains the reason there is so much anger that no government officials have been accused of crimes by the ICC.

they were apprehensive that the ICC indictments could hinder a peace agreement, and thereby prolong 20 years of suffering for the Acholi people of northern Uganda.⁵⁹ Similar criticisms have been made in at least three of the four current situations before the Court, excluding the DRC. It has, however, been most pronounced in Uganda due to the political context during which the ICC's involvement began. This will be discussed in greater detail in the latter half of this chapter.

Second, there are many in Uganda who doubt the sincerity of the referral from the Ugandan President, Yoweri Museveni. While opinions differ as to exactly why Museveni decided to refer the case to the ICC, most agree that it was for political reasons rather than an inability to handle the situation internally or any abiding belief in international justice. As the Refugee Law Project (RLP) explained, "the referral of the LRA to the ICC by Museveni did not reflect an honest desire to meet international obligations under the Statute, but was a trump card to re-assert democratic credentials at the international level, ones which had been damaged by the failure of several military campaigns in the north."⁶⁰ Differing slightly, Payam Akhavan believes that for Uganda, "the referral was an attempt to engage an otherwise aloof international community by transforming the prosecution of LRA leaders into a litmus test for the much celebrated promise of global justice... The imprimatur of international criminal justice, sought through the referral to the ICC, was a means of thrusting this long forgotten African war back onto the

⁵⁹ The Acholi tribe makes up the majority of people affected by the war, with up to 90% of the entire population displaced at peak times of violence. "Acholiland" consists of the northern districts Gulu, Kitgum and Pader.

⁶⁰ Refugee Law Project. 2004. "Refugee Law Project Position paper on the Announcement of formal investigations of the Lord's Resistance Army by the Chief Prosecutor of the International Criminal Court and its implications on the search for peaceful solutions to the war in Northern Uganda." Refugee Law Project Position Paper. 28 July 2004. p. 5.

international stage.”⁶¹ As Chidi Anselm Odinkalu of the Open Society Institute (OSI) put it, “as far as political maneuvers go, it [the referral] is clever beyond compare.”⁶²

Third, there is an opinion among many Ugandans, particularly those from the north, that there is too little focus on crimes committed by government troops. While the offenses committed by the GoU may or may not fall under the jurisdiction of the court,⁶³ the lack of indictments against government personnel and the perceived cozy relationship between the two parties have raised critical concerns. When the Prosecutor is pushed on the issue, he “invariably states that the investigation concerns all actors in the Northern Uganda situation, and that his office operates with a threshold of gravity of crimes, on the basis of which it gave priority to the LRA leadership.”⁶⁴ While such a response is not inappropriate, the impression left upon many Ugandans is that the Court is one-sided and not interested in pursuing crimes by the GoU. This line of criticism has plagued other situations before the Court and will be discussed in greater detail in the latter half of this chapter.

Finally, there have been concerns that the ICC represents a ‘foreign’ form of justice to the people of northern Uganda. This critique has not occurred only in Uganda, but it has been particularly pronounced there, and the Acholi form of ‘traditional

⁶¹ Akhavan, Payam. 2005. “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court.” *The American Journal of International Law*. Vol. 99, No. 2: p. 404.

⁶² Odinkalu, Chidi Anselm. 2004. “Uganda: Museveni Has Been Clever, Will ICC Be Wise?” *The Vanguard*. 6 February 2004.

⁶³ According to Marlies Glasius, “It is generally accepted that the army has killed or tortured civilians more sporadically [than the LRA]. But it has been responsible for implementing the policy of forcing nearly two million people in the region to live in displacement camps, indirectly causing thousands of deaths through lack of hygiene, health services or adequate nutrition. The army has generally failed to do anything to protect the people in the camps from the LRA and has contributed to the level of brutality in the camps.” Glasius, Marlies. 2008 (B). “What is Global Justice and Who Decides? Civil Society Responses to the ICC’s First Investigations.” *Human Rights Quarterly*. Vol. 31, No. 2. p. 5.

⁶⁴ Glasius, 2008 (B). p. 6.

justice'⁶⁵ has been widely documented. Many sectors of African societies, particularly rural ones, still ascribe to customary forms of 'justice' different from that meted out by the ICC in terms of the norms of international human rights law.⁶⁶

This thesis, unfortunately, cannot seek to answer this deeply enigmatic question about whether the ICC's method of justice is the most appropriate. It is still far from conclusive that the ICC does not fit in indigenous African conceptions of justice. As Glasius argues,

it is clear that the idea of achieving justice through international trial and punishment of perpetrators of massive crimes is not too abstract or too remote from the experiences of victims to be understood and appreciated by them. Nor does their daily struggle for survival make this form of justice irrelevant, even though in a context of on-going violence as in Northern Uganda, physical security may be their first priority. On the contrary, the mere announcement that an international prosecutor is opening an inquiry increases victims' morale and self-esteem because it is seen as recognition that they have suffered an injustice for which accountability will be demanded.⁶⁷

There clearly are divergent perspectives on this issue. Regardless of one's viewpoint, however, it is clear that the issue has been problematic in Uganda and other situations before the Court, even in Darfur.

Remarkably, while the outcry from civil society was immediate and loud in Uganda, other African leaders were largely quiet. After all, what would they not like about the ICC's involvement in Uganda? The GoU had invited the Court in, and the Prosecutor was only going after rebel leaders, not heads of state.

⁶⁵ The process the Acholi use, known as *Mato Oput*, is widely promoted by sympathetic scholars and local community groups who wish to see a local solution to the problems faced in northern Uganda.

⁶⁶ These sectors of society also often are those most impacted by the crimes within the Court's jurisdiction, but they lack representation and power in the elite social and political structures, making them especially vulnerable to exploitation and violence.

⁶⁷ Glasius 2008 (B), p. 16.

2.2. The Democratic Republic of Congo and the Prominence of Warlords

On April 19, 2004, the Democratic Republic of the Congo referred the situation within its borders to the ICC, making it the second state party to do so in as many years. The OTP released a statement that explained how the Prosecutor had “received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.”⁶⁸ As a result of this letter, the DRC invited the OTP to investigate crimes committed within its territory, and pledged its support and cooperation in pursuit of that goal.⁶⁹

The formal investigation was opened by the OTP in June 2004, and the Prosecutor decided to focus the initial investigations in the Ituri district of the DRC, one of the locales that had experienced the most intense conflict. There are currently four individual cases open in the ICC with regards to the DRC. The first arrest warrant was for Thomas Lubanga in February 2006. Lubanga, the president of the rebel group Union of Congolese Patriots (UPC), was accused of several charges involving the use of child soldiers. The DRC arrested and handed him to the ICC in March 2006.⁷⁰ Lubanga is currently on trial in The Hague and represents the first such case to reach that stage. Then in July 2007, the ICC issued an arrest warrant for Germain Katanga, a former commander of the Patriotic Forces of Resistance (FRPI). Katanga was also captured by the DRC government and has

⁶⁸ Office of the Prosecutor. 2004. “Prosecutor receives referral of the situation in the Democratic Republic of Congo.” ICC-OTP-20040419-50. Situation: Democratic Republic of the Congo.

⁶⁹ In point of fact, however, the Prosecutor had already been monitoring the situation in the DRC due to multiple communications transmitted to him by NGOs and other community-based groups. Indeed, “in September 2003, the Prosecutor informed the Assembly of States Parties that he would be prepared to seek authorisation from a Pretrial Chamber to start an investigation under his *proprio motu* powers, but that a referral and active support from the DRC would facilitate the work of the Office of the Prosecutor” (Office of the Prosecutor, ICC-OTP-20040419-50). In the end, this invocation of Prosecutorial power was not necessary.

⁷⁰ Du Plessis, p. 6.

since been turned over to the ICC to face charges of war crimes and crimes against humanity. The third case that came before the Court from the DRC is that of Mathieu Ngudjolo Chui, and the fourth is that of Bosco Ntaganda.⁷¹ Ntaganda is still at large.

There are several key differences between the situation in the DRC and in Uganda. First, while some hostilities were ongoing at the time the Congolese warrants were issued, the nature of the conflict was substantively different from what took place in Uganda. Second, a number of the DRC suspects were already in Congolese custody. This fact, combined with the first, is important in that it meant that few people were critical of the ICC's interventions in the DRC because it was potentially perpetuating a conflict, as had been the case in Uganda. Third, the Prosecutor pursued suspects from multiple groups in the DRC, unlike in Uganda, while the nature of the conflict is also clearly different. As in Uganda, however, the OTP has yet to go after any government or army official despite widespread allegations of violence and rape on the part of government soldiers.

These differences go a long way in explaining the different reaction experienced in Uganda and the DRC to the Court's involvement. In Lubanga's case, reaction from around the country was largely positive. As Glasius explains, "the transfer of Thomas Lubanga to The Hague was initially applauded by all except fellow extremists of Lubanga's own ethnic group, the Hema...With the agreement of the DRC authorities his arrest was actually going to give the judges their first case, giving a message against

⁷¹ Chui was a colonel in the Congolese army and 'alleged former leader of the National Integrationist Front.' The cases of Chui and Katanga have since been joined together and will proceed accordingly. Ntaganda, a leader in the Patriotic Force for Congo Liberation (FPLC), originally had his arrest warrant issued in August of 2006 but it was not unsealed by a pre-trial chamber until April of 2008 (International Criminal Court. 2006. "Warrant of Arrest for Bosco Ntaganda." 22 August 2006).

impunity just ahead of DRC's first free elections."⁷² This optimism and excitement about the Court's involvement, however, did not last for very long. While the criticism from within the DRC has never been as vociferous or unified as in Uganda, the citizenry and civil society began to display increasing signs of dissatisfaction with the Court's operation. One concern was that there were many other warlords and army officials in the DRC who were still free and had not yet been charged, and additional arrest warrants did not come quickly enough for those who knew the extent of the atrocities taking place in the DRC.⁷³ While subsequent arrest warrants were eventually issued, there are still those who criticize the OTP for not going high enough in the chain of command.⁷⁴

As violence continues to plague areas of the DRC, many Congolese are left to wonder why the OTP has not cast a wider net. For its part, the OTP generally falls back on the standard (and often completely fair) response that it can only proceed with a case and begin legal prosecution when there is sufficient evidence against an individual to merit the issuance of arrest warrants. However, many remain dubious: "certain commentators believe there is also a more political reason for the Prosecutor's reluctance: that his investigations must not be seen as upsetting the recent relative stability in the DRC, in which his European political supporters have heavily invested."⁷⁵ If true, the OTP's issuance of a warrant for Bashir's arrest in the midst of Sudan's efforts to implement the Comprehensive Peace Agreement (CPA) is perplexing.

⁷² Glasius, 2008 (B). p. 6.

⁷³ *Ibid*, p. 5.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*, p. 6.

2.3. The Central African Republic and the Extremes of Sexual Violence

In December 2004, the Central African Republic became the third African country to refer a situation within its borders to the ICC. Though it continued the trend of state referral, the circumstances that led to the opening of an investigation were markedly different than in the prior two situations.⁷⁶ In the DRC and Uganda, state leaders, perhaps influenced by overtures made by Ocampo or motivated by their own political imperatives, decided to refer the situations within their borders to the Court. In the CAR, however, small local organizations played an instrumental role in orchestrating the ICC's involvement. They first tried to involve the ICC on its own, and when that failed, "they appear to have engineered a state referral."⁷⁷

When the Prosecutor eventually did open a formal investigation in May 2007, he announced that "my Office has carefully reviewed information from a range of sources. We believe that grave crimes falling within the jurisdiction of the Court were committed in the Central African Republic. We will conduct our own independent investigation, gather evidence, and prosecute the individuals who are most responsible."⁷⁸ The crimes committed in the CAR were in many ways substantively different from those committed in the other cases before the Court. As the OTP press release stated, "this is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings...The allegations of sexual crimes are detailed and

⁷⁶ Glasius, 2008 (A). p. 415.

⁷⁷ *Ibid*, p. 426.

⁷⁸ Office of the Prosecutor. 2007. "Prosecutor opens investigation in the Central African Republic." ICC-OTP-20070522-220. Situation: Central African Republic.

substantiated. The information we have now suggests that the rape of civilians was committed in numbers that cannot be ignored under international law.”⁷⁹

The peak of this sexual violence took place in October 2002 and March 2003, around the time of two coup attempts, the second of which was successful, by the forces of François Bozizé Yangouvonda against the government of Ange-Félix Patassé. At the time of writing, Jean-Pierre Bemba, a Congolese warlord who sent a mercenary force in support of Patassé, is the only individual to be charged in connection with crimes committed in the CAR. He was arrested by Belgian authorities on 24 May 2008 after a warrant was issued charging him with war crimes and crimes against humanity.⁸⁰ He is currently in custody in The Hague awaiting trial.

Due to the unique way in which the situation came before the Court, criticism from civil society within the country has been relatively muted, though it has picked up steam in the last year. Unlike the other situations before the Court, the citizenry in the CAR has been an integral and instrumental part of the investigation. Victims have come forward by the hundreds, recounting stories of unimaginable perversity.⁸¹ While the crimes suffered are tragic, the willingness to come forward and the active participation of citizens and civil society in the process has created a different operational environment for the OTP, one in which the ICC is seen more as a partner of civil society than as a tool of the government.⁸² As a result of this active participation, there is less vocal opposition to the ICC’s involvement than in Uganda.

⁷⁹ *Ibid.*

⁸⁰ Du Plessis, p. 7.

⁸¹ Office of the Prosecutor, ICC-OTP-20070522-220.

⁸² Glasius 2008 (A), p. 426.

That does not mean, however, that there has been no criticism. Some scholars such as Dov Jacobs and Noora Arajärvi have been critical of the political manipulations by African leaders, particularly by Bozizé, in deciding to refer the situations in their countries to the ICC. They claim that “this arrest warrant confirms a trend in self-referrals: that they allow for the prosecution of rebel groups only. After Uganda and the DRC, it is difficult to escape the conclusion of instrumentalisation of the ICC by governments. This is especially the case in this situation, where the arrest warrant not only targets a former opponent of the current president of CAR, but also the most notable political opponent to the government in the DRC.”⁸³ Tellingly, this criticism has more to do with the political motivations on the part of the referring government than it does with the ICC’s involvement in the situation.

In addition, there also is the now-familiar criticism that the OTP is not casting a wide enough net. While Bemba’s arrest was warmly received by most advocates, that single arrest is not seen as enough. According to Glasius, “if the prosecutions stop there, it will seem like another case of prosecuting the vanquished, not the sitting government.”⁸⁴ The Prosecutor is, however, closely monitoring conflicts that erupted in 2005 in the northern parts of the CAR.⁸⁵ If the OTP were to issue arrest warrants for officials within the Bozizé government, or for Bozizé himself, in connection to crimes committed in the north since 2005, it would likely go a long way to demonstrate to civil society, in CAR and internationally, that the Court is not simply a pawn of African

⁸³ Jacobs, Dov, and Noora Arajärvi. 2008. “The International Criminal Court.” *The Law and Practice of International Courts and Tribunals*. Vol. 7, No. 3. p. 128.

⁸⁴ Glasius 2008 (B), p. 6.

⁸⁵ According to Glasius, “In both of these conflicts, the burden of violations seems to lie overwhelmingly with the army, for which the Bozizé government is ultimately responsible. These areas are considered unsafe to travel in without armed convoy, even by local human rights activists so it is unlikely that the prosecutor’s office is currently in a position to pursue investigations there, but this may change as the humanitarian operation recently mounted by the United Nations gets underway” (Glasius 2008 (B), p. 6).

governments. Though, as will be demonstrated, when the Prosecutor did shift his focus to state leaders, as he did in Sudan, he faced an entirely different form of criticism in style and substance that is potentially more damaging to the Court.

While the ICC has not encountered any large-scale opposition to its operation in the CAR from any collective of African nations, Bozizé has recently requested that the UNSC suspend the Court's investigation in accordance with Article 16 of the Rome Statute.⁸⁶ In a letter to the UN Secretary General in August 2008, Bozizé wrote that investigations into crimes committed later than the originally declared period of interest (25 October 2002 to 15 March 2003) would “jeopardize the Comprehensive Peace Agreement were any of the combatants to be arrested” and that “CAR tribunals are competent to try cases involving acts committed during the periods covered by amnesty laws.”⁸⁷ Noting this situation, he asked that the UNSC defer these investigations.

While it is not possible to conclusively determine whether the motivation for this request is genuine, most indicators suggest that it is based more in Bozizé's realization of his own vulnerability than any obstructive influence the ICC presents for the CAR peace process. As mentioned above, the crimes committed in the northern conflicts are more attributable to the government than to other forces. Additionally, just months before Bozizé's request, one expert in the CAR wrote that “the possibility of the ICC investigation interfering with peace negotiations – one of the most sensitive points in the Uganda situation – is rather hypothetical in the case of the CAR. While hostilities and

⁸⁶ Article 16 of the Rome Statute gives the UNSC the power to defer any investigation by the ICC for up to one year. The article states: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

⁸⁷ As found in: Coalition for the International Criminal Court. 2008. “CAR Government calls the UN Security Council to suspend ICC investigation.” *CICC-Africa Newsletter*, No. 10. November 2008. p. 4.

alliances are fluid in Central African politics, reconciliation between Bozizé and Patassé currently seems unlikely. Nor is it a priority for the Central African people.”⁸⁸ This request potentially represents one of the first indicators of an African head of state attempting to directly influence the operation of the Court in his own self-interest.

2.4. The Selective Nature of the Situations Before the Court: Neocolonialism?

While the anti-ICC sentiment grew exponentially louder in the wake of the Bashir indictment, the seeds of discontent had already been laid with the first three situations. It is only with an understanding of the situations described above and the varied reactions to each that one can better comprehend the situation regarding Sudan. There are four particular critiques that will be discussed briefly in this thesis, some of which have already been introduced in the discussion above. First, there is the charge that the Court represents neocolonialism, that it is a tool of major Western powers to once again dominate and subjugate the powerless African continent – or at least those countries and governments which the West finds disagreeable.⁸⁹ This is, in many ways, the most overarching critique that is at the root of the next three related problems. Second, a frequently cited problem with the ICC’s operation is that it has been too selective, and this has made charges of neocolonialism even more pronounced.⁹⁰ Third, many observers have criticized the Court for being drawn into situations in which its very involvement creates an unnecessary dichotomy between peace and justice.⁹¹ Finally, there is the accusation that the Court is a creation of the Western powers and that it imposes an alien form of justice – retributive, criminal justice – that is foreign to many indigenous

⁸⁸ Glasius 2008 (A), p. 420.

