



Addis Ababa University

School of Graduate Studies College of Law and Governance

Public International Law

**“African Union’s Decision not to Cooperate with ICC and its Implications on the
Member State’ Obligations under ICC’s Statute and AU Constitutive Act”**

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Declaration

I Simon Biruk, hereby declare that this thesis is my original work and has not been submitted for a degree at any other institution. I also confirm that all referenced information has been appropriately cited to the best of my knowledge and belief.

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This thesis is submitted to the Faculty of Law and the School of Graduate Studies at Addis Ababa University in fulfilment of the requirements for the degree of Master of Public International Law.

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Acronyms and Abbreviations

AU - African Union

ICC - International Criminal Court

OAU - Organization of African Unity

UNSC - United Nations Security Council

UN - United Nations

UNGA- United Nations General Assembly

ILC- International Law Commission

SADC- Southern African Development Community

ICTY - International Criminal Tribunal for the former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

IMTN- International Military Tribunal Nuremberg

IMTFE- International Military Tribunal for the Far East

WWI- First World War

WW II- Second World War

The Statute - Rome Statute of the International Criminal Court

Art. - Article

e.g. - for example

etc. - etcetera (and so on)

i.e. - that is

Par. - Paragraph

pg. - page

vol. – volume

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Abstract

The establishment of the ICC was widely welcomed in Africa, as a significant step towards ending impunity for the most serious international crimes. However, as the ICC began its operations, the fact that most of its cases involved African countries led to tensions between the Court and the AU. This tension escalated when the ICC issued an arrest warrant for Sudanese President Omar al-Bashir. The AU subsequently urged its member states to refrain from cooperating with the ICC regarding al-Bashir's arrest, creating a conflict between the AU's decision and the obligations of African states that are parties to the Rome Statute and the United Nations. This thesis examines the legal implications of the AU's non-cooperation decision and its impact on the obligations of its member states under general international law, the ICC Statute, and the AU Constitutive Act. It explores the extent of the AU's authority to override existing international treaties and whether the decision aligns with the AU's objectives related to human rights protection. The findings highlight how the AU's position challenges the ICC's mandate and international cooperation.

Key words, AU, ICC, non-cooperation, state obligation, fighting impunity

Chapter One

1.1. Background of the Study

In the twentieth century, numerous horrific crimes occurred worldwide, with many violations of international law going unpunished.¹ In response to the atrocities committed in the former Yugoslavia and Rwanda, the United Nations Security Council (hereafter UNSC) established ad hoc tribunals to hold perpetrators accountable. These events played a crucial role in the creation of the International Criminal Court (hereafter ICC) in Rome in 1998.²

The Court's Statute was adopted on July 17, 1998,³ and the Court officially came into existence on July 1, 2002, following ratification by sixty member states.⁴ This marked the first time that states agreed to establish a permanent international criminal court with the authority to prosecute individuals responsible for the most heinous crimes⁵, including genocide, war crimes, crimes of aggression, and crimes against humanity. The ICC has the power to prosecute individuals anywhere in the world. However, for individuals from states that have not ratified the ICC Statute, a UNSC resolution is required to initiate prosecution.⁶

On the other hand, in 1999, the Assembly of the Organization of African Unity (OAU) issued the Sirte Declaration, which called for the creation of the African Union (AU). The following year, during the Lome Summit, the Constitutive Act of the AU was adopted.⁷ The AU was officially established in 2002, replacing the OAU as a continental organization now comprising 55 member states.⁸ Among its key objectives, the promotion of peace, security, and stability across the continent was a primary reason for its formation.⁹ However, given the widespread conflicts and atrocities in many African states, it is clear that Africa remains a

¹ Rome statute preamble par 2

² Understanding the International Criminal Court “The most serious crimes of concern to the international community as a whole must not go unpunished” Pub.ICC. p. 9

³ Michelle Nel and Vukile Ezrom Sibiyi, Withdrawal from the International Criminal Court: Does Africa has an alternative? page 82-83

⁴ Rome Statute Preamble, supra note 2,

⁵ Understanding the International Criminal Court Pub.ICC. p.8

⁶ Catherine Gegout, “The International Criminal Court: limits, potential and conditions for the promotion of justice and peace Source:” Third World Quarterly, Vol. 34, No. 5 (2013), pp. 800-818 Published by: Taylor & Francis, Ltd

⁷ Jackyfung Wainam, Jurisdictional conflict between the ICC and AU, solution to the dilemma “DENV. J. INT'L L. & POL'Y” vol. 44:1 page 44

⁸ <https://au.int/en/overview> accessed on Jun 31 2023

⁹ AU Constitutive Act Art. 3(f)

region where accountability for perpetrators is crucial. Holding these individuals responsible not only acts as a powerful deterrent but also plays a vital role in successful reconciliation and the consolidation of peace in post-conflict societies.¹⁰