⁸⁹ See Mamdani, Palayiwa, Du Plessis.

⁹⁰ See Mamdani, Hammond, Du Plessis, Kimani, Palayiwa, Glasius, Jacobs and Arajärvi.

⁹¹ See Mamdani, Damaska, Branch, Grono and O’Brien.

societies around Africa, impacted by the men who have come before the Court.⁹² This last line of criticism has been addressed earlier, and it is to the first three critiques that attention is now turned.

One consistent line of criticism that has been levied at the ICC is that it represents neocolonialism, it is imperialistic, and it seeks once again to subjugate and domesticate an ‘out of control’ African population.⁹³ Rwandan President Paul Kagame has been particularly critical of the colonialist approach that he believes the ICC represents, and he has been active in attempts to discredit the Court. For example, he once claimed that the ICC “has been put in place only for African countries, only for poor countries. Every year that passes, I am proved right...” He continued to claim that “Rwanda cannot be part of that colonialism, slavery and imperialism.”^{94 95}

⁹² See discussion in Chapter 2.1.

⁹³ It is important to again note here the importance that Africa and Africans have played throughout the Court’s history. In addition to the integral role that African states played in the creation of the Rome Statute and the ICC, Africans continue to play a significant role in the operation of the Court. Of the 110 current states parties, 30 of them are African, making it the largest regional bloc (see appendix C for a break down of states parties by region). An additional 13 African states have signed the statute but have yet to ratify it. Perhaps most important, roughly 20 African states have incorporated national legislation to address crimes within the jurisdiction of the Rome Statute and facilitate increased cooperation with the Court. Most indicative of the AU’s initial institutional support for the ICC is the fact that the 2004-2007 Strategic Plan of the African Union, one its five core commitments was to facilitate the ratification of the statute by all member countries (CICC Factsheet, p. 2).

Africans also are well represented in the Court’s higher ranks. Five of the Court’s current judges are African: Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana), Daniel David Ntanda Nsereko (Uganda), Joyce Aluoch (Kenya), and Sanji Mmasenono Monogeng (Botswana). One former judge, Navanethem Pillay (South Africa), is now the UN High Commissioner for Human Rights (CICC Factsheet, p. 2). Recently, 12 of 19 candidates for judicial positions were African, nominated by African governments (CICC Factsheet, p. 2). Even in the much-maligned OTP, the second highest ranking individual, Fatou Bensouda (Deputy Prosecutor), is from Gambia.

⁹⁴ Greenberg, David. “African Union Declaration Against the ICC not what it Seems.” *Foreign Policy in Focus*. 6 August 2009. p. 1. Available at http://www.fpif.org/articles/african_union_declaration_against_the_icc_not_what_it_seems.

⁹⁵ Kagame’s opposition to international justice has not just been local, however, and it has not been contained to sound bites. According to one legal scholar, “it would appear that Rwanda has been instrumental in putting the perceived abuse of universal jurisdiction so firmly in the current AU agenda. Thus, in early November 2008 the Rwandan Prime Minister managed to bring together all African ministers of justice in the capital Kigali and called for ‘a unified stand to fight neo-colonialism spearheaded by foreign judges hiding under international law’” (Magliveras, Konstantinos D. 2009. “The African

While many believe that Kagame's strong stance against the ICC may be rooted in pragmatic concerns for his own potential vulnerability before international law, similar critiques are coming from many others as well, including foreign dignitaries and scholars. In *The Times*, a British newspaper, Dr. John Laughland wrote, "forget the rhetoric, this court is just another excuse for superpower bullying."⁹⁶ Robin Cook, former British foreign secretary, declared that, "If I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States."⁹⁷ Even Richard Goldstone, a former prosecutor at the ICTY and ICTR, has been critical of the ICC's singular focus in Africa, stating that the Court has been "too focused on prosecuting crimes committed on the continent of Africa, while paying scant regard to similar situations elsewhere in the world."⁹⁸ Perhaps the most renowned African scholar to advance this line of critique is Mahmood Mamdani. In his comprehensive book, *Saviours and Survivors: Darfur, Politics, and the War on Terror*, Mamdani argues the UNSC's decision to refer the case to the ICC was "tantamount to declaring Sudan a failed state"⁹⁹ and that "in its present form, the call for justice [from the ICC] is really a slogan that masks a big power agenda to recolonise Africa."¹⁰⁰

Millius Palayiwa, an outspoken African critic of the ICC, argues that it is the Court's very foundation and structure of operation that makes it susceptible to such attacks. He states that "in addressing the issue, we have to first look at who is doing the indicting, who is being indicted, at whose behest, what the charges are, and the system of

Union." *Reports on International Organizations*. A publication of the American Society of International Law. August 2009. Available at http://www.asil.org/rio/africanunion_sum09.html). Indeed, Kagame has used very strong language to condemn the actions of the ICC on a number of occasions.

⁹⁶ As found in: Palayiwa, Millius. 2009. "What's the ICC Up To?" *The New African*. May 2009. p. 17.

⁹⁷ As found in: Palayiwa, p. 17.

⁹⁸ Kimani, p. 13.

⁹⁹ Mamdani, p. 44.

¹⁰⁰ *Ibid*, p. 300.

law in use. In the second place, we have to ask why an indictment is made at a particular point in the history of African conflicts, and most important, what the motives for intervention are? And *motives are* very important!”¹⁰¹ What Palayiwa and others who make similar arguments refer to is not merely that all of the situations before the Court are African, but that the OTP has been selective and has targeted small, non-powerful, African states rather than looking to other places where crimes within the Court’s jurisdiction have been committed. Mamdani has also been fiercely critical along these lines, arguing that “the law is being applied selectively. Some perpetrators are being targeted and not others. The decision as to whom to target and whom not to is inevitably political. When the law is applied selectively, the result is not the rule of law but a subordination of law to the dictates of power.”¹⁰² Mamdani is additionally concerned with the extent of the influence of the United States despite the fact that the country is not a signatory to the Rome Statute, arguing that the first four situations before the Court are places where the U.S. does not have objections to the ICC’s involvement. He claims that “the ICC’s attempted accommodation with the powers that be has changed the international face of the ICC. Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. Even then, its approach is selective: it targets governments that are adversaries of the United States and ignores U.S. allies, effectively conferring impunity on them.”¹⁰³

There is evidence to support Mamdani’s claim, and while it cannot be denied that there are a number of countries in Africa within which crimes have been committed that fall within the Court’s purview, the same can be said for other regions including Central

¹⁰¹ Palayiwa, p. 17.

¹⁰² Mamdani, p. 284.

¹⁰³ *Ibid.*

and South America, the Middle East, and Southeast Asia. Many Africans and other critics believe that a truly international court would also look into issues in those parts of the world. Tim Allen, a professor at the London School of Economics, explains that “most criticisms of the ICC are really assertions that it should be able to do more” and he argues that critics of the Court would be quieted if indictments were to be levied at a larger world power.¹⁰⁴ To understand how realistic such a venture would be, however, we must understand how situations come before the OTP, and the office’s method of deciding with which situations to move forward.

Palayiwa emphasises that “by October 2007, the ICC Prosecutor, Luis Moreno-Ocampo, had received 2,889 communications about alleged war crimes and crimes against humanity in at least 139 countries, and yet by March 2009, the Prosecutor had opened investigations into just four cases; Uganda, DR Congo, the Central African Republic, and Sudan/Darfur. All of them in Africa!”¹⁰⁵ However, Palayiwa fails to provide the full context behind the numbers that he offers, as do too many critics who quickly cite such statistics. While the figures that he uses are a year older than those of Palayiwa, Du Plessis points out that the vast majority of such ‘communications’ were unusable by the Court: “a staggering 80 per cent of those communications were found to be ‘manifestly outside [the Court’s] jurisdiction after initial review.’”¹⁰⁶ This provides a different perspective on the OTP’s investigation selection process.

Understanding why and how the OTP makes such determinations is not always easy as the office has a reasonable interest to keep many of these proceedings

¹⁰⁴ As found in: Hammond, Phillip. 2009. “The Tyranny of International Justice.” *Spiked*. 30 March 2009. Available at <http://www.spiked-online.com/index.php/site/article/6410/>.

¹⁰⁵ Palayiwa, p. 18.

¹⁰⁶ Du Plessis, p. 7.

confidential. Still, the OTP does strive to create some transparency when certain conditions are met.¹⁰⁷ The OTP has released information that explains why it chose not to proceed in certain situations that critics often claim should be the first non-African situations to be before the Court: Iraq and Venezuela. In each situation, the OTP laid out three primary factors that must be considered in the decision of whether to open an investigation: “mainly, in view of the information available, are there reasonable motives to believe that the crimes have been committed; does the situation fulfil the admissibility requirements of gravity and complementarity; and, finally, the interests of justice.”¹⁰⁸

Marlies Glasius further points out that “with a limited mandate and limited resources, the Court was always going to be accused of being selective in its choice of situations and cases. Broad criticisms, coming from many quarters either unfamiliar with the limitations of the Statute, or disappointed with these limitations, concern situations not selected for investigation by the prosecutor.”¹⁰⁹ While Glasius laments the attacks the Court has to withstand due to its failure to pursue cases in Iraq or the Israeli Occupied Territories, she recognizes that such shortcomings are directly related to the fact that neither of these countries ratified the Rome Statute.¹¹⁰ Even though Britain ratified the treaty, the Court would be forced to use massive political capital in order to make such an undertaking, and even then it is likely that Britain would use its own considerable clout to defer the proceedings, potentially by invoking the principle of complementarity. This is clearly a problem; it creates a system in which the superpowers are unlikely to be held to

¹⁰⁷ According to Jacobs and Arajärvi, these preconditions include “whenever the situation requires intensive analysis, it has generated public interest and the relevant facts are in the public domain, and release of the information does not jeopardize the well-being and privacy of persons involved in that situation.” (Jacobs and Arajärvi, p. 126).

¹⁰⁸ Jacobs and Arajärvi, p. 130.

¹⁰⁹ Glasius 2008 (B), p. 3.

¹¹⁰ *Ibid.*

account in the same way that smaller and weaker states are, and gives rise to legitimate grievances that are currently manifested in vocal opposition to the ICC's operations in Africa. This will be discussed in greater detail in Chapter Four, but is clearly an area in which legitimate grievances are felt and that needs to be rectified in order for the Court to move forward with broad-based support.

2.5. Peace vs. Justice: A Credible Dichotomy?

A different, but related line of critique that many individuals, NGOs and governments have posited is that the ICC has, in certain situations, created a dichotomy between peace and justice, and that the Court needs to defer to aspirations for peace when its judicial mandate may contribute to the continuation of hostilities. As Damaska points out, one of the central problems within the ICC is that

a tension may arise between the aspiration to stop an ongoing conflict and the desire to bring the suspected leaders of the warring parties to justice. If such leaders expect to be prosecuted after the conflict ends, or after they abdicate, the leaders are likely to hold tenaciously to the reins of power and continue fighting. The demand to enforce international criminal law then begins to clash with deeply troubling prudential calculations: how many lives should be sacrificed to provide justice for the dead?¹¹¹

This potential problem is most present when the ICC becomes involved in a conflict before the violence has concluded. As mentioned earlier in this chapter, this tension has been most present in Uganda (and now in Sudan, as discussed more fully below).

Calls for the ICC to withdraw from Uganda have grown as it has become increasingly apparent that the ICC's continued involvement may represent the largest obstacle to the conclusion of negotiations between GoU and the LRA. Mamdani has argued that "not only has the ICC stooped to embrace a partisan notion of justice, it has

¹¹¹ Damaska, p. 332-333.

also not hesitated to do so at the expense of peace... The terms of the resulting debate in Uganda on the role of the ICC pitted justice against peace. In this debate, the civilian population of Acholi districts often demanded peace, even if this would mean conferring immunity from prosecution on the LRA leadership. The president demanded justice – and wielded the ICC as a hammer. The ICC, in turn, prioritized a particular form of justice – criminal justice.”¹¹² While there is truth in what Mamdani states, it must also be remembered that it is not only the ICC that prioritized criminal justice; President Museveni and the GoU invited the Court in after the country passed an amnesty law for LRA members, and the government largely continues to support the court’s operation.¹¹³

Both supporters and critics of the ICC have been forced to address compelling questions, among them: “What happens – and what should happen – when efforts to prosecute perpetrators of mass atrocities coincide with a peace process? What is the best approach when the price of a peace deal may be a degree of impunity for those most responsible for such abuses?”¹¹⁴ While some proponents of the ICC would strongly argue that there can be no choice between peace and justice because the two are inextricably and irrevocably linked,¹¹⁵ this seems to be too easy a way out. As Grono and O’Brien

¹¹² Mamdani, p. 284-285.

¹¹³ Branch, Adam. 2004. “International Justice, Local Injustice: The International Criminal Court in Northern Uganda.” *Dissent*. Vol. 51, No. 3: p. 22.

¹¹⁴ Grono, Nick and Adam O’Brien. 2008. “Justice in Conflict? The ICC and Peace Processes,” in *Courting Justice: Justice, Peace, and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark. The Royal African Society. March 2008. p. 13.

¹¹⁵ The well-known advocacy group, Amnesty International, has explicitly stated that it “rejects the argument that justice must be sacrificed to ensure peace. Peace is not merely the absence of violence or conflict. Sustainable peace is based on rebuilding a society in which individuals can live their lives free from fear; in which perpetrators know that impunity will not be tolerated; in which victims understand that the state will bring perpetrators to justice and take measure to protect victims and provide reparations. In short, a sustainable peace is founded on the principle that violations of human rights or humanitarian law will be neither tolerated nor rewarded” (Amnesty International, p. 11).

argue, “to present peace and justice as invariably mutually reinforcing is misleading and unhelpful when the difficult reality of peacemaking often proves otherwise.”¹¹⁶

While the argument in support of taking action that will solidify peace is compelling, many critics argue such steps damn a future generation to violence or insecurity, or allow the brutal dictators or rebel leaders to have too much control in any negotiation. Mabvuto Hara, president of the Southern African Development Community Lawyers Association, believes that the very idea that peace must come before justice projects the wrong ideal: “When our leaders are under pressure or when there is a change in government, they come to the negotiation table blackmailing their counterparts and asking for amnesty.... What they are actually saying is: ‘Let’s have no accountability for criminal acts.’”¹¹⁷ In a similar vein, Kofi Annan has emphatically argued that “unless indicted war criminals are held to account, regardless of their rank, others tempted to emulate them will not be deterred, and African people will suffer.”¹¹⁸ Grono and O’Brien further expound upon the deterrent potential for future generations when they explain that “while mediators are inclined to insist that conflict resolution necessitates that all options, including full amnesty, must be on the table, this insistence ignores the very important deterrence impact of international prosecutions, let alone fundamental moral considerations. By discounting this deterrence dimension we miss a potentially valuable way of reducing the prospect of atrocities in years to come.”¹¹⁹

Again, this thesis does not seek to answer such questions conclusively; rather, it points to the very real and complex conundrums that plague the operation of the ICC and

¹¹⁶ Grono and O’Brien, p. 13.

¹¹⁷ As found in: Kimani, p. 15.

¹¹⁸ *Ibid.*

¹¹⁹ Grono and O’Brien, p. 13.

that give rise to much of the spirited attacks that have come from Africa in recent years. History is rife with examples that could support actions that favor ‘peace’ or those that favor ‘justice,’ if one is willing to accept such a dichotomy.¹²⁰ One thing is certain, however: the ICC’s activities over the past several years have raised interesting questions about how to deal with the complex realities behind peace and justice in a transitional environment, and whether a dichotomy between the two even exists.

2.6. Conclusion

The discussion above has identified the central characteristics of the three open situations before the Court apart from Sudan. Importantly, it has also discussed some of the criticism the Court has faced with regards to its chosen course. While it is not an exhaustive analysis of the varied criticisms aimed at the ICC, it provides a foundation upon which some of the issues presented by the situation in Sudan may be examined.

Most interesting about the situations outlined above is the fact that the bulk of criticism encountered by the OTP in these situations came from civil society and human rights groups that objected to the *modus operandi* of the Court or its limited scope rather than its targets. As will be discussed at greater length in Chapters Three and Four, African states parties were, at least publicly, continuously supportive of the Court throughout the period in which these situations were active, and there was no unified opposition or criticism from the AU. This support in the Court’s early years of operation continued the trend that was demonstrated by African states before and during the Rome

¹²⁰ Grono and O’Brien point to the fact that “failed amnesty agreements brokered with the likes of Foday Sankoh in Sierra Leone and Jonas Savimbi in Angola, and their violent aftermath, demonstrate the potential costs of impunity.” They also point to the Truth and Reconciliation Commission in South Africa and the amnesty that ended civil war in Mozambique as situations in which offers of ‘limited or full immunity from prosecution’ helped bring an end to violence and instability.

Conference. While the critiques discussed above do provide the topical foundation for much of the current opposition to the ICC's role in Sudan, there was almost no sign from African states parties or the AU at the time that they strongly opposed the way the Court conducted its affairs.¹²¹ Therefore, it is important to note that the indictment of Bashir is an exception, not a rule, in the OTP's operation, revealing a great deal in terms of the political, legal and social aspects of the situation, particularly as they are viewed within the OTP. Understanding why these situations provoked such little reaction from African leaders and Bashir's indictment generated such a different response is at the heart of this thesis. Accordingly, it is to Sudan and the AU's reaction to the pursuit of Bashir that attention is now turned.

¹²¹ Leaders of non states parties, like Gaddafi and Kagame, were always vocal about their criticism of the ICC.