During the establishment of the ICC, it was saluted and praised almost everywhere. Africa was undoubtedly the most vocal region of the world in welcoming the new court.¹¹ African lawyers and human rights activists played a pivotal role in the campaigns leading to the creation of the ICC.¹² Nonetheless, since the court began its operations, the defendant has typically been an African. Africans have criticised these figures because they think they are out of proportion.¹³ Government representatives from African nations have voiced numerous concerns regarding the ICC's independence and management, and the AU itself has grown increasingly hostile to the court's actions.¹⁴

On the other hand in 2005, the UNSC deemed the situation in Darfur, Sudan, a threat to global peace and, under Article 13(b) of the Rome Statute, adopted Resolution 1593 to refer the case to the ICC. The ICC prosecutor then sought and obtained an arrest warrant for Sudanese President Omar Al Bashir on charges of international crimes in Darfur, escalating tensions between the AU and the ICC.¹⁵ In 2009, the ICC issued an arrest warrant for al-Bashir, which strained relations between the AU and the ICC after the UNSC rejected the AU's request to defer the case.¹⁶

In response, the AU, representing almost all African nations, adopted a hostile stance towards the ICC.¹⁷ The AU then urged its member states to refuse cooperation with the ICC regarding

¹⁰ Rachel Goodman and Nokukhanya Mncwabe, International Criminal Justice in Africa: Neo-colonial Agenda or Strengthened Accountability? P.1

¹¹ Mandiaye Niang, Africa and the Legitimacy of the ICC in Question p.1

¹² Christa-Gaye Kerr, "Sovereign Immunity, The AU and ICC: Legitimacy Undermined," Michigan Journal of International Law vol 41:195 page 198

¹³ Lee J. M. Seymour, Kamari M. Clarke(eds), The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy, in Africa and ICC: Perception of justice, p.107, 109; 2016.

¹⁴ Mba Chidi Nmaju, Relevance of the law of international organisations in resolving international disputes: A review of the AU/ICC impasse p.156

¹⁵ Manisuli Ssenyonjo, The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan p1-16

¹⁶ ICC Cases, <https://www.icc-cpi.int/cases> (accessed June 1, 2023)

¹⁷ Dr Tim Murithi, The African Union and the International Criminal Court: An Embattled Relationship, march 2013,

al-Bashir's arrest¹⁸ and called for a mass withdrawal of African states from the ICC's founding treaty, the Rome Statute.¹⁹

However, the AU's decision to instruct its members to refrain from cooperating with the ICC raises several legal issues, particularly concerning member-state obligations. While the AU has the authority to establish binding decisions and policies for its members, this non-cooperation decision presents a conflict with the obligations of African states that are parties to the Rome Statute of the ICC.²⁰ The core issue is whether the AU can issue decisions that contravene existing international treaties or whether it has the authority to direct its member states to disregard their treaty obligations.²¹ Additionally, there is the question of whether the AU's stance aligns with its objectives related to human rights protection, as outlined in the AU Constitutive Act and its various protocols. Consequently, the focus of the study will be on examining the AU-ICC conflict, the validity of the AU's non-cooperation call, the implication of AU decisions on member state obligations, and its alignment with general international law.

1.2. Statement of the problem

The AU and the ICC are two distinct and autonomous international organizations, each established by multilateral treaties, the Rome Statute and the AU Constitutive Act, respectively in which only states participate.²² When a state joins either organization, it assumes specific responsibilities, including the expectation to act with integrity and modern principle duty of cooperation with the relevant authority.²³ The Rome Statute explicitly imposes a duty on its state parties to cooperate with the ICC.²⁴ Meanwhile, Article 23 of the AU's Constitutive Act stipulates that member states failing to comply with the AU's decisions and policies may face sanctions.

¹⁸ Assembly [AU/Dec.245\(XIII\)](#) Rev 1

¹⁹ Christa-Gaye Kerr, "Sovereign Immunity, the AU and ICC: Legitimacy Undermined", [Michigan Journal of International Law](#) vol. 41:195 page 170; Seymour, supra note 6, at 107-08.

²⁰ Mba Chidi Nmaju, [Relevance of the law of international organisations in resolving international disputes: A review of the AU/ICC impasse](#), page 177

²¹ Nsongurua J. Udombana, "In Search of a Lasting Therapy for AU and ICC Toxic Relationship" [African Journal of International Criminal Justice](#) 2014 page 66-68

²² Mba Chidi Nmaju, [Relevance of the law of international organizations in resolving international disputes: A review of the AU/ICC impasse](#), page 165

²³ Henry G. Schermers & Niels M. Blokker (ed), [International Institutional Law: Unity within Diversity](#), 4th Revised, page 118

²⁴ Rome statute part 9, art 86

The Rome Statute recognized the importance of the cooperation of the state to the effective operation of the Court.²⁵ The statute imposes a duty on the state parties to cooperate with the Court and to ensure that their domestic law accords with all forms of cooperation.²⁶ The non-cooperation of the state parties will lead to the distraction of evidence and create difficulties for ICC work and impunity. It will make it more challenging for the Court to achieve its goal.