CHAPTER THREE

The Catalyst to Unified Opposition: The Case of Sudan and the AU's Condemnation of Universal Justice

While the situations and developments discussed in Chapter Two are significant in that they provide the historical and intellectual context in which the OTP operated when it chose to indict Bashir, they did not directly give rise to any major problem between the AU and the ICC. It is possible, however, that Bashir's indictment served as a catalyst for the expression of grievances that had already been created by the preceding situations. For the Court, this was an inopportune time for its largest regional bloc of states parties to express, very publicly, its dissatisfaction.

As outlined in the introduction, Bashir's case represents, in theory, the very type of case for which the Court was designed to handle – a leader who allegedly had perpetrated massive crimes against humanity and was unlikely to be held accountable by any national or standard judicial institution. The indictment was a significant moment in the history of the Court and international justice, and it helped put an additional focus on the situation in Darfur. The reaction from the AU, however, helped to partially shift the discourse away from the problems in Darfur and instead focus on the role of the ICC in Africa, specifically, and international affairs more generally.

Given that Bashir's indictment and the subsequent reaction to it by the AU are of central importance to this thesis, it is important to understand the situation that developed in Darfur and Bashir's alleged role in the affair. In addition to a brief synopsis of the conflict in Darfur, this chapter will also set out other elements of the underlying context at play in the ICC's involvement in Sudan and the AU's opposition to it. Importantly, this chapter will demonstrate that the confrontation between the AU and the ICC did not start

until Bashir, specifically, was indicted, and that such opposition was driven by a multitude of different factors and that its support from within AU member states was and is far from unanimous.

3.1. Violence and Humanitarian Catastrophe in Darfur

Armed conflict has been nearly omnipresent in Sudan since the country gained independence from the British in 1956. From the decades-long North-South civil war between the Sudan Peoples Liberation Movement/Army (SPLM/A) and the Government of Sudan (GoS) to small clashes between nomads and pastoralists over patches of land, various conflicts have profoundly impacted the civil and governmental structures that currently operate in the country. In fact, the civil war between the North and South represents only one piece of a complex string of conflicts.¹²² Yet, just as this tragic war was drawing to a conclusion, a conflict erupted in the western region of Darfur. Though the conflict in Darfur only became overtly manifested in the past seven years, its origins are rooted in Sudan's unique history of conflict.¹²³ The root causes combine a range of historical, political, social/cultural, legislative, economic, and geographic factors. As such, the current conflict has its origins in decades of neglect, mismanagement and oppression by a succession of governments in Khartoum, manifested in and exacerbated by a web of quotidian elements of Sudanese life (culture, economics, land claims, national and local politics, etc.).

When years of injustice and oppression on the part of Bashir's ruling party, the National Islamic Front (NIF), culminated in the initial rebel uprisings of the SLM/A and

¹²² Simmons, Mark and Peter Dixon. 2006. "Introduction." *Peace by Piece: Addressing Sudan's Conflict*. Edited by Mark Simmons and Peter Dixon. Published by Conciliation Resources, London. p. 6.

¹²³ International Crisis Group. May 2004. "Sudan: Now or Never in Darfur." *ICG Africa Report No. 80*. 23 May 2004. p. 3.

the Justice and Equality Movement (JEM), Khartoum's response was quick and calculated, with devastating consequences. Often acting by proxy through militias known as the Janjaweed, the GoS instituted a brutal campaign to repress the emerging rebellion. Instead of focusing the attacks solely on the rebel forces threatening the regime, however, much of the violence was more generally targeted at the Darfur tribes from which the rebels came, namely the Fur, Zaghawa, and Massalit. This has popularly been described as genocide and ethnic cleansing (though some observers and intellectuals, like Mahmood Mamdani, strongly disagree with this classification). While the numbers of dead is a hotly contested issue,¹²⁴ there is little debate about the fact that the attacks in the region are in blatant violation of international humanitarian law and do constitute crimes against humanity.

The dynamics at play in Darfur indicate an unresolved and continuing conflict. While the number of civilian casualties has remained at lower levels than it was at its peak in 2003-04, the crisis is hardly over. Millions remain displaced, living in destitution and perpetual insecurity without any durable solution in sight. Following the ICC arrest warrant for President Bashir the humanitarian situation further worsened due to the expulsion of most international NGOs. However, there is some evidence that direct

¹²⁴ In 'Saviours and Survivors', Mahmood Mamdani goes to great length to demonstrate the ways in which the Save Darfur Coalition has manipulated and misconstrued the number of deaths in order to achieve one of the organization's political aims - forcing the designation of the Darfuri conflict as 'genocide'. Mamdani assesses a wide range of death toll estimates from academics, NGO's, government agencies and international organizations, estimates that range from as low as 35,000 to as high as 450,000. The US Government Accountability Office (GAO) conducted a study to determine which estimate carried the most validity and concluded that one done by the Center for Research on the Epidemiology of Disasters (CRED) was the most accurate. The CRED estimated that 118,142 'excess deaths' had occurred during the peak period of violence (September 2003 - January 2005). Only 35,000 of these deaths were attributed to direct violence - the rest were from disease, malnutrition and other ailments that resulted from the conflict (Mamdani, pps. 25-32). Mamdani further argues that the violence could be more aptly described as counterinsurgency. Violence, even mass violence, happens in varied situations, but designating that violence as genocide requires an intent to destroy a particular group - a threshold Mamdani does not believe has been met in Darfur.

support for the Janjaweed by the GoS has begun to decline, and militia defections are growing.¹²⁵ There are a plethora of entrenched and difficult factors that will need to be addressed in the wake of this violence in a genuine and substantive way if the people of Darfur are to find peace again and future conflict is to be avoided.¹²⁶

Some steps have been taken towards this end. The Comprehensive Peace Agreement (CPA) of 2005 demonstrated, at least superficially, that Khartoum recognizes some need for compromise and more equitable distribution of power and wealth throughout the country.¹²⁷ However, the CPA may actually have had counterproductive effects on Darfurians. The negotiations only took place between the North and the South, and the eventual terms of the agreement did not include greater recognition for other parts of the country. This may actually have fueled perceptions of marginalization and neglect in Darfur and contributed to the decision to take up arms. Further, while it is clear that Darfurians seek greater representation in the government and more equitable distribution of the nation's wealth, the International Crisis Group (ICG) claims that this is anathema to the ruling party as the CPA had already drastically reduced its share of the country's oil wealth.¹²⁸

There have been many attempts to negotiate peace in Darfur between the warring factions, but the commitment of all parties has been as regularly called into question. Many observers believe that the GoS participates mostly to appease the international

¹²⁵ Flint, Julie. 2009. "Beyond 'Janjaweed': Understanding the Militias of Darfur." *Small Arms Survey*, Graduate Institute of International and Development Studies. Geneva, Switzerland. p. 13. Available at http://www.smallarmssurvey.org/files/portal/spotlight/sudan/Sudan_pdf/SWP-17-Beyond-Janjaweed.pdf.

¹²⁶ The ICC and some form of justice clearly forms one part of this complex equation, but it is far from the only thing necessary in a society as violence-ravaged as Darfur.

¹²⁷ Although the peace agreement was an encouraging development, its promise is dampened by the continuing fears of renewed war and the abandonment of the CPA if southern Sudan votes to secede in the 2011 referendum, a referendum mandated by the CPA.

¹²⁸ ICG Africa Report No. 80, p. 11.

community. One notable “achievement” that resulted from one set of negotiations was the Darfur Peace Agreement (DPA), signed in 2006 by the GoS and one element of the SLA. This agreement, however, had serious flaws and has subsequently proven to be almost entirely ineffective, failing to bring peace and “leading instead to an intensification of conflict in the region.”¹²⁹ According to the ICG, “the DPA has failed because it did not adequately deal with key issues, too few of the insurgents signed it, and there has been little buy-in from Darfur society, which was not sufficiently represented in the negotiations.”¹³⁰ With the primary rebel groups further divided (including a split of the SLA into two different factions), achieving a comprehensive negotiated settlement between all parties to the conflict has remained elusive. As a result, the ICG points out, while “a lasting solution to the conflict can only come through a revised political agreement...there is no consensus on the way forward.”¹³¹

There is much work to be done to bring peace to the people of Darfur and Sudan as a whole. The issues discussed above, as well as others meriting attention, though beyond this thesis’ scope, have created a conflict with deep and broad roots that will not be easily resolved, particularly given the intransigence and limited resolve demonstrated to date by the parties. As el-Battahani astutely observed, “the Sudanese people are resilient...[but] unless the historical grievances of oppressed sections of the population are redressed, a new social contract is negotiated within a framework of political restructuring, and a conducive environment created for a just political system which accommodates the interests of all, the seeds of further conflict will continue to be

¹²⁹ International Crisis Group. 2007. “Darfur: Revitalizing the Peace Process.” *ICG Africa Report*, No. 125. 30 April 2007. p. 1. Available at www.crisisgroup.org.

¹³⁰ *Ibid.* p. i.

¹³¹ *Ibid.*

sown.”¹³² Regardless of whether the ICC plays a role in achieving justice in the aftermath of Darfur, it is clear that many other measures will need to be taken to ensure a lasting peace in Darfur and throughout Sudan.

3.2. The ICC's Involvement in Sudan

Given the nature and the scale of the atrocities that reportedly took place in Darfur, as well as the ICC's quest for credibility, it seems as if the Court and Sudan were fated to engage. Sudan, however, is not a state party to the Rome Statute, thus constraining the Court's assertion of jurisdiction. As a result, if the situation was to appear before the Court, it would have to occur by UNSC referral.

In September 2004, largely as a result of strong pressure and advocacy by the international human rights lobby, Colin Powell, the U.S. Secretary of State, referred to the events in Darfur as 'genocide'. In the wake of this announcement, the UNSC established the International Commission of Inquiry into Darfur (ICID) to assess events in Darfur and to determine what, if anything, the UN could do. The ICID did not define the situation as genocide, but did identify the extent of some of the atrocities.¹³³ The ICID also included a list of 51 people who were implicated in the violence, a list that included individuals from various sectors of the GoS. UNSC Resolution 1593, which referred the situation in Darfur to the ICC, passed in March 2005 (with the U.S. abstaining).¹³⁴ There

¹³² el-Battahani, Atta. 2006. "A Complex Web: Politics and Conflict in Sudan." *Peace by Piece: Addressing Sudan's Conflict*. Edited by Mark Simmons and Peter Dixon. Published by Conciliation Resources, London. p. 13.

¹³³ De Waal, Alex. "Darfur, the Court and Khartoum: The Politics of State Non-Cooperation," in *Courting Justice: Justice, Peace, and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark. Published by the Royal African Society. March 2008. p. 13.

¹³⁴ *Ibid*. Due to political calculations stemming from the fact that the United States has not signed the Rome Conference, the US government could not actively support the resolution. If the US were to support the indictment of a sitting of head of state to a non state party, it could set a dangerous precedent for the country's own leaders.

were no dissenting votes in the UNSC, and it is important to note that three African countries participated in this vote. Benin and Tanzania both voted in favor of the resolution, while Algeria abstained.¹³⁵

This referral was a big moment for the fledgling ICC as the institution was in the midst of attempts to solidify its existence and legitimacy in a rapidly evolving geopolitical landscape. In terms of publicity, the situation was very important for the Court, as Darfur was (and arguably still is) the most notorious humanitarian issue currently confronting the world community. A successful prosecution of the first ‘recognized genocide’ of the 21st century likely would do far more to establish the Court’s international legitimacy than any of its other cases. In short, Sudan represented the very type of case which international law and the ICC were intended to address. At the same time, it was clear that the ICC’s involvement in Sudan was bound to encounter significant obstacles due to the fact that some of the accused were state actors, and the fact that Sudan was not a party to the Rome Statute.

With the referral in place, the OTP took only two months to begin its investigations, compared with over a year that it required for the CAR. From the outset, according to a well-known expert in the Darfur conflict, Alex de Waal, the effort was conducted “with only minimal cooperation from the Sudanese government, which

¹³⁵ CICC Fact Sheet, p. 3. While not directly relevant to the proceedings, it should also be noted that the UN Secretary General at the time, Kofi Annan, is from Ghana. At the time of the referral, Annan released an unequivocal statement of support: “The Secretary-General welcomes the adoption today of Security Council resolution 1593 (2005), which refers the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court. He commends the Council for using its authority under the Rome Statute to provide an appropriate mechanism to lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked. He congratulates all Members for overcoming their differences to allow the Council to act to ensure that those responsible for atrocities in Darfur are held to account” (Office of the Prosecutor. 2005. “Secretary-General Welcomes Adoption of Security Council Resolution Referring the Situation in Darfur, Sudan, to the International Criminal Court.” Press Release. 31 March 2005). Since this initial endorsement, Annan has remained an advocate for the ICC in Darfur.

declared it would not allow the ICC to open an office in Sudan. Khartoum instead established its own Special Criminal Court for Events in Darfur (SCCED), arguing that domestic prosecutions would debar the ICC from playing any role, on the basis of its complementarity provision under Article 17 of the Rome Statute.”¹³⁶ As discussed in Chapter One, complementarity is a central component of the Rome Statute and, in theory, is one key way by which a state can prevent the ICC’s involvement. As Tom Ginsberg elaborates,

because a state can avoid prosecution of its nationals by initiating a credible investigation or prosecution, the only states likely to have their nationals prosecuted are those that either (1) want the prosecution to go forward (say because of a domestic regime change) and wish the international community to bear the costs of prosecution; or (2) have too little state capacity to initiate a credible prosecution or investigation. Sudan forms a potential third category: a recalcitrant state that wishes to avoid prosecution.¹³⁷

In addition to the recalcitrance that Ginsberg refers to, however, it is also likely that his second point applies as well. The Sudanese state through the central government in Khartoum is not in the position to initiate credible prosecutions for the atrocities committed in Darfur due to its alleged involvement in the crimes in question.

Having been satisfied that the Court had jurisdiction and that local efforts at prosecution were not credible or sufficient, the OTP moved forward with its investigation. In particular, the OTP concluded that Sudan was not making an earnest or credible attempt to prosecute the same cases that the office had decided to pursue.¹³⁸ At the time, however, Moreno-Ocampo declared that “the investigation will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence

¹³⁶ De Waal, p. 31.

¹³⁷ Ginsberg, p. 499.

¹³⁸ De Waal, p. 31.

in Darfur and to promote justice. Traditional African mechanisms can be an important tool to complement these efforts and achieve local reconciliation.”¹³⁹ The Prosecutor was aware of the monumental task ahead, and hoped to gain widespread support for his efforts. Initially, at least, the AU voiced support for those efforts. In a press statement released on June 19, 2006, the PSC stated that the body had “received a briefing from the President and the Prosecutor of the [ICC]...The Council welcomed the briefing and underlined the importance of effective and continued working relationship between the AU Commission and the ICC. The Council reiterated the AU’s commitment to fight impunity and, in this respect, stressed the importance of the relevant provisions of the AU Constitutive Act.”¹⁴⁰

On April 27, 2007, the Court issued the first two arrest warrants for individuals implicated in the atrocities committed in Darfur: Ahmed Mohamed Haroun (former Minister for the Interior and current Minister for Humanitarian Affairs) and Ali Mohamed Abdel Rahman Kushayb (Janjaweed militia leader). Both men were charged with crimes against humanity and war crimes. As Minister of State for the Interior, Haroun was allegedly involved in various aspects of the violence, including recruitment and coordination of funding.¹⁴¹ Kushayb is alleged to have worked in close contact with Haroun and involved in many of the same crimes.¹⁴² Not only did the GoS not cooperate with the ICC on these indictments, but its leadership changed Haroun’s position in the government to the Minister of Humanitarian Affairs.

¹³⁹ Office of the Prosecutor. 2005. “The Prosecutor of the ICC opens investigation in Darfur.” ICC-OTP-0606-104. Situation: Darfur.

¹⁴⁰ African Union. 2006. “Press Statement of the Peace and Security Council.” Press Statement. Addis Ababa, 19 June 2006.

¹⁴¹ De Waal, p. 31.

¹⁴² *Ibid.*

3.3. Early Reactions

Even before the first indictments were levied against Haroun and Kushayb, Sudan was fighting back against the ICC and its operation in the country. Thus, for example, Ambassador Sirajuddin Hamid Yousuf, Sudan's Director of the Department of International Law and Treaties, attacked the hypocrisy and politically-motivated actions of the ICC in front of the entire Assembly of States Parties to the Rome Statute in 2006:

The intense feeling of remorse and guilt for past heinous crimes, combined by political motivation, have been the driving force to bring some controversial cases before the Court without conclusive and solid legal grounds. Let us ask ourselves the questions: Why would it be easily possible for the UNSC to refer the situation in Darfur, for example, for consideration by the Court, while the same UNSC finds it almost totally impossible to condemn the documented, grave, and massive crimes committed by Israel in Bait Hanoon? Emotional and political motivations and double standards are both prime enemies of the Court.¹⁴³

Similarly, the GoS made a strong statement before the UNGA in 2007. This public pronouncement, however, had a more biting tone and condemned much of the assembly for its suggestion that Sudan should cooperate with the ICC:

What kind of justice are they talking about?!! The kind that only affects Darfur, while victims are forced to close their eyes to the daily gross violations that the whole world witnesses everyday [in other parts of the world]? Justice does not discriminate and neither should the brave and courageous activities carried out in defense of it... The Sudanese judiciary is independent and capable of prosecuting Sudanese individuals with evidence against them. We urge you [the international community] to stop sobbing and start encouraging peace and equality around the world.¹⁴⁴

From the start, Khartoum was not happy with the ICC's involvement in Sudan, and the opposition only grew louder in the lead-up to the Bashir indictment.

¹⁴³ Government of Sudan. 2006. "Statement by the Delegation of the Sudan, as Observer, to the 5th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 23rd November – 1st December 2006." Delivered by Ambassador Sirajuddin Hamid Yousuf, Director, Department of International Law and Treaties of Sudan.

¹⁴⁴ Government of Sudan. 2007. "Statement by Sudan during the 62nd General Assembly plenary meeting on Agenda Item 76: The ICC." *Translated text from Arabic of Sudan's right of reply concerning the ICC's report on 01 November 2007 to the General Assembly.

While the condemnation coming from Sudan was strong long before Bashir became a target publicly, negative comments from the rest of the continent were noticeably quieter. In fact, as late as December 2007, numerous African countries expressed their full support for the ICC and its operation without any qualification. During the general debate of the 6th session of the assembly of states parties to the Rome Statute in December 2007, no less than 10 African countries unequivocally expressed their ongoing and unflinching support for the Court. These states stressed the importance that all other states parties fully cooperate with the Court to ensure that it would be able to fulfill its mandate. Some examples include:

From Ghana: “It is clear that the success and effectiveness of the Court hinges on the cooperation and support of states parties and the international community as a whole...It is important that states demonstrate the necessary commitment and provide the resources to enable the Court to discharge its responsibilities. Sustained diplomatic and political pressure by the international community should also be directed at states that have provided unwilling to cooperate with the Court in the discharge of its mandate. Lack of focus and pressure in this regard, will send the wrong signal to the perpetrators of the most serious crimes, and also be a betrayal of the victims of these crimes who yearn for justice.”¹⁴⁵

From Sierra Leone: “We should always remember that the Court’s potential for deterrence lies mainly in the likelihood of the threat of prosecution being carried out. Any dilution of that threat makes the worldwide fight against impunity and the ICC’s role within that process much more difficult and more at risk of failure...It is not time to be critical of the Court for the difficulties it is facing in the area of cooperation: this does not lie solely in the hands of the Court, but in the hands of all of us. It is an area where we have the responsibility to find solutions and to make the system work.”¹⁴⁶

¹⁴⁵ Statement by Mr. Robert Tachie-Menson, Deputy Permanent Representative of Ghana to the United Nations at the 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. New York. Tuesday, December 4, 2007.

¹⁴⁶ Statement by Ambassador Allieu Ibrahim Kanu on behalf of Her Excellency Zainab Bangura, Minister of Foreign Affairs of the Republic of Sierra Leone at the 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. New York. Monday, December 3, 2007. Further examples include:

From Kenya: “With the Court now entering the prosecutorial and judicial phase of its activities, commitment by member states to the object and purpose of the Rome Statute is imperative, especially on rendering effective cooperation and support. The Court’s role and judicial activities must also be well understood by a variety of audiences. My delegation therefore welcomes the efforts undertaken by the Court to foster cooperation with States, international and regional organizations”(Statement by Mr. Dorothy Nyagoha Angote, Permanent Secretary, Ministry of Justice and Constitutional Affairs of the Republic of Kenya at the

These are not statements that are made by countries looking to renege on their obligations to the ICC, despite its singular involvement in Africa. They are emphatic statements in favor of the Court's operation and activities. A large number of African countries were outspoken in support of the Court even after the first Sudanese indictments were announced. While they may have taken issue with certain aspects of its operation, the overall message that came out of the 6th Assembly was that African states parties were behind the Court and encouraged all others to do the same. As Ugandan Ambassador Mirjam Blaak explained at an International Security Studies (ISS) symposium on the *ICC That Africa Wants*, "the fact that the Security Council referred the situation of Darfur to the ICC was certainly welcomed by Africa and it is only when the third indictment in the Darfur situation was made against President Al Bashir that some African states felt that this was unjust and that the Prosecutor had exceeded his mandate."¹⁴⁷

6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. New York. Tuesday, December 4, 2007).

From Nigeria: "My delegation is convinced of the great importance of the ICC in the fight against impunity and believes that the court should adequately equipped to effectively discharge this crucial function. We urge other Member States to support the project as well as other endeavors necessary for the success of the Court" (Statement by Ambassador Felix A. Aniokoye, Deputy Permanent Representative and Charge D'Affairs a.i. Permanent Mission of Nigeria to the United Nations at the 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. New York. Monday, December 3, 2007).

From South Africa: "The Government of the Republic of South Africa is committed to assist the International Criminal Court so that it can function efficiently and effectively. This commitment was demonstrated by my government during the negotiations of the Rome Statute of the International Criminal Court leading to the establishment of the Court and is stronger today" (Statement by Mrs. B.S. Mabandla, Minister for Justice and Constitutional Development of South Africa at the 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. New York. Monday, December 3, 2007).

From Tanzania: "We cannot overemphasize the fact that the Court relies entirely on the support and cooperation from all states, it should not only be the responsibility of those states whose situation has been referred to the Court. It is equally important that all states should cooperate fully with the Court to enable it to fulfill its mandate" (Statement by Ambassador Augustine P. Mahiga, Permanent Representative of the United Republic of Tanzania to the United Nations at the 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. New York. Tuesday, December 4, 2007).

¹⁴⁷ Blaak, Mirjam. 2009. "The ICC Review Conference: Opportunity for Change?" Speech presented at the ISS Symposium on the 'The ICC that Africa Wants.' South Africa, 9-10 November 2009. p. 5. Available at <http://www.iss.co.za/pgcontent.php?UID=14278>.

What, then, changed so dramatically in such a short period of time that led to the AU's 'unanimous' resolution for non-cooperation with the ICC? Why did this support dissipate in approximately 18 months? To understand this question, we must first understand Bashir's involvement in the situation, the indictment against him, and several processes that took place between the issuance of his arrest warrant and the passing of the AU's non-cooperation resolution.

3.4. Sudanese Government Involvement and Complicity: Making the Necessary Links

The international advocacy group HRW has published some of the most comprehensive reports detailing the involvement of the highest echelons of Sudanese government in the atrocities. As HRW explained in its report *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, the organization "found that the highest levels of the Sudanese leadership, including al-Bashir, were responsible for the creation and coordination of the Sudanese government's counterinsurgency policy that deliberately and systematically targeted civilians in Darfur in violation of international law."¹⁴⁸ When the ICID issued its first report to the UN Secretary General in late 2004, it contained a sealed list of 51 people (including senior government officials in different branches) for whom there was evidence to suggest that they were involved in the atrocities and warranted a criminal investigation.¹⁴⁹

While the involvement of other central figures in the government was clear, it was President Bashir's involvement that is most significant. On this topic, HRW has issued several reports that detail the actions, and inactions, of the Sudanese president (as

¹⁴⁸ Human Rights Watch. 2009. "Question and Answer: International Criminal Court's Action against al-Bashir." Available at <http://www.hrw.org/legacy/english/docs/2008/01/14/sudan19333.htm>.

¹⁴⁹ De Waal, p. 13.

commander-in-chief of the Sudanese Armed Forces [SAF]) central to the violent campaign that has decimated Darfur. HRW documents the ways in which Bashir's

public statements were precursors to military operations and peaks in abuses by Sudanese security forces. There are indications that they echoed the private directives given to civilian administration, military and security services. For instance, on December 30, 2003, al-Bashir announced that: 'Our top priority will be the annihilation of the rebellion and any outlaw who carries arms.' A few days later, in January 2004, the Sudanese security forces began an offensive that used systematic force in violation of international humanitarian law to drive hundreds of thousands of people from rural areas in Darfur.¹⁵⁰

Further, HRW claims that the "methodical use of aerial support to target civilians in the military campaign, despite protests from air force officers, also appears to reflect the involvement of high-level officials in Khartoum."¹⁵¹

While the precise nature of Bashir's involvement with the crimes committed in Darfur is not fully known, it at least appears that he knew of the atrocities and did little, if anything, to avert them. As HRW explains, Bashir had to have known about the terror being perpetrated by his security forces because, "beginning in May 2002, reports of tens of thousands of displaced people and information from dozens of police complaints, press accounts, and reports by numerous organizations, including the United Nations High Commissioner for Human Rights, made it clear that massive abuses were taking place in Darfur."¹⁵² Despite the information that existed, there is little to indicate that Bashir or others in his government made any considered effort to curb the abuses. The Janjaweed continued to wreck havoc for months after their activities were widely publicized.¹⁵³

While HRW's evidence is not conclusive and insufficient to convict a man of genocide, it does demonstrate that there were a substantial number of factors that

¹⁵⁰ Human Rights Watch, 2009.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

indicated Bashir's close involvement and that merited further investigation. As such, the OTP made a determination that it would do exactly that and decided to open a formal case to investigate Bashir's involvement.

3.5. The First Indictment of a Sitting Head of State: Consequences and Repercussions

Starting in 2007, murmurs about a possible indictment of Bashir began to circulate and grew in strength as time went on. One of the external criticisms of the ICC in its initial investigations in Sudan was that it did not go high enough in the command chain.¹⁵⁴ As momentum behind the effort to pursue Bashir grew and the Prosecutor's intentions became more well-known, opinions in favor and against such a move became increasingly open and, in some cases, hostile. Before the Prosecutor requested an arrest warrant in July 2008, it was clear that several African governments would oppose the move and possibly obstruct the ICC's pursuit of Bashir.

Despite the continued support of the ICC shown by African states after the UNSC referral, the pursuit of Bashir triggered a distinct shift.¹⁵⁵ When the OTP formally announced that a request had been submitted to the Pretrial Chamber for an arrest warrant for Bashir on July 14, 2008, the reaction from the world and Africa was swift. The negative reaction espoused by many African leaders will be discussed below. It is important initially to briefly note that much of international human rights community fully embraced the decision to pursue President Bashir.¹⁵⁶ For example, Dr. Gregory Stanton, President of Genocide Watch, wrote that "the action that the International

¹⁵⁴ See Du Plessis, Max and Allen, Tim.

¹⁵⁵ Schabas, William. 2009. "African Union Defying International Criminal Court." Human Rights Doctorate Blogspot. Blog posted 10 July 2009. Available at <http://humanrightsdoctorate.blogspot.com/2009/07/african-union-defying-international.html>.

¹⁵⁶ Given the earlier discussion about the U.S.-based human rights lobby and its support of the ICC, this development is hardly surprising.

Criminal Court has taken in this situation has restored hope to peace and justice loving people, affirming that international human rights law not only exists on paper, but in reality.”¹⁵⁷ In his statement, Stanton also touched upon the fact that one reason why so many African leaders are opposed to the action is that it means they will not be immune from prosecution for their own crimes.¹⁵⁸ Similarly, the International Federation for Human Rights (FIDH) released a statement that the organization and its partner, the Sudan Organization against Torture (SOAT), “welcome today’s announcement by the Prosecutor of the International Criminal Court on the request for an arrest warrant against Omar Hassan Al-Bashir...We believe that disclosing this evidence and indicting Al-Bashir could contribute to stability in the region.”¹⁵⁹

This support was espoused not only by Western-based human rights groups, but by a wide range of organizations around Africa. As the CICC noted, many of its members in dozens of African countries came out quickly and emphatically in support of the OTP’s action against Bashir.¹⁶⁰ Voices from Darfur have also been heard in support of Bashir’s prosecution. A statement from the Darfur Leaders Network (DLN)¹⁶¹ explained that “despite the immense magnitude of suffering and unimaginable pain of our people, we have witnessed many governments and international experts condemn Mr. Moreno-Ocampo’s decision with some of the same justifications and rationales as President Al Bashir and the Government of Sudan. These criticisms ignore the Darfuri voices that

¹⁵⁷ Stanton.

¹⁵⁸ Stanton makes specific reference to Meles Zenawi, Prime Minister of Ethiopia.

¹⁵⁹ As found in CICC-Africa Newsletter, No. 10, p. 3.

¹⁶⁰ Coalition for the International Criminal Court. 2009. “AU Criticizes the ICC; Civil Society Reacts.” *The Monitor – Journal of the Coalition for the International Criminal Court*. Issue No. 39. November 2009 – April 2010. p. 14.

¹⁶¹ “Darfur Leaders Network (DLN) is an independent non profit organization and consists of leaders from Darfuri civil society organizations of the diaspora located in the United States. The DLN is an independent initiative of Darfuri leaders in the U.S. The DLN works closely with other organizations that possess a shared vision and common objectives for the people of Darfur” (from www.darfurleadersnetwork.org).

view... the ICC as the only available outlet to secure justice and accountability for the crimes committed in Darfur since 2003.”¹⁶²

African governments, as well as many African citizens, did not share the positive reaction from various human rights organizations. To them, the ICC’s attempt to pursue Bashir represented an affront to the African continent and to the sovereignty of African nations.¹⁶³ The most common line of attack, however, was that any attempt to prosecute Bashir at this moment could jeopardize the maintenance of a very fragile peace held in place by the CPA and the continuation of negotiations with the rebel factions. As the Report from the African Union High Level Panel on Darfur (AUDP)¹⁶⁴ noted, the AU has “expressed worries about the stability of Sudan and the potential impact external interventions might have on the situation there. It considered, in particular, that the arrest warrant against President Bashir might further destabilise Sudan at a time when potentially epoch-making political events are set to unfold in that country.”¹⁶⁵

In this environment, the AU took a significantly different public stand. On July 21, 2008, only a week after the Prosecutor’s request for a warrant, the PSC released a statement that requested that the UNSC exercise the powers afforded under Article 16 of the Rome Statute “to defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, [under] the current circumstances, a prosecution may not be in the interest of the victims

¹⁶² CICC-Africa Newsletter, p. 3.

¹⁶³ Mahmood Mamdani has been one of the most outspoken critics in this regard. See footnote 7.

¹⁶⁴ The AUDP will be discussed in greater detail in Chapter Four.

¹⁶⁵ African Union High Level Panel on Darfur. 2009. “Report of the African Union High Level Panel on Darfur.” Presented to the Peace and Security Council at the 207th Meeting at the Level of the Heads of State and Government. 29 October 2009. p. 63.

and justice.”¹⁶⁶ The AU reiterated this request on a number of occasions. Though the UNSC acknowledged its receipt of said requests, the body failed to act upon them. For its part, the ICC moved forward with its investigation of Bashir and waited upon the response from the Pretrial Chamber as to whether it would grant the request for an arrest warrant.

At the same time the AU pressed its request for the deferral of the investigations against Bashir, some African countries continued to vocally support the work of the Court, and encouraged others to do the same. For example, at the 7th Session of the Assembly of States Parties to the Rome Statute in November 2008, the Lesotho delegation declared that the “Court has already demonstrated its positive impact in determining the perpetration of systematic atrocities. Thus strengthening the system of international justice and making an important contribution in the search for peace and promotion of democracy and the rule of law. It will be noted however, that these tangible milestones are being realized by the ICC despite its shortcomings having limited powers in some instances. To my delegation, this only reiterates the importance of the UN and State cooperation for the future effectiveness of the Court.”¹⁶⁷ At the same meeting, South Africa declared that it “wishes to re-affirm its support for the Court. As we have said before, the Court will only be able to sustain its present momentum if it obtains the support from all States, and we call on States that have not yet ratified the Rome Statute to do so expeditiously.”¹⁶⁸

¹⁶⁶ African Union Peace and Security Council. 2008. “Communique of the 142nd Meeting of the Peace and Security Council.” 142nd Meeting, 21 July 2008, Addis Ababa, Ethiopia. PSC/MIN/Comm(CXLII).

¹⁶⁷ Statement of Lesotho to the 7th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. The Hague, The Netherlands. 14th-22nd November 2008.

¹⁶⁸ Statement by Nkhulu Daniel Sebothoma, Charge D’Affaires of the South African Embassy to the Netherlands at the 7th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. The Hague, The Netherlands. 14th-22nd November 2008.

Just a month later, in December 2008, following the Eighth Report of the Prosecutor of the ICC pursuant to Resolution 1593 before the UNGA, Burkina Faso recognized the efforts that Sudan had attempted to implement to deal with crimes in Darfur. The representative for the country concluded, however, that “their efforts remain clearly insufficient, and they must be urged to be bolder and more engaged.”¹⁶⁹ The statement concluded that, “as a State party to the Rome Statute, my country reaffirms yet again its full support for the activities of the [ICC] and believes that those activities must be undertaken with the greatest possible caution and in the context of a purely judicial approach, with the sole objective of revealing the truth, prosecuting the guilty and protecting the interests of the victims in accordance with resolution 1593 (2005).”¹⁷⁰ In October of 2008, before the UNGA, Kenya declared that it would like to “reaffirm [its] commitment to its obligations under the Rome Statute. We appreciate the ongoing cooperation and consultation between the ICC and the Office of the Attorney General on a broad range of issues. This attests to the recognition and support that my country gives to the Court.”^{171 172}

Based on these statements, it appears reasonable to conclude that at least some African states, as of the end of 2008, still strongly believed in the mission of the Court, though they may have harbored some misgivings about the Court’s decision to pursue President Bashir. At the same time that these countries re-affirmed their support for the ICC, the AU as a whole made the case that it was against the prosecution of Bashir. Thus,

¹⁶⁹ Statement by Burkina Faso on the Eighth Report of the Prosecutor of the ICC pursuant to Resolution 1593 (2005). 3 December 2008. Official Record from the United Nations.

¹⁷⁰ *Ibid.*

¹⁷¹ Statement by Mr. Zachary D. Muburi-Muita, Ambassador of the Kenya Mission to the United Nations on Agenda Item 69 – Report of the International Criminal Court. 63rd Session of the United Nations General Assembly. New York, 30 October 2008.

¹⁷² This cooperation and consultation refers to the post-election violence in Kenya, as will be discussed in greater detail in Chapter Four.

in September 2008, Tanzania, on behalf of the AU, made the following statement to the UNGA: “It is the considered view of the African Union that the indictment of President Omar Al-Bashir at this particular point in time will complicate the deployment of UNAMID and the management of the humanitarian crisis in Darfur. It is for this reason that the African Union sees deferment as the most expedient thing to do now.”¹⁷³ Subsequently, the AU continued its efforts to have the investigation deferred and explored alternative ways to handle the situation. In February 2009, the AU summit in Addis Ababa voted to reiterate its request for deferral to the UNSC, and requested that the AU Commission gather the African states parties to “exchange views on the work of the ICC in relation to Africa.”¹⁷⁴

This meeting of states parties convened in June 2009, approximately three months after the Pretrial Chamber granted the Prosecutor’s request for an arrest warrant for Al-Bashir on March 4, 2009.¹⁷⁵ In the lead-up to the conference, concerns were expressed by various external parties that the outcome could be a mass exodus of African countries

¹⁷³ Statement by Jakaya Mrisho Kikwete, President of the United Republic of Tanzania and Chairman of the African Union at the 63rd Session of the United Nations General Assembly. New York, 23 September 2008.

¹⁷⁴ Assembly/ AU/Dec.221(XII).

¹⁷⁵ On the same day that this announcement was made, the PSC released another communiqué condemning the action and once again requesting the deferment of proceedings. In part, the communiqué read: “Expresses deep concern over the decision taken by Pretrial Chamber I of the ICC on 4 March 2009, to issue an arrest warrant against the President of the Republic of the Sudan, Mr. Omar Hassan Al Bashir, for war crimes and crimes against humanity, and the far reaching consequences of this decision. Council notes with regret that this decision comes at a critical juncture in the process to promote lasting peace, reconciliation and democratic governance in the Sudan, and underlines that the search for justice should be pursued in a way that does not impede or jeopardize the promotion of peace... Deeply regrets that, despite the risks posed by the ongoing ICC process to the search for lasting peace and stability in the Sudan and in the region, the United Nations Security Council has failed to consider with the required attention the request made by the AU to implement the provisions of article 16 of the ICC Statute... Appeals once again to the UN Security Council to assume its responsibilities by deferring the process initiated by the ICC, and reiterates the AU’s determination to continue to do whatever is in its power to mobilize the necessary support...” (African Union, Peace and Security Council. PSC/PR/Comm(CLXXV)).

from the Rome Statute.¹⁷⁶ However, not only did these fears not materialize, but the meeting concluded with a statement that African states parties should reaffirm their commitment to the ICC and its mandate.¹⁷⁷ There were also recommendations made for an African preparatory meeting for the ICC Review Conference.¹⁷⁸ This meeting, therefore, provided a boost of confidence to the ICC. Despite the displeasure that many African countries had with the approach of the ICC with regards to the pursuit of Bashir, it indicated that they would hold fast to their commitment to the ideal behind the Rome Statute.¹⁷⁹ Given all this it came as a surprise that, less than a month later, in July 2009, the AU Assembly met and passed the declaration of non-cooperation.

3.6. A Defiant Stand by the AU

From July 1 to 3, 2009, the AU convened for the 13th General Session in Sirte, Libya, to discuss a wide variety of concerns confronting the continent and the organization. During this meeting, citing “the unfortunate consequences that the indictment has had on the delicate peace processes underway,”¹⁸⁰ and the fact that UNSC has not heeded to its request for deferment,¹⁸¹ the AU passed a resolution that declared “the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the

¹⁷⁶ Schabas, William. 2009. “African Union Defying International Criminal Court.” Human Rights Doctorate Blogspot. Blog posted 10 July 2009.

Available at <http://humanrightsdoctorate.blogspot.com/2009/07/african-union-defying-international.html>.

¹⁷⁷ Institute for Security Studies. 2009. “Briefing Paper on the African Union Meeting on the Review Conference of the International Criminal Court Scheduled for November 3-6, 2009.” 21 October 2009. p. 2.

¹⁷⁸ The Rome Statute Review Conference will take place in Kampala in the May-June 2010 and will provide a forum for all states parties to the Rome Statute to debate and alter different provisions within the statute.

¹⁷⁹ According to Magliveras, however, “it would appear that it was more a lack of consensus (the preferred means of doing business in the AU) than anything else that led the meeting to adopt six neutral recommendations and not take any drastic action.”

¹⁸⁰ African Union. 2009. “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court.” Addis Ababa, 1-3 July 2009. Doc. Assembly/AU/13(XIII).

¹⁸¹ Chairman of the AU, Jean Ping told reporters after the assembly adopted the resolution that “if you don’t want to listen to the continent, as usual, we also are going to act unilaterally” (As found in Greenberg).

Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.”¹⁸²

The AU relied on Article 98(1) of the Rome Statute to legally justify this decision.¹⁸³ This decision was met with anger and disbelief by many human rights groups across Africa, including organizations in Botswana, DRC, Kenya, Nigeria, Liberia, Sierra Leone, South Africa, and Uganda.¹⁸⁴ On July 30, 2009, 164 African civil society groups released a joint statement that called on African states parties to reaffirm their commitment to the Rome Statute. The letter stated, *inter alia*, that “the AU’s decision threatens to block justice for victims of the worst crimes committed on the continent. It is inconsistent with article 4 of the AU’s constitutive act that rejects impunity, as well as the treaty obligations of the 30 African governments that ratified the Rome Statute of the ICC. The decision also undermines the consensus reached by African ICC states parties at a meeting in Addis Ababa in June 2009.”¹⁸⁵ The letter concludes with an emphatic plea that African countries not abandon their support of the ICC: “Ensuring that the determined steps to end impunity on our continent are not undermined requires a collective effort by all Africans. Instead of retreating from important achievements to date, we look to our governments to remain steadfast in their support for justice for

¹⁸² Doc. Assembly/AU/13(XIII).

¹⁸³ Article 98(1) prevents the ICC from requesting a State to arrest an individual if this would involve the requested State in breaching the diplomatic immunity of a person from a third State, unless the third State waives the immunity of the individual concerned (AUDP Report, p. 63).

¹⁸⁴ International Justice Desk. 2009. “African Civil Society Urges African Union Member States for ICC Support.” 3 November 2009. Available at <http://www.rnw.nl/int-justice/article/african-civil-society-urges-african-union-member-states-icc-support>.

¹⁸⁵ International Center for Transitional Justice. 2009. “African civil society urges African States Parties to the Rome Statute to reaffirm their commitment to the ICC.” Press Release. Signed by 164 Organizations, 30 July 2009. Full text of letter and list of signatories available at <http://www.ictj.org/en/news/press/release/2853.html>.

victims of the worst crimes, including by reaffirming their commitment to cooperate with the ICC.”^{186 187}

Despite the outcry that followed the AU’s decision, just over two weeks later the PSC issued a communiqué which reiterated “earlier AU decisions on the ICC process, in particular the non cooperation of AU member States with the arrest and surrender of President Al Bashir. In this respect, Council **requests** all AU member States to respect decision Assembly/AU/Dec.245 (XIII).”¹⁸⁸ The communiqué again focused on the detrimental impact that the proceedings would have on the Sudan peace process to defend the decision of non-cooperation.

This prompts several questions. Why was there not a similar protest and reaction to the other situations, particularly Uganda? Is it only because Uganda was a self-referral and not made by the UNSC? Such an explanation would be inadequate given the paucity of criticism when the UNSC referral was first made as well as the fact that at one point Uganda began to recant its commitment to the ICC in the case against the LRA as amnesty started to be seen as a potential way to end the war.

If it is true that the ICC’s involvement in Sudan does jeopardize the peace process and contribute to continued killings and instability, one also must ask why African governments are the only ones to throw up their hands so vigorously? Would one not assume that those outside of Africa, and particularly Western governments, would also be able to see this objective truth as well? If such is the case, why would they fail to respond to calls from the continent? Many African critics argue that the ICC is a puppet for the

¹⁸⁶ International Center for Transitional Justice, Press Release.

¹⁸⁷ Importantly, this declaration comes from groups across Africa, not just the US-based human rights lobby that Mamdani so disparages.

¹⁸⁸ Emphasis present in original.

Western governments looking for new ways to control and belittle Africa, and that the ultimate goal of the ICC prosecution of Bashir is regime change in Sudan.¹⁸⁹ Even if one were to accept such a subversive conclusion, however, greater analysis of the whole situation would still be needed.

How, then, can this be explained? What lies behind this resolution? Was the decision unanimous, as would be required under the rules governing the AU? Information in two areas has emerged shedding light on these questions. First, some evidence suggests that considerable responsibility lies in the hands of one man: Libyan President Muammar Gaddafi, who was also the AU chairman at the time. Second, it has also become clear that the decision to not cooperate with the ICC was far from unanimous, and that numerous African states have in fact made it clear that their actions will not necessarily conform to the AU resolution. In addition to these two micro-political developments, greater attention will be paid in the next chapter to the macro-political imperatives that helped give rise to the resolution of non-cooperation. Indeed, it is the cumulative affect of micro and macro political imperatives at play that makes the situation so intriguing and difficult to assess.

3.7. The Central Role of Gaddafi

Gaddafi has long been one of the most outspoken critics of the ICC. For example, he once expressed his belief that the ICC represents “new world terrorism.”¹⁹⁰ Following Bashir’s indictment by the ICC, Gaddafi described the ICC as a “terrorist

¹⁸⁹ See Mamdani.

¹⁹⁰ Greenberg, p. 2.

organization.”¹⁹¹ While he has long been a critic of the Court and its operation in Africa, that opposition became significantly more influential when he became the Chairman of the AU in February of 2009, approximately a month before the request for an arrest warrant for President Bashir was approved by the Pretrial Chamber. The fact that the Assembly decided to elect Gaddafi, an individual who was well known for his opposition to the ICC, and particularly for its involvement in Sudan, around the same time that the Court was beginning its groundbreaking attempts to bring Bashir to justice, might suggest some discontent with the Court’s operation. While Gaddafi was certainly elected for other reasons as well, the choice and its timing were significant.

Almost immediately upon taking office, it became clear that Gaddafi would continue his opposition to the ICC and level accusations of blame at others (everyone except, it seems, Bashir and the GoS). Only two weeks into his term as chairman, and before the arrest warrant for Bashir was approved, Gaddafi accused Israel of primary responsibility for the crisis in Darfur (at a meeting designed to explore possibilities for enhanced cooperation between the UN and AU, no less). Without offering any evidence to support his claims, he asked the assembly, “why do we have to hold President Bashir or the Sudanese government responsible when the Darfur problem was caused by outside parties, and Tel Aviv, for example, is behind the Darfur crisis?”¹⁹²

¹⁹¹ Sudan Tribune. 2009. “African Countries back away from ICC Withdrawal Demand.” *Sudan Tribune*, 10 June 2009.

¹⁹² Ghanmi, Lamine. 2009. “Gaddafi Says Israel, not Bashir, behind Darfur War” *Reuters*, 24 February 2009. Available at <http://www.reuters.com/article/idUSLO50752>. Ignoring the absurdity of this statement, it is also worth mentioning that Gaddafi himself has regularly fueled the flames of other conflicts in Africa, particularly in the 1980’s and 1990’s, frequently defending such actions as part of the battle against colonialism. In addition, as Geoffrey Robertson points out, “Gaddafi has in the past ordered many assassinations of dissidents (“stray dogs”) and sponsored terrorist groups reportedly ranging from Baader Meinhof to Abu Nidal – while his charity provides lavish compensation to the families of Palestinian suicide bombers” (Robertson, Geoffrey. 2009. “Gaddafi Getting Away with Murder.” *Mail & Guardian*, 22 Sep 2009. Available at <http://www.mg.co.za/article/2009-09-22-gaddafi-getting-away-with-murder>).

When the arrest warrant was approved on March 30, 2009, Gaddafi, as chair of the AU (which, again, includes 30 African countries that are states parties to the Rome Statute) took his rhetoric to the next level and falsely claimed that “it is a known fact that all Third World countries are opposing the so-called ICC. This is the case right now. This court is against the countries colonised in the past and they want to recolonise now. It is a practice of a new world terrorism that is not below the standard of the other terrorism.”¹⁹³ The ICC had a problem on its hands. The man who led the organization representing the largest regional bloc of states parties, had just declared that the Court represented a form of terrorism that was as harmful as Al-Qaeda.

Several months after this publicity campaign against the ICC, the AU summit in Sirte took place. The Assembly agreed to not cooperate with the ICC in its pursuit of President Bashir and announced that this decision was arrived at by consensus.¹⁹⁴ Since July 2009, however, much of the available information has indicated that no consensus existed, and that it was Gaddafi’s coercive tactics and manipulative management of the summit that led to the purported consensus.¹⁹⁵

An AU press statement released only 11 days after the summit declared that “the decision by the Assembly on the Meeting of African States Parties to the Rome Statute of the International Criminal Court was arrived at by Consensus after due consideration.”¹⁹⁶ Accounts that emerged shortly thereafter, however, made it clear that this was not the case. The CICC reported that some African governments that attended the meeting

¹⁹³ ABC News. 2009. “Gaddafi slams ICC as ‘new form of world terrorism.’” *ABC Online*, 30 March 2009. Available at <http://www.abc.net.au/news/stories/2009/03/30/2529298.htm>.

¹⁹⁴ Greenberg, p. 1.

¹⁹⁵ For example, see Greenberg, CICC, and Owino, Wene. 2009. “Botswana Faults Gaddafi over ‘Hasty’ AU Decisions.” *The Daily Nation*, 7 July 2009.

¹⁹⁶ African Union. 2009. “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC).” Press Release. Addis Ababa, 14 July 2009.

walked out on the proceedings citing unprecedented levels of intimidation and pressure by Gaddafi to vote in accordance with his desires. According to Greenberg, this pressure went so far as to include threatening foreign dignitaries and censorship of communication in and out of the meeting, effectively precluding anyone from challenging the resolution.¹⁹⁷ Indeed, following the summit Botswana's vice-president, Lieutenant General Mompoti Merafhe, slammed Gaddafi and the manner in which the summit was run: "The chair did not permit much debate on this matter and we did not get an opportunity to put our opinion across. It is our view that Africa should not try to undermine the work of the ICC simply because one Head of State called Bashir has been indicted by the Court. Indeed by doing so we would be, as Kofi Annan recently put it, demeaning 'the yearning for human dignity that resides in every African heart.' It also represents a step backward in the battle against impunity."¹⁹⁸

Gaddafi's manipulative approach to the meeting did not stop at simply disallowing certain types of debate. According to David Greenberg, "Gaddafi also tampered with the procedural rules of AU Assembly meetings. Shortly after being elected chairman of the AU on February 2, Gaddafi instituted into AU meetings the Islamic practice that 'silence is approval.'"¹⁹⁹ As a result, silence was considered active support, which required that a state actively challenge the Chairman in the midst of the floor debate. As Greenberg notes, "this is difficult for one nation to do alone, and far more challenging to rally two-thirds of the AU's 53 members to openly oppose the chairman to override his mandate. When the chairman of the African Union barely allows for any

¹⁹⁷ Greenberg, p. 1.

¹⁹⁸ Owino, Wene. 2009. "Botswana Faults Gaddafi over 'Hasty' AU Decisions." *The Daily Nation*, 7 July 2009.

¹⁹⁹ Greenberg, p. 2.

discussion of the matter and silences possible detractors, the task becomes almost impossible.”²⁰⁰ Post-summit statements by the vice-president of Botswana again corroborate Greenberg’s assertions. Merafhe claimed that “the chair of the African Union, Libya, has no respect for established procedures and processes of the African Union and this may be motivated by his burning desire to coerce everyone into the premature establishment of an African Union Government.”²⁰¹

In the end, according to one source, the AU declaration was only actively supported by Sudan, Senegal, Djibouti, and Comoros.²⁰² Significantly, all of these countries with the exception of Sudan have ratified the Rome Statute. Why these countries did not raise stronger objections during the Conference for States Parties in June, or why non-states parties did not support the declaration in greater numbers, is an interesting question. It is reasonable to speculate that, given their past condemnation of the Court, leaders such as Rwanda’s Kagame and Eritrea’s Isaias Afewerki were in support of the measure. Perhaps they knew that their silence would be counted as support and therefore decided to avoid the political fallout that could result from active support of the resolution.

3.8. Dissent within the Ranks

While there is no way to determine precisely why any given state failed to take a stronger stand one way or the other, the picture that has emerged after the fact demonstrates that not all Africa states parties decided to abandon the ICC.²⁰³ Prior to the

²⁰⁰ *Ibid.*

²⁰¹ Owino, The Daily Nation. Gaddafi has long promoted the idea of the ‘United States of Africa’ as a way of promoting economic integration and rising Africa’s global profile.

²⁰² As described in Greenberg.

²⁰³ In the same string of comments that were quoted above, Vice-President Merafhe did state that, “given the way the meeting was presided over by the chair, Botswana found it fruitless to oppose the adoption of

July meeting, they had already done so despite Gaddafi's call that they withdraw their support for the Rome Statute. When the African states parties reaffirmed their support for the ICC in the lead up to the meeting in Sirte, they were aware that the ICC was solely involved in African situations but still believed the ICC was properly pursuing its mandate. While some may have had reservations, none were sufficiently strong to push for a drastically different course forward. Further, this approach was in clear defiance of Gaddafi who, before the meeting, had demanded that all states parties should withdraw from the ICC.²⁰⁴ In the wake of the AU Summit, some states parties declared their ongoing support for the Court, while others remained quiet, though have not publicly affirmed the AU declaration.

In addition to the statements made by Botswana's vice-president, the Minister of Foreign Affairs declared that "the government of Botswana does not agree with this [AU] decision and wishes to reaffirm its position that, as a State Party to the Rome Statute on the [ICC], it has treaty obligations to fully cooperate with the ICC in the arrest and transfer of the President of Sudan to the ICC."²⁰⁵ The country expressed a similar sentiment before the UNGA in September 2009.²⁰⁶ South Africa released a similar statement, declaring that "if President Al-Bashir arrives on South African territory, he

what is essentially the framework of the African Union Government, the issue on which our position is well known. It was clear that the chair was not prepared to entertain opposing views or opinions calling for a gradual approach to continental integration"(Owino, *The Daily Nation*, 7 July 2009). Perhaps other nations felt similarly cajoled into non-opposition.

²⁰⁴ Greenberg, p. 3.

²⁰⁵ CICC - *The Monitor*, p. 16.

²⁰⁶ "Botswana reiterates its position that it is fully committed to respecting the integrity and impartiality of the International Criminal Court in order that it can freely carry out its judicial mandate. We equally support the principle of universal jurisdiction under international law and practice" (Statement by Mr. C.T. Ntwaagae, Ambassador of the Republic of Botswana to the United Nations at the 64th Session of United Nations General Assembly. New York, 29th September 2009).

[would] be liable for arrest.”²⁰⁷ Amnesty International (AI) also has cited the fact that Chad and Kenya have in recent months made “strong statements countering this perception by clarifying that their governments will cooperate fully with the Court.”²⁰⁸ Some of this support has surely been a result of strong pressure from various NGOs in each country that have taken a vocal stand in favor of the ICC, as detailed above.

According to Moreno-Ocampo, the support for the ICC has been even more widespread. In a December 4, 2009 address before the UNSC, Ocampo stated that “African States Parties to the Rome Statute have affirmed both their position as AU members that the UN Security Council should consider a deferral of the Darfur investigation and their legal duty under the Statute to execute arrest warrants should indictees be present on their territory.”²⁰⁹ The Prosecutor even cited several personal assurances he received from African leaders: “Over the last 6 months, myself and Deputy Prosecutor Bensouda met with many African presidents, President Zuma of South Africa, President Museveni of Uganda, President Jammeh of the Gambia, President Kibaki of Kenya, and President Deby of Chad. All of them express their commitment to justice and to ending impunity.”^{210 211}

While this recent trend is encouraging, many, if not most, of the African states parties have yet to come out and publicly reaffirm their commitment to the Court. This

²⁰⁷ CICC - The Monitor, p. 15.

²⁰⁸ Amnesty International, p. 4.

²⁰⁹ Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court. Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005). 4 December 2009.

²¹⁰ *Ibid.*

²¹¹ This public reaffirmation of the ICC’s operation in Africa has actually had some potentially positive affects. While Bashir has not yet been arrested, Amnesty International points out that he “has had to give up plans so far to travel to South Africa, Uganda, Venezuela and any other state party to the Rome Statute after African civil society objected and it became clear that he faced a serious risk that justice officials in these states would fulfill their obligations under the Rome Statute to arrest and surrender him to the International Criminal Court” (Amnesty International, Review conference, p. 4).

means one of two things, or both. First, it could mean that there are still many states parties that no longer support the Court in the face of the situation in Darfur and would not arrest Bashir if he were within their borders, which would be damaging to the Court. Second, it could mean that some African governments are too timid or weak to publicly declare their opposition to the AU or to more powerful countries like Libya, and even Sudan. This too, could be problematic for Africa and the ICC; it will be far more difficult for the ICC to be successful in pursuing its mandate if leaders of less powerful countries do not keep to their commitments. Similarly, if the AU is to achieve the successes needed to catapult Africa into a more influential position on the world stage, the institution cannot allow a powerful few to seize the process and undermine the legitimacy of the institution.

3.9 Conclusion

This chapter has traced the history of conflict in Sudan, the origins of the ICC's involvement, the AU's defiant response (as well as the individual actions of its leader), and demonstrated the lack of unanimity from AU member states regarding the declaration of non-cooperation. These various parts paint a complex picture; they at once demonstrate the process by which the ICC became involved, the convoluted political nature of both institutions' actions, and the very real disagreements that exist within African governments about the indictment and the declaration of non-cooperation.

As discussed at the outset of this thesis, the risks of getting involved in Sudan, and particularly with the indictment of Bashir, were significant, and the confrontation that has developed between the ICC and the AU has proven that the dangers were real. While the situations discussed in Chapter Two did not trigger any significant opposition from

African governments, Bashir's indictment ignited a substantively different reaction. Yet the importance of Sudan, and Bashir's case in particular, to the future success and potential of the Court remains the same. Perhaps it is even more significant now given that success in Sudan will require making significant amends with the membership of the Court's largest regional bloc. Accordingly, while this thesis does not seek to resolve the current confrontation, Chapter Four will identify and outline a few of the major issues at stake that will require some resolution for the achievement of that potential.

CHAPTER FOUR

Clarifying the Issues at Stake: Challenges and Opportunities

The confrontation between the ICC and the AU has been set in place, and the lines have been drawn. Neither side has thus far demonstrated any significant willingness to drastically change their position in order to appease the other. Yet, in many ways, these institutions need each other: the importance of Sudan and Africa to the Court has been stated at length in these pages, and the history of violence and impunity on the African continent has represented a major hindrance to the type of influence the AU desires. As a senior legal adviser (who also happens to be African) in the ICC's Registry commented, "no other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur."²¹² While the AU may not appreciate the approach the ICC has taken in Sudan, the goals that the ICC represents are in line with those consistently expressed by the AU.

Recognizing the mutual importance of Africa and the Court to each other, it is necessary to clarify some of the major issues at stake in the confrontation, both for further analysis and to potentially find common ground where compromises or concessions might be made. In that vein, the following discussion is an examination of several different issues that can also be seen as challenges and/or opportunities. The foundation

²¹² As found in Du Plessis on p. 2.

for these issues was laid out in the preceding chapters, and they are more fully explored here.

4.1. The Consistent Refrain: The AU Does Not Condone Impunity!

Due to the principles embedded in the AU's Constitutive Act, many outside observers have strongly criticized the body for breaking its own commitment to ending impunity. While the AU has called upon the UNSC to defer the proceedings against Bashir and passed the declaration of non-cooperation, statements and resolutions released by the organization have also repeatedly reiterated the fact that they do not approve of or condone impunity. Observers have not failed to point out the successes that Africa has made in this regard. As the UN Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons, and Migrants in Africa recently pointed out, "in the recent past Africa has taken bold measure to fight impunity, with the support of the international community through the work of the International Criminal Tribunal for Rwanda, the Special Court of Sierra Leone, ICC investigations and prosecutions of alleged perpetrators of international crimes in DRC, Central African Republic and Uganda, as well as the adoption of certain legal instruments..."²¹³

It is precisely because of the encouraging progress of the past two decades that the present clash is so problematic. Yet, many African leaders categorically reject that the resolution of non-cooperation has anything to do with condoning impunity. As the President of Tanzania (and at that time the Chairman of the AU), Jakaya Mrisho Kikwete, said before the UNGA in September 2008, "Let me make one thing clear that when we

²¹³ African Union. 2009. "Press Release by UN Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons, and Migrants in Africa." Press Release. Available at http://www.iccnw.org/documents/Sudan_AfricanCommissionSpRap_2009-04-13.pdf.

talk about deferment, we should not in anyway be perceived as condoning impunity. Justice is a matter of essence. We are simply concerned with the best possible sequencing so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are dealt with first.”²¹⁴ Subsequently, almost every resolution or decision that the AU made with regards to Sudan and the ICC made sure to point out that the organization does not condone impunity and strongly condemns the ongoing human rights abuses in the country. For example, three independent AU decisions use the following passage verbatim: the AU reiterates its “unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire Continent, in conformity with its Constitutive Act.”²¹⁵ Another PSC communiqué announced that the AU once again reiterates its commitment to “combat impunity, in line with the relevant provisions of the AU Constitutive Act, and strongly condemns the violations of human rights and international humanitarian law, including attacks against humanitarian workers and all other acts of violence against civilians.”²¹⁶

While the AU has been very active in trying to bring peace to the region both diplomatically and with UNAMID peacekeepers,²¹⁷ accountability has rarely been at the front of the agenda. While the AU consistently issued many press releases and

²¹⁴ Statement by Jakaya Mrisho Kikwete, President of the United Republic of Tanzania and Chairman of the African Union at the 63rd Session of the United Nations General Assembly. New York, 23rd September 2008.

²¹⁵ Assembly/AU/Dec.221(XII), PSC/MIN/Comm.1(CLI), Assembly/AU/Dec.245(XIII).

²¹⁶ African Union Peace and Security Council. 2009. “Communiqué of the 198th Meeting of the Peace and Security Council.” 198th Meeting, 21 July 2009, Addis Abbaba, Ethiopia. PSC/PR/COMM(CXCVIII).

²¹⁷ Both the African Union Mission in Sudan (AMIS) and UNAMID were heavily involved in Darfur, beginning in 2003. As Mamdani laments, however, “whereas the work of the INGOs is almost universally celebrated, the work of the African Union has been almost universally derided. The African Union’s weak financial and resource capacity has been evident to one and all, making it heavily dependent on external material support, functioning more as a nongovernmental than an intergovernmental organization...” (p. 38). Mamdani also credits the AU work in Darfur, arguing that unlike most organization’s working on Darfur issues, “the AU leadership fused moral fervor with a political vision. The African Union did not see its work in Darfur as a purely humanitarian intervention from the outside but as one guided by humanitarian and political objectives” (p. 38).

communiqués, little concrete action has been taken to hold those responsible to account. In other words, there is a stark contrast between the AU's official declarations and their practical actions. The AU's emphasis on eradicating impunity, however, means that there is clearly potential to work with the organization towards a mechanism of accountability in Darfur and elsewhere. The creation of the African Union Higher Level Panel on Darfur (AUDP) demonstrates this commitment, and it is to the work of this body that attention is now given.

4.2. The AUDP Report: An Attempt to Understand Peace, Justice and Reconciliation

The AU has consistently acknowledged that the situation in Darfur represents a blight on the image of the continent and that human rights violations are rampant. Most African leaders, and other critics like Mamdani, have never denied that unacceptable violence has occurred, but they have significantly different views about the nature of the problem and how it should be handled. In such a context and with the recognition that if a strong position was taken against the ICC's involvement in Darfur something would need to take its place, the AUDP was established. Chaired by former South African President Thabo Mbeki and including seven other distinguished African statesmen, including two other former presidents, the AUDP was "mandated to examine the situation in Darfur in-depth and submit recommendations on how best to effectively and comprehensively address the issues of accountability and combating impunity, on the one hand, and peace, healing and reconciliation, on the other."²¹⁸ The AUDP had its inaugural meeting on March 18-19, 2009 in Addis Ababa, and began its substantive work soon thereafter.

²¹⁸ Introductory note by Thabo Mbeki to the AUDP report, p. ii.

After months of research, interviews, missions to Sudan and Darfur, and extensive analysis of the findings, the Panel submitted its final report to the PSC on October 8, 2009 and presented its findings to the PSC on the 29th of October. Upon receipt of the report, the Chairperson of the PSC wrote that “the Commission fully associates itself with the recommendations contained in the report and believes that they provide a clear roadmap on how best the interrelated issues of peace, justice, reconciliation and healing could be addressed in Darfur, thereby contributing to the overall objective of promoting sustainable peace and stability in the Sudan.”²¹⁹ Since the report was submitted, the AU has created the AU High Level Implementation Panel (AUHIP) to assist with implementing its recommendations.

What does this report entail, and more importantly for the purposes of this thesis, what does it mean for the ICC’s role in Darfur? As President Mbeki reflected in his introductory note to the report, the Panel’s “fundamental observation is that the people of Darfur have suffered extreme violence and gross violations of human rights. At the same time, we came to understand that the situation in Darfur cannot be settled outside the framework of the wider challenges facing Sudan as a nation. We also believe that it is Africa’s crisis and, as such, Africa has a duty to help the people of Sudan to achieve a lasting solution.”²²⁰ As a result, and after a thorough review of their findings, the Panel concluded that

the objectives of peace, reconciliation and justice in Darfur are interconnected, mutually dependent and equally desirable. They must be pursued in a manner consistent with the need to achieve democratic and socioeconomic transformation in Sudan. A crucially important component of the Panel’s vision is that, ultimately, a settlement in Darfur lies primarily with the Sudanese people themselves, and that it must involve the integration of Darfur into Sudan so as to

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

make it possible for Darfurians to play their rightful role as equal citizens of the nation.²²¹

While the above quotes are telling, there is, in fact, no direct recommendation within the report regarding the ICC's current involvement and Bashir's indictment. The AUDP neither calls for the ICC to withdraw nor explicitly endorses its involvement. There are unquestionably strong undertones, based on widely-circulated critiques of the ICC's involvement in Africa, that could lead one to believe that the Panel has implied that the Court is not welcome in its pursuit of Bashir. For example, in explaining the AUDP report to the UNSC on December 22, 2009, Mbeki stated that

we would like to underline the important reality that the three objectives of peace, justice and reconciliation are inter-connected and interdependent. Thus we are convinced that the positive outcome we all seek with regard to Darfur will have to take the form of an integrated package that achieves the necessary balance among the objectives of peace, justice and reconciliation. We are convinced that any attempt to emphasise the importance of any of these three objectives at the expense of the others, would not bring about the just and stable peace we all desire for the people of Darfur, and which the Darfurians themselves seek.²²²

The common refrain that the ICC's involvement actually places justice above other imperatives may suggest that the ICC is not welcome, however the Panel never explicitly states its position on the ICC. This has led some observers such as AI to confidently conclude that the Panel supports "the International Criminal Court as a court of last resort if the Sudanese justice system, reinforced by an international component, was unable and unwilling genuinely to investigate and prosecute those responsible regardless of rank for crimes under international law committed in Darfur and to provide reparations to

²²¹ *Ibid.*

²²² Remarks of the Chairperson of the African Union High Level Implementation Panel for Sudan (AUHIP), H.E. Mr Thabo Mbeki: United Nations Security Council, New York: December 21, 2009. Full text available at <http://allafrica.com/stories/200912221143.html>.

victims.”²²³ Based on the available language used in the report, this seems a reasonable conclusion.²²⁴ There is also the possibility, left open by the paucity of explicit language, that the AUDP believes that the ICC does represent the appropriate solution for leaders like Bashir, but did not want to set off a political firestorm with its report and thus consciously decided to use ambiguous language.

Regardless of how one interprets the language the panel employed, there are several key recommendations that will have a bearing on the way that the ICC approaches its future mandate in Sudan, presuming, for the time being, that the UNSC does not defer that mandate anytime in the near future. The Panel recognized that “even at full capacity, the ICC can only deal with a handful of individuals, thus leaving the burden of justice to the national system.”²²⁵ There was also a clear recognition, however, that while Sudan’s judicial system was equipped, in principle, to handle the situation, the current political environment in Sudan has ensured that the system cannot be put to use in practice. Therefore, the report concludes, those responsible have to date gone unpunished, and it would be unreasonable to assume that would change without some intervention.²²⁶ As a result, the AUDP’s final recommendations about how to approach justice and reconciliation include:

1. Measures to expand and strengthen the system of Special Courts to deal with crimes committed in the conflict in Darfur;
2. The establishment of a Hybrid Court to deal particularly with the most serious crimes, to be constituted by Sudanese and non-Sudanese judges and senior legal support staff, the latter two groups to be nominated by the African Union;

²²³ AI, Review conference, p. 4.

²²⁴ Tellingly, in a long list of obstacles to justice and reconciliation listed in the report, the ICC is not mentioned at all. See para. 201 in the report for details.

²²⁵ AUDP Report, p. xvii.

²²⁶ The report also notes that the people of Darfur have little to no faith in the Sudanese judicial system to adequately address their concerns, and therefore a solely internal approach would be entirely inappropriate.

3. Measures to strengthen all aspects of the criminal justice system, including investigations, prosecutions and adjudication, paying attention to its capacity to handle sexual crimes in an effective manner;
4. Introduction of legislation to remove all immunities of State actors suspected of committing crimes in Darfur;
5. Establishment of a Truth, Justice and Reconciliation Commission (TJRC) to promote truth telling and appropriate acts of reconciliation and to grant pardons as considered suitable.

Recommendation number four is a clear statement that no government figure should be above the law, and, if implemented, could make a substantial difference in how the international community (governments and civil society) would respond to an internal or hybrid solution. As mentioned above, however, at the heart of the Panel's recommendations is that Darfurians, as well as the wider Sudanese citizenry, must believe they are able to participate in the process.

Whether the ICC can eventually achieve this level of involvement from the citizenry is questionable, but the recommendation of the Panel to extend the reach of justice in Sudan does little to necessarily preclude the Court from pursuing its indictment of Bashir. In fact, as Mbeki noted, the ICC is only equipped to deal with those perpetrators whose crimes are of sufficient gravity. While there is no guarantee that a hybrid court, such as the one that the Panel calls for, would work,²²⁷ it is a necessary first step to addressing the widespread accountability problems that are certain to plague Darfur and Sudan in the coming years. If such a hybrid court is created, it would surely

²²⁷ As the AUDP report notes, "the main distinguishing feature of a hybrid court is that it combines national and international staff, and often involves a fusion of domestic and internationally recognised criminal justice procedures. Hybrids began to be the preferred model after the initial experience with the UN *Ad Hoc* Tribunals for Yugoslavia and Rwanda, international courts that became associated with an expensive and slow pace of justice. It was more cost effective, more efficient and in some cases more acceptable in the domestic or regional context, to have courts operating *in situ*, but strengthened by external actors" (AUDP Report, p. 64).

draw from the institutional knowledge and personnel of other international courts, including the ICC.

In a statement before the UNSC, Moreno-Ocampo acknowledged the AUDP's findings and also concluded that there was nothing in them that would inhibit his ability to move forward with the cases before him, and that, in fact, it only strengthens the overall purpose underlying the Court's mission. He argued that "the Panel's report respects the independent judicial work of the ICC, and recognizes the need to do more, not less justice efforts for Darfur, more, not less cases."²²⁸ There seems to be wide agreement that justice is needed in Sudan, and with the AUDP's recommendations gaining momentum – they have been backed by the AU and an official position is soon expected from the UNSC – a framework for its implementation may be in the works. Where the ICC sits in those efforts is unknown, but there is opportunity for the Court to continue as a key player, either in its current role or in a strong advisory capacity.

4.3. Respecting the "Interests of Justice"

While the framework for justice in Darfur may be in place, the possibility of the ICC's removal from the situation, and how that could happen, must be considered. One way by which this could happen would be for the UNSC to acquiesce to continued demands from the African continent, to defer the situation. Another way, less emphasized in this thesis, would be through the power of the OTP and a specific interpretation of a certain part of the Rome Statute.

Article 53 of the Rome Statute specifically delineates the circumstances under which the Prosecutor should not pursue an investigation into crimes within the Court's

²²⁸ Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court. Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005). 4 December 2009.

jurisdiction. While the article is specifically designed for the pre-indictment stage, the fourth clause states that “the prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.”²²⁹ Those who hope the Prosecutor will invoke the powers granted in Article 53(4) point to Article 53(1)(c). There, the Statute states that, when deciding whether to pursue a case, the Prosecutor should not do so if, “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”²³⁰

This language leaves the Prosecutor with substantial discretionary authority and has led to considerable debate as to when such power should be invoked, particularly where continued prosecution by the OTP may lengthen or exacerbate a given conflict, or complicate a peace process.²³¹ Opinions vary widely. Some commentators, such as HRW,²³² believe that “interests of justice” should be interpreted very narrowly. Others, such as Henry Lovat, claim that such a narrow interpretation of the language restricts the many possibilities which must be considered. HRW points to Article 16, which gives the UNSC the power to defer prosecutions for 12-month periods, as the only acceptable way to avoid prosecution. The organization claims that putting such power in the hands of the Prosecutor is a dangerous move that subverts the very purpose of the institution, and that

²²⁹ The Rome Statute, Article 53(4).

²³⁰ The Rome Statute, Article 53(1)(C).

²³¹ Lovat, Henry. 2006. “Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court.” Working Paper hosted by the Berkeley Electronic Press, Paper # 1435. Available at <http://law.bepress.com/cgi/viewcontent.cgi?article=6510&context=expresso>.

²³² Human Rights Watch. 2005. “The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute.” Human Rights Watch Policy Paper. Available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf>.

the Prosecutor should never be deterred from prosecution due to national efforts towards amnesties or peace processes.²³³

Other scholars such as Lovat and Darryl Robinson, however, have concluded the polar opposite, i.e., that “interests of justice” must be loosely interpreted to include multiple, relativistic meanings:

Article 53(2)(c) specifically contemplates that the prosecutor may take into account broader factors, including compassionate considerations such as the age or infirmity of the accused. Moreover, Article 53(1)(b) specifically juxtaposes the traditional criminal justice considerations – the gravity of the crime and the interests of the victims – with the broader notion of ‘interests of justice’ and clearly indicates that the latter might trump the former.²³⁴

Similarly, Lovat believes that defining the idea narrowly also opens the door for interpretations the Court is not prepared to deal with. As he puts it, “taking the view that the ‘interests of justice’ can only be construed narrowly would seem to militate in favour of the ICC undertaking a potentially very large number of prosecutions – which may not be desirable, let alone practicable.”²³⁵

In light of the recent debate regarding this aspect of the Rome Statute, the OTP released a policy paper on the issue. Recognizing that the ‘interests of justice’ “represents one of the most complex aspects of the Treaty” and that it “is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide,”²³⁶ the OTP decided to clarify its position. Importantly, the paper notes that “there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of

²³³ *Ibid*, p. 8.

²³⁴ Robinson, Darryl. 2006. “Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court.” Found in *Bringing Power to Justice: The Prospects of the International Criminal Court*. Edited by Joanna Harrington, Michael Milde, and Richard Vernon. Montreal, Canada: McGill-Queens University Press. p. 216.

²³⁵ Lovat, p. 6.

²³⁶ Office of the Prosecutor. 2007. “The Interests of Justice.” Policy Paper on the Interests of Justice.

the Prosecutor.”²³⁷ With this in mind, the OTP stresses that the Rome Statute clearly favors investigations and prosecutions over the alternatives (where evidence is available). Further, the OTP points out that “the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.”²³⁸

In the case of Sudan, the Prosecutor has made it known that he does not believe that sufficient grounds exist to invoke this provision. Perhaps most important in the OTP’s argument and in terms of its relevance to this thesis, the OTP explains that “the last paragraph [of the Preamble to the Rome Statute] indicates their [states parties] resolve ‘to guarantee lasting respect for and the enforcement of international justice’.

Thus, considerations of prevention of serious crimes and guaranteeing lasting respect for international justice may be significant touchstones in assessing the interests of justice.”²³⁹ This line of reasoning has been advanced by many proponents of the Court’s involvement in Sudan, and is clearly an important part of the Court’s overall vision.

Regardless of the perspective one chooses to take on the issue, it is clear that the Prosecutor does hold significant discretionary power with regards to Article 53. While Moreno-Ocampo may be unlikely to invoke this power with regards to Bashir, there is flexibility for him to do so if he wants to use it as a bargaining tool or if he decides that continued pursuit of his target against such opposition may be fatal to the institution. More generally, an examination of the idea behind the ‘interests of justice’ could generate an important discourse on justice and accountability in Sudan’s current political context.

²³⁷ *Ibid*, p. 2.

²³⁸ *Ibid*.

²³⁹ *Ibid*, p. 3.

4.4. Finding the Middle Ground: Working with African Leaders and Broadening the Global Vision of the Court

As discussed throughout this thesis, one of the major grievances cited by most critics of the ICC's operation is that the Court has been entirely focused on African conflicts. This has led to the widespread perception that, as Mamdani states, "its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity."²⁴⁰ Almost all observers agree that criticism, from within the continent and elsewhere, would be greatly diminished if the OTP were to open a formal investigation in another part of the world. While some hard-line critics would like to see investigations in Israel, Iraq or Afghanistan, others acknowledge that *any* case outside of Africa would be a boost to the Court's ambition for universal justice. For its part, the OTP is looking into a number of other situations. Surely the OTP realizes how its mission would be aided and criticism relaxed if it were to pursue a situation in another region.

As discussed earlier, the OTP has received thousands of referrals for further review. Well over 80% of these, however, are manifestly unfounded.²⁴¹ Nonetheless, there are several situations which the office can seriously pursue, and has begun to do so. Unfortunately, one of the situations that has gained the most momentum of late is in Kenya, where election violence riveted the country in December 2007 and February 2008. Despite the fact that this represents another African country that could come before the ICC, it is once again largely the state itself that put it there. The OTP has been working closely with the Waki Commission, an international commission of inquiry constituted by the Kenyan government to assess the post-election violence, and has received extensive information and evidence from within the country. While Kenya has

²⁴⁰ Mamdani, p. 284.

²⁴¹ See discussion in Chapter 2.3 (Du Plessis).

established a Truth, Justice and Reconciliation Commission to address some of the aftermath of violence, other efforts to create a special tribunal fell short. As such, the OTP has endorsed a ‘three-pronged’ approach to prosecuting those responsible.²⁴² ²⁴³ In March of 2010, the ICC pre-trial chamber authorized an investigation, and the OTP has begun its work. At this time, no charges against an individual have yet been filed.

While crimes committed in Kenya may fall within the jurisdiction of the Court, the investigation in that country does not represent the major departure from the Court’s status quo that critics demand. In fact, it may only amplify the criticism discussed throughout this thesis. There are, however, a number of other situations under analysis that could broaden the Court’s global engagement. One of the most closely watched involves Afghanistan. Its relevance stems from the fact that any involvement by the ICC would likely require the investigation of British or American personnel, a tantalizing notion to those who wish to see the Court take on global hegemony with the same zeal with which it has appeared to pursue actors within weaker states. According to the Monitor, a publication issued by the CICC, “on 10 September 2009, ICC Prosecutor Moreno-Ocampo publicly stated that the situation in Afghanistan remains under examination and that his office is collecting information on all crimes allegedly committed in Afghanistan that fall within the Court’s jurisdiction and of all actors believed to be involved.”²⁴⁴ If the Afghanistan investigation were to move forward in some substantive way or arrest warrants were issued for any super power personnel, the

²⁴² CICC - The Monitor, p. 15.

²⁴³ According to the CICC, this approach “would involve prosecution by the ICC of those most responsible for the post-election violence coupled with national accountability proceedings for other perpetrators, the format for which would be determined by the Kenyan Parliament. The third prong would include other mechanisms, such as a Truth, Justice and Reconciliation Commission.” (CICC - The Monitor, p. 15).

²⁴⁴ *Ibid.*

ICC would almost certainly enjoy a large boost in its support from around the world. There are, however, significant political risks that would come hand in hand with such a decision, of which the Prosecutor, no doubt, must be acutely aware. If the ICC has found that the indictment of Bashir has brought strong resistance, just imagine what the indictment of George W. Bush or Tony Blair might bring.²⁴⁵

Another situation under review by the OTP involves Gaza, and any formal investigation or charges in this area likely would bring jubilant reactions from a wide range of parties. The UN Fact Finding Mission on the Gaza Conflict, led by Richard Goldstone, former lead prosecutor at the ICTY and ICTR, released its final report in September 2009. The report detailed strong evidence of war crimes committed by both Israeli armed forces as well as armed Palestinian groups in Gaza. Goldstone's report suggested that both Israel and Palestine need to make real attempts to institute credible national proceedings to hold those responsible to account. If either side should fail to do this within a six-month period, the report concludes, the UNSC should refer the situation to the OTP.²⁴⁶ Thus, while no formal actions have been taken yet by the ICC, it is within the realm of possibility, given the intransigence that characterizes both sides in Gaza, that

²⁴⁵ Of course, there are other reasons why this situation actually materializing is extremely unlikely. With regards to the United States, the fact that the country has not ratified the Rome Statute means that the only way any of its citizens could come before the ICC would be through UNSC referral, which would likely be impossible given the fact that the U.S. has veto power as one of the five permanent members of the body. For both Britain and the U.S., another obstacle has to do with the fact that the judicial systems within each country are among the strongest in the world. Therefore, the issue of complementarity would probably rise and, if forced, it is likely that both countries would rather put their citizens on trial within their own system rather than before an international court. This is clearly one potential reason why the Court may be destined to have the majority of its operations take place in the developing world; those countries are more likely to have national judicial systems incapable and/or unwilling of handling the crimes within the jurisdiction of the Rome Statute.

²⁴⁶ CICC - The Monitor, p. 15.

no action will be taken by the respective authorities and the matter will land before the Court.²⁴⁷

One final situation that must be mentioned is that of Colombia where the Prosecutor has conducted two official visits in 2007 and 2008. The OTP has declared its interest to look further into possible prosecutions.²⁴⁸ While this situation would not entail bringing international justice to a global superpower, it would serve to placate those who are angry and frustrated that the Court has focused its energies solely on Africa. The pursuit of investigations in Columbia would also come with the added benefit of less political resistance, though this would stem from lack of political clout, not the demonstration of geopolitical tenacity that many ICC critics would prefer.

It is unlikely that any single case will remove all criticism about the way that the Court has conducted its affairs to this point. Further, if the AU's chief concern genuinely is about the peace process in Sudan, it makes little difference whether the ICC opens investigations elsewhere. Yet doing so would send a strong message to those in Africa that the Court is not concerned only with their continent, and that it has been focused there until now due to a confluence of circumstance. In addition to placating critics, such a move would be good for the Court's credibility; much in the way that diversification is important in any investment plan, one could argue it is for such an international institution as well. As the AU non-cooperation declaration has shown, if the Court is too narrowly focused in a single area, relatively small problems can become a major obstructive force in its ability to achieve its mandate.

²⁴⁷ Once again, however, this situation would be difficult to materialize due to the fact that Israel is not a state party and the U.S. would most likely veto any UNSC action that attempts to go after one of its staunchest allies.

²⁴⁸ CICC - The Monitor, p. 15.

4.5. The Political Problem: The Importance of Reform of International Organizations

The fact that the ICC's operations are focused in one geographic region is not to the benefit of any party. As this thesis has demonstrated, it has exacerbated feelings of victimization and marginalization on the part of certain parties in Africa, and created unnecessary problems for the Court. Through whatever prism one views the problem, however, the antagonism from within Africa, even if it does not involve a majority of states parties but just a vocal few, has created a significant political problem for the Court. As one observer noted, instead of starting the Court's operation in an effort to bring a superpower to justice, "the Prosecutor has chosen 'soft targets', compliant African States. But it looks like the Court may have bitten off more than it can chew. If the Court is going to be 'political' about NATO States, and about its wealthy supporters, then it needs to show the same kind of deference to African States. Otherwise, they will react just as they have done. We all want a Court that is free of these political concerns. But as it flexes its muscles and shows that it is not afraid to go after even a head of State, maybe it should have started with a European instead of an African?"²⁴⁹

This highlights the central political problem at the root of the entire issue: the involvement of the UNSC in the affairs of the Court, and Africa's lack of permanent representation in that body. As the reader will recall, one of the few requests that African states made in the Dakar Declaration and the SADC Principles in the lead up to the Rome Conference that was not incorporated into the final product was that the UNSC be excluded from the process. In the end, with the UNSC powers that are granted by Articles 16 and 17, a small group of powerful states won out in an effort to be in position to

²⁴⁹ Schabas, William. 2009. "African Union Defying International Criminal Court." Human Rights Doctorate Blogspot. Blog posted 10 July 2009. Available at <http://humanrightsdoctorate.blogspot.com/2009/07/african-union-defying-international.html>.

protect their own interests. This has been a strong point of contention for many critics who decry the political influence that the Court is thereby subjected to, particularly given the fact that three of the five permanent members are not signatories to the Rome Statute.

Therefore, one issue underlying the current antagonism between Africa and the Court is that the collection of states across the continent resent their marginal position in global affairs. Although the continent is of increasing importance in the global economy and political realm, it is still treated with secondary consideration when it comes to matters of global consequence. As an Eritrean representative put it before the UN, “the role of Africa in this august body as well as other international organizations could be better described as inconsequential.”²⁵⁰ As such, it is no surprise that African states have resorted to the rhetoric of anti-colonialism to make their point. Seen in this light, the declaration of opposition to the ICC, regardless of how widely supported it actually was, can be viewed as a collective call for greater representation in a variety of international organizations, particularly in the UNSC, and as an institutional stand by the AU to force the issue.

Unsurprisingly, then, while only Botswana specifically mentioned the ICC at the UNGA meeting in September 2009, almost every single African country demanded that Africa be represented on the UNSC.²⁵¹ As the representative for Namibia put it,

There is an urgent need to reform the Security Council to make it more representative, democratic and accountable. Is it not an anomaly and unjust that Africa remains the only region without a permanent representation on the Security Council? This does not reflect the Continent’s vital role in the maintenance of global peace and security. The need for Africa to be equitably represented in the Council, with all the privileges associated with membership, remains our priority. In this regard Namibia stands by the Common African

²⁵⁰ Statement by Mr. Osman Saleh, Minister of Foreign Affairs of the State of Eritrea at the General Debate of the 64th Session of the United Nations General Assembly. New York, 28 September 2009.

²⁵¹ Which was, in fact, another decision arrived at during the July 2009 Summit.

position on the reform of the United Nations as articulated in the Ezulwini Consensus and the Sirte Declaration.²⁵²

As these statements make clear, even if the Bashir indictment were to be deferred by the UNSC or, even more unlikely, dropped by the Prosecutor, reform of the UNSC would still be necessary. While the likelihood of significant reform within the UNSC in the near future is low, other measures diminishing its influence in the affairs of the ICC are significantly more plausible. As it so happens, the perfect opportunity for that debate is just around the corner.

4.6. The ICC Review Conference: An Opportunity for Change

The ICC Review Conference is set to take place in Kampala, Uganda, in May 2010. This conference will allow all states parties to the Rome Statute to take stock of the ICC's operation over the past eight years. While many African states parties have grown increasingly disillusioned with certain aspects of the Statute as they have seen them in practice, the Review Conference will allow all states to assess the appropriateness and efficiency with which the ICC has pursued its mandate over the past eight years.²⁵³ To mend the chasm that has resulted recently between the AU and the ICC, it is imperative for this opportunity to be used wisely by African states to ensure that they make their concerns known and insist on reform. As long as the Court is involved solely in Africa, African states should hold a significant amount of power in these negotiations. As Ugandan Ambassador Mirjam Blaak, put it, "If a large group in this case belonging to the African Union is of the opinion that the Rome Statute needs further scrutiny then we

²⁵² Statement by Hon. Marco Hausiku, MP Minister of Foreign Affairs of the Republic of Namibia at the 64TH Session of the United Nations General Assembly. New York, 28 September 2009.

²⁵³ Amnesty International, Review Conference, p. 5.

should heed this advice and listen to the arguments that form the basis of this need to change.”²⁵⁴

The AU has had this review conference on its agenda for some time. At the July Summit in 2009, in the very same declaration that announced the AU’s stance of non-cooperation with the ICC with regards to Bashir, the organization requested that a preparatory meeting of African states parties be convened in order to adequately and fully prepare for the Review Conference. In particular, the declaration asked the preparatory meeting to address, *inter alia*, the following issues:

- i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;
- ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;
- iii.) Procedures of the ICC;
- iv.) Clarification on the Immunities of officials whose States are not party to the Statute;
- v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;
- vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and
- vii.) Any other areas of concern to African States Parties.²⁵⁵

The African states parties did convene a preparatory meeting at the beginning of November 2009. While the conclusions of this meeting have not been publicly released, it is reasonable to assume that the participating states have put together a plan of attack to address many of the common criticisms emanating from the continent’s leaders, which likely include the seven points above.

²⁵⁴ Blaak, p. 12.

²⁵⁵ Doc. Assembly/AU/13(XIII).

One major issue likely to be on the agenda is the role of the UNSC. As discussed in Chapter One, the AU is not, and never was, in favor of the UNSC's participation in the Court's affairs, and this could become a key issue during the Review Conference.

According to supporters, such as AI, of the UNSC's role within the Rome Statute,

referral of situations being considered by the UNSC to the Prosecutor is one positive way of bringing cases before the International Criminal Court. Permitting such referrals makes unnecessary the establishment of ad hoc tribunals in the future. It also enables the UNSC in Chapter VII situations to exercise its powers under that Chapter to assist the court in implementing its orders and judgments, particularly when there has been a complete breakdown of national systems or even defiance of the international criminal court.²⁵⁶

While AI does support the ability of the UNSC to refer cases, it has consistently been opposed to the body's ability to defer prosecutions, arguing that "such power gives the UNSC the ability to give persons suspected or accused of the gravest possible crimes under international law blanket amnesties, undermining the rule of law and the very reason for a permanent, international criminal court."²⁵⁷ This issue is sure to cause some contention during the Review Conference, particularly between states for whom the status quo represents a political advantage or disadvantage.

The role that African states parties have to play at the Review Conference is a complicated one. On the one hand, they need to be aware of their own political imperatives and make sure that the structure of the Court favors their needs just as much as it favors those of their more powerful Western counterparts. Now, more than ever, they have that power at the bargaining table, and they are entitled to use it. On the other hand, however, they need to be keenly alert to ulterior motives by certain parties among them and to make sure that the efforts they exert to change some of the foundation

²⁵⁶ Amnesty International, Review Conference, p. 7.

²⁵⁷ *Ibid.*

elements of the institution do not inflict any fundamental damage to the Court that would inhibit its ability to achieve its mandate. Given that powerful Western governments did this during the Rome Conference,²⁵⁸ it would certainly be reasonable for African governments to take a similar stand now and use the unique position of power they currently hold. If this is the chosen course of action, however, it is difficult to predict the ramifications for Court and the working relationship between all states parties. The Review Conference has significant potential to help shape the Court's actions in the coming years, in Africa and elsewhere, but that potential fully rests with the participants and their willingness to keep the goals of the institution paramount to their own shrewdly pragmatic desires.

²⁵⁸ For example, see discussion about American influence in Chapters 1.2 and 1.3.

CONCLUSION

The first eight years of the ICC's existence have been anything but easy. The Court has dealt with a multitude of challenges, ranging from the judicial to the political and many others that don't fall in either category. There are likely few observers, however, who did not expect this tumultuous road. As a new international legal institution, and one that seeks to establish universal legal norms in an increasingly diverse global order in which a larger variety of states shape the discourse, multi-faceted challenges are inevitable.

The most intriguing element of those challenges, however, is the places and timing in which they have often appeared. As this thesis has laid out, there were substantively different reactions to the four situations before the Court, and to individual cases within those situations. In Uganda, DRC, and CAR, the opposition came more from civil society than it did from African governments. This, in itself, was a significant development. As Adam Branch pointed out in reference to Uganda, "for perhaps the first time in the history of international law... those opposing the enforcement of humanitarian and human rights law were not self-interested government officials or rebel leaders" but "the Ugandan human rights community itself, from activists, lawyers, and civil-society organizations working for peace in the North."²⁵⁹ When attention was turned to the President of Sudan, however, the ICC's involvement in the continent became a matter of great contention.

Why this momentous shift? What was so different about this case that elicited such a different response, and from a varied cast of characters? As has been discussed

²⁵⁹ Branch, Adam. 2004. "International Justice, Local Injustice: The International Criminal Court in Northern Uganda." *Dissent*. Vol. 51, No. 3: p. 22.

throughout this thesis, the answer is complex, and can only be partially understood. To begin with, micro and macro political issues must be examined. In Chapter Three, an examination of personal politics on the part of Gaddafi during the AU Summit in July 2009 demonstrated the way in which his involvement may have enabled the passage of the declaration of non-cooperation, but the sentiments behind such work cannot be explained by personal politics only. In order for Gaddafi to orchestrate such an accomplishment, the will already had to have been present in some places – not in all African countries, as also demonstrated in these pages, but a significant number.

Chapter One discussed the ways in which matters come before the Court, and Chapter Two examined the first three situations in which this occurred. As discussed in Chapters Two and Three, the manner in which a situation came before the Court is correlated to the type of response it engenders. While Uganda, DRC, and CAR all came through state referrals, Sudan was the first of its kind to come through a UNSC referral. Given that the role of the UNSC in the Court's affairs is one of the most controversial aspects of its operation, and has been since the Rome Conference in 1998, it is hardly surprising that the reaction in this case was substantively different than in the others. As discussed in Chapter Four, the marginalization of Africa in global affairs is directly embodied in its lack of permanent representation on the UNSC. While Africa is not the only continent without a permanent presence on the Council, the power imbalance that results from that lack of representation, and the ability of larger powers to use their own positions to shield themselves and their allies, is a significant problem. Viewed from this perspective, and given the available evidence as provided in Chapters Three and Four, the

declaration of non-cooperation can also be seen as a strong collective statement in opposition to the prevailing *status quo* in the pre-eminent global institution.

Finally, the reason most often propagated by the AU and by individual African governments to explain their opposition to the ICC's activities in Sudan revolves around the fact that it will interfere with a peace process that is already underway, and could destabilize a country that is held together by a fragile accord, the CPA. This is a real concern; Sudan has a long history of conflict, and peace in the country is precarious. At the same time, however, conflict in Sudan in the last 20-25 years has been largely fueled by the NIF, and it is Khartoum's refusal to more equitably share the country's massive resource wealth that has led to the proliferation of grievances from the north to the south. Even if one were to accept the premise that the pursuit of Bashir at this stage will lead to further destabilization of the country, questions still remain. For example, given that Bashir has refused to participate in most peace talks regarding Darfur, as discussed in Chapter Three, would his absence really have such an adverse affect on the possibility for peace? Much of the concern about Bashir's removal from power does not revolve around his involvement in Darfur peace negotiations, however, as it does in his role in the implementation of the CPA and the governmental structure in Khartoum. In that case, what if the South votes to secede during the 2011 referendum and war is renewed? If such a scenario demonstrates that Bashir's power is not necessary to maintain order, that it may, in fact, actually fuel disorder, will the AU and individual African governments continue to oppose the ICC's pursuit? It is impossible to forecast such events, but the questions must be asked as the situation is examined and new dynamics continue to inject themselves into the debate.

When the foregoing discussion is combined with widespread concerns about the selective nature of ICC prosecutions, a distinct problem comes to light. Mamdani argues that the problem lies in the fact that the ICC creates a disconnect between legal and political questions, and since the “domain of the legal is defined through the political process,”²⁶⁰ this can lead to significant lapses. He explains that when the legal regime is detached from the political one, problems result that revolve around political accountability. Mamdani first cites the fact that the only body to which the ICC is accountable is the UNSC, not the UNGA, and even that accountability is tenuous. The problem here, as discussed throughout this thesis, is that the UNSC is a collection of five major powers that excludes much of the rest of the world from its decision making,²⁶¹ and that three of the five permanent members of that body are not even signatories to the Rome Statute.

The second problem is that the paucity of political accountability built into the structure of the ICC “has created the conditions for the informal politicization of the ICC.”²⁶² As a result, a country like the United States has managed to keep itself outside of the ICC’s reach, yet directly influences and supports its work in other places, such as Sudan. This problem, however, would not correct itself if all of the permanent members to decide to join the ICC. The fundamental problem, i.e., the detachment of the legal from the political, still would be present. As Mamdani asks, “What would happen if we privileged the legal over the political, regardless of context? The experience of a range of transitional societies – post-soviet, postapartheid, and postcolonial – suggests that such a

²⁶⁰ Mamdani, p. 286.

²⁶¹ It is true that there are many other temporary representatives on the UNSC, but they are all temporary, and they do not have the all-important veto power that permanent members hold.

²⁶² *Ibid.*, p. 287.

fundamentalism would call into question their political existence.”²⁶³ This detachment between the legal and political is not something that ICC can easily fix given the provisions delineated in its founding document.

There are, however, already proposals that have been raised that might mitigate such problems. For example, South Africa has proposed that the UNGA assume the oversight role that the UNSC has held up to this point, thereby minimizing the ability of the world’s great powers to hijack the process to accommodate their own interests. While such a reform may be difficult to achieve, and would not even fully address Mamdani’s criticism regarding the detachment of the legal from the political, this is the type of step that will be necessary to preserve this project in international justice.

To some degree, controversy over the ICC’s work is inevitable. As a legal institution operating in a distinctly political context, but without political accountability, it would be nearly impossible to avoid criticism and disagreement. And there are real, discernible problems with the ICC as currently constituted. None of this, however, represents a reason to cast aside the goals the ICC was created to achieve, nor does it represent an appropriate time for the AU to make a collective assertion about its lack of power in international institutions. Serious problems exist, but they should only serve as greater motivation to help accomplish the ideals that the drafters, African and otherwise, envisioned at the Rome Conference. In order for this to happen, however, a few things are clear. First, Africa’s participation in and cooperation with the Court is essential. Given that it contains the largest regional representation of states parties, that all of the situations before the Court are within its borders, and its long history of conflict and human rights abuses, Africa must be an integral component of the ICC. Second, reform

²⁶³ *Ibid.*

within the institution and of the external rules which govern its operations is *required*. As outlined throughout this thesis, there are several areas where changes can and should be made. The areas that have been given the most attention in these pages is the role afforded to the UNSC and the need to pursue situations and cases outside of Africa, both of fundamental importance for the Court's long-term sustainability.

We also must entertain the idea that the ICC may fail. The problems that have confronted the institution in its first years of operation are significant, and many of them may prove intractable. If this is the case, and support continues to wane, primarily from the less powerful states from which most of the Court's docket will likely originate, then there is the real possibility that the Court will disintegrate. It may be that this experiment in international justice is a necessary failure before a successful formula can be found, just as the failure of the League of Nations helped pave the way for the United Nations – an international organization that, while flawed, has proven durable and has cemented its place in global affairs.

The obstacles before the Court are great. Yet such challenges should only serve as greater motivation for all states, whether parties to the Rome Statute or not, to recognize the need for an effective ICC and to strive towards its realization. In discussing the way that American theologian Reinhold Niebuhr influenced his thinking, American President Barack Obama recently remarked: "I take away the compelling idea that there's serious evil in the world and hardship and pain. And we should be humble and modest in our belief we can eliminate those things. But we shouldn't use that as an excuse for cynicism and inaction."²⁶⁴ Nothing could be truer for the case at hand.

²⁶⁴ As found in Brooks, David. 2009. "Obama's Christian Realism." *The New York Times*. 14 December 2009.

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Appendix A: AU Declaration of Non-Cooperation

DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) Doc. Assembly/AU/13(XIII)

The Assembly,

1. TAKES NOTE of the recommendations of the Executive Council on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC);

2. EXPRESSES ITS DEEP CONCERN at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;

3. NOTES WITH GRAVE CONCERN the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

4. REITERATES the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union;

5. REQUESTS the Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity;

6. ENCOURAGES Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and security of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies;

7. FURTHER TAKES NOTE that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;

8. REQUESTS the Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States

Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues:

- i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;
- ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;
- iii.) Procedures of the ICC;
- iv.) Clarification on the Immunities of officials whose States are not party to the Statute;
- v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;
- vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and
- vii.) Any other areas of concern to African States Parties.

9. DEEPLY REGRETS that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;

10. 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 Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan;

11. EXPRESSES CONCERN OVER the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia*, guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

12. UNDERSCORES that the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent;

13. FINALLY REQUESTS the commission to follow-up on the implementation of this Decision and submit a report to the next Ordinary Session of the Assembly through the Executive Council in January / February 2010 and in this regard

AUTHORIZES expenditure for necessary actions from arrears of contributions.

**Appendix B: List of State Signatories to the ICC by Region
(Accompanied by the date each country ratified the treaty)**

African States:

1. Burkina Faso, 30 November 1998
2. Senegal, 2 February 1999
3. Ghana, 20 December 1999
4. Mali, 16 August 2000
5. Lesotho, 6 September 2000
6. Botswana, 8 September 2000
7. Sierra Leone, 15 September 2000
8. Gabon, 20 September 2000
9. South Africa, 27 November 2000
10. Nigeria, 27 September 2001
11. Central African Republic, 3 October 2001
12. Benin, 22 January 2002
13. Mauritius, 5 March 2002
14. Niger, 11 April 2002
15. Democratic Republic of the Congo, 11 April 2002
16. Uganda, 14 June 2002
17. Namibia, 20 June 2002
18. Gambia, 28 June 2002
19. United Republic of Tanzania, 20 August 2002
20. Malawi, 19 September 2002
21. Djibouti, 5 November 2002
22. Zambia, 13 November 2002
23. Guinea, 14 July 2003
24. Congo, 3 May 2004
25. Burundi, 21 September 2004
26. Liberia, 22 September 2004
27. Kenya, 15 March 2005
28. Comoros, 18 August 2006
29. Chad, 1 January 2007
30. Madagascar, 14 March 2008

Asian States:

1. Fiji, 29 November 1999
2. Tajikistan, 5 May 2000
3. Marshall Islands, 7 December 2000
4. Nauru, 12 November 2001
5. Cyprus, 7 March 2002
6. Cambodia, 11 April 2002
7. Mongolia, 11 April 2002
8. Jordan, 11 April 2002

9. Timor-Leste, 6 September 2002
10. Samoa, 16 September 2002
11. Republic of Korea, 13 November 2002
12. Afghanistan, 10 February 2003
13. Japan, 17 July 2007
14. Cook Islands, 18 July 2008
15. Bangladesh, 23 March 2010

Eastern European States:

1. Croatia, 21 May 2001
2. Serbia, 6 September 2001
3. Poland, 12 November 2001
4. Hungary, 30 November 2001
5. Slovenia, 31 December 2001
6. Estonia, 30 January 2002
7. The Former Yugoslav Republic of Macedonia, 6 March 2002
8. Bosnia and Herzegovina, 11 April 2002
9. Slovakia, 11 April 2002
10. Bulgaria, 11 April 2002
11. Romania, 11 April 2002
12. Latvia, 28 June 2002
13. Albania, 31 January 2003
14. Lithuania, 12 May 2003
15. Georgia, 5 September 2003
16. Montenegro, 3 June 2006
17. Czech Republic, 21 July 2009

Latin American and Caribbean States:

1. Trinidad and Tobago, 6 April 1999
2. Belize, 5 April 2000
3. Venezuela, 7 June 2000
4. Costa Rica, 30 January 2001
5. Argentina, 8 February 2001
6. Dominica, 12 February 2001
7. Paraguay, 14 May 2001
8. Antigua and Barbuda, 18 June 2001
9. Peru, 10 November 2001
10. Ecuador, 5 February 2002
11. Panama, 21 March 2002
12. Brazil, 20 June 2002
13. Bolivia, 27 June 2002
14. Uruguay, 28 June 2002
15. Honduras, 1 July 2002
16. Colombia, 5 August 2002

17. Saint Vincent and the Grenadines, 3 December 2002
18. Barbados, 10 December 2002
19. Guyana, 24 September 2004
20. Dominican Republic, 12 May 2005
21. Mexico, 28 October 2005
22. Saint Kitts and Nevis, 22 August 2006
23. Suriname, 15 July 2008
24. Chile, 29 June 2009

Western European and Other States:

1. San Marino, 13 May 1999
2. Italy, 26 July 1999
3. Norway, 16 February 2000
4. Iceland, 25 May 2000
5. France, 9 June 2000
6. Belgium, 28 June 2000
7. Canada, 7 July 2000
8. New Zealand, 7 September 2000
9. Luxembourg, 8 September 2000
10. Spain, 24 October 2000
11. Germany, 11 December 2000
12. Austria, 28 December 2000
13. Finland, 29 December 2000
14. Sweden, 28 January 2001
15. Andorra, 30 April 2001
16. Denmark, 21 June 2001
17. Netherlands, 17 July 2001
18. Liechtenstein, 2 October 2001
19. United Kingdom, 4 October 2001
20. Switzerland, 12 October 2001
21. Portugal, 5 February 2002
22. Ireland, 11 April 2002
23. Greece, 15 May 2002
24. Australia, 1 July 2002
25. Malta, 29 November 2002

Appendix C: Preamble to the Rome Statute

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

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 cooperation,

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,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

Appendix D: The SADC Principles

SADC Ministers of Justice/ Attorneys-General anxious to address the concerns expressed by SADC Member States that the setting up of the Court should be such that the integrity and the sovereignty of states shall not be undermined or compromised. Hereby:

1. Affirm their commitment to the early establishment of an independent and impartial Court which shall be an effective complement to national criminal justice systems, operating within the highest standards of international justice, and insist that the composition of the Court should reflect equitable geographical representation;
2. Further affirm their belief that an effective and independent Court is a necessary element of peace and security in our contemporary world where universal respect for human rights is of paramount significance to humanity;
3. Strongly believe that the Court must have inherent jurisdiction over the core crimes of genocide, crimes against humanity, war crimes in international and non-international armed conflict and aggression;
4. Further believe that the Court should have competence to decide admissibility issues regarding the inability, unwillingness or unavailability of national criminal justice systems to bring to justice those responsible for grave crimes under the Statute while respecting the complementary relationship between the Court and such national systems;
5. Support the independence of the Prosecutor, who should be able to initiate investigations and institute prosecutions on his or her own initiative and without influence from states or the Security Council, subject only to appropriate judicial scrutiny;
6. Affirm that the Court must respect the human rights of suspects, the accused, witnesses and victims at all stages of the proceedings, and in particular that the Court should be sensitive to the rights of women and children;
7. Emphasise that the Court should be provided with long-term secure funding as well as human, technical and other resources necessary for its effective functioning;
8. Stress that while recognising the role of the Security Council in maintaining international peace and security the independence and operations of the Court and its judicial functions must not be unduly prejudiced by political considerations;
9. Urge all states to fully cooperate with the Court;
10. Further stress that the number of ratifications required for the Statute to enter into force must be such that (a) it ensure its universality (b) it facilitates the establishment of the Court without undue delay;
11. Re-iterate that the basic principle underlying the setting up and operation of the Court should be the acceptance that the Court should contribute towards the furtherance of the integrity of states generally as well as equality of states within the general principles of international law;

12. Encourage all SADC member States to fully and actively participate in the Rome Conference with a view to finalising and adopting the Statute for the establishment of an effective Court at the end of the Conference and urge all states to contribute to the Trust Funds established for the assistance of least developed and developing countries to participate in the conference.
13. Further encourage all SADC member States to sign the Statute once it is adopted, and implement measures for its early ratification with a view to ensuring that the Court begins its work timeously.²⁶⁵

²⁶⁵ Southern Africa Development Community. "SADC Principles." As found in "The establishment of the International Criminal Court: SADC's participation in the negotiations," by Sivu Maqungo. *African Security Review*. Vol 9, No. 1, 2000.

Appendix E: The Dakar Declaration

In part, the Dakar Declaration states that,

“...it is essential that the Convention and the Statute of the Court be adopted at the Diplomatic Conference in Rome;

That the Court shall be independent, permanent, impartial, just and effective;

That a complementarity exists between the International Criminal Court and national and regional tribunals, when these are ineffective and where political will is manifestly absent;

That the role of national tribunals in the prosecution of these crimes is primordial, nevertheless allowing the International Criminal Court the possibility of determining with respect to genocide, crimes against humanity and war crimes whether these national tribunals are unwilling or unable to carry out legal actions, creating the risk of allowing these crimes to go unpunished;

That the International Criminal Court shall be the judge of its own jurisdiction;

That the International Criminal Court shall operate without being prejudiced by actions of the Security Council,

That the independence of the Prosecutor and his functions must be guaranteed;

That the cooperation of all States is crucial in order to ensure the effectiveness of the International Criminal Court...²⁶⁶

²⁶⁶ Participants of the African Conference in Dakar. 1998. The Dakar Declaration For the Establishment of the International Criminal Court.” 6 Feb 1998. Available at <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>.