The AU's decision to call for non-cooperation with the ICC was driven by the belief that the Court was unfairly targeting African leaders, particularly with the indictment of Sudanese President Omar al-Bashir.²⁷ However, this decision raises several legal issues. The Rome Statute requires its member states to cooperate with the ICC, while the AU's Constitutive Act obliges member states to comply with AU decisions.²⁸ As many AU member states are also parties to the Rome Statute, this creates a competing between their obligations to the AU and the ICC. Resolving these competing obligations is a significant challenge, and the researcher will explore this issue and identify the gaps in the current legal framework.

On the other hand, the Rome Statute stipulates the essential role of the UNSC in addressing crimes within states. In our case, UNSC by Resolution 1593 (2005) referred the situation in Darfur to the ICC, even though Sudan is not a party to the Statute, as part of efforts to restore international peace and security.²⁹ As a regional organization, the AU must align its actions with the UN Charter's purposes and principles.³⁰ Consequently, the AU's decision to call for non-cooperation with the ICC appears to contravene UNSC Resolution 1593 (2005), UN Charter and the Statute.

Furthermore, since all AU member states are also members of the UN, this adds complexity to their obligations.³¹ Supporting the AU's non-cooperation stance may force member states to choose between conflicting obligations to different international organizations. Therefore, it is crucial to assess the legality of the AU's decision within the framework of general international law.

²⁵ Valerie Oosterveld, Mike Perry, and John McManus; "The Cooperation of States with the International Criminal Court", Fordham International Law Journal, Vol. 25 (2001–200), page 767.

²⁶ Rome Statute Art 86 and 88

²⁷ Assembly/AU/Dec.245(XIII) Rev.1 Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009 Par10

²⁸ AU constitutive act art 23(2)

²⁹ André Mbata Mangu, "The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa" An Overview Africa Development, Volume XL, No. 2, 2015, pp. 7-32 (page 25)

³⁰ Art. 52 UN charter

³¹ Dr. David Donat Cattin, Legal Arguments to Rebut the AU Position on Immunities Regarding the Bashir Case

The AU Constitutive Act promotes international cooperation,³² making the AU's decision to call for non-cooperation with the ICC seems questionable. This stance appears to support the impunity of certain leaders despite the AU's official condemnation of impunity in its Constitutive Act.³³ So, we need to evaluate the soundness of the AU's justifications for the decision.

Therefore, the study will explore the deadlocks between the AU and the ICC, assess the implications of the AU's non-cooperation decision on member states' obligations, evaluate its legality under general international law, and examine its impact on the ICC's primary mission of ensuring accountability for perpetrators. Additionally, it will propose potential solutions to address the challenges arising from this conflict.

1.3. Research Questions

The paper seeks to address the following research questions:

- What are the reasons for the confrontation between the AU, the ICC, and the UNSC?
- What are the implications of the AU's decision to call its members not to cooperate with the ICC concerning to member state obligations under general international law, the Rome Statute, and the AU's Constructive Act?
- Does the AU's decision lead to regimes conflict regarding African states legal obligations?

1.4. Objective of the study

1.4.1. General objective

The general objective of this study is critically examining the overall effects of the AU decision not to cooperate with the ICC and its implication on member state obligations.

1.4.2. Specific objectives

The specific objectives of the study are:

- Assessing the reasons for the current contention between the AU and ICC;
- Explore the implication of the AU decision calling for the member state not to cooperate with the ICC on member state obligations in respect of legal instruments they have ratified;
- Examine the validity of the AU decision in line with general international law;

³² AU constitutive act art 3(e)

³³ AU constitutive act art 4(0)

- Exploring the impact of the AU decision on ensuring the accountability of the perpetrators;
- Recommend a possible course of action to be followed by the AU and ICC.

1.5. Significance of the study

This study gives background on the present impasses between the AU and the ICC and serves as a starting point for academics and researchers who are motivated to perform in-depth research on the study's topic. The research will clarify the legal implications and applicability of the AU's decision to instruct its members not to cooperate with the ICC, with a focus on how this decision creates conflicting obligations. The study will detail how the AU's decision introduces competing obligations for member states, potentially leading to conflicts between their responsibilities under the Rome Statute and their duties to the AU. It will address the controversy surrounding the AU's stance and emphasize the importance of viewing the fight against impunity as a collective objective of the international justice community.

Additionally, the study aims to highlight the critical need for combating impunity and provide valuable insights to legal practitioners regarding member state obligations to international organizations. It will also offer guidance to policymakers and legal experts on how to apply the study's findings and recommendations to address these complex issues effectively.

1.6. Methodology of the study

The study will be conducted through a doctrinal-based research method. Examine both primary and secondary sources of law. The researcher will use the primary source of law for the study, such as the AU Constitutive Act, the Rome Statute of the ICC, the Vienna Conventions on the law of treaties, and other regional and international legal instruments such as treaties, resolutions, decisions, and agreements.

More importantly, to develop the information obtained through the primary source of a legal instrument, the researcher uses secondary sources of data such as books, different kinds of literature, journals, scholarly articles, and research reports related to this study. Additionally, to be updated on the current situation and obtain recent information relevant to the study, the researcher will be using internet sources. The researcher uses this kind of methodology because he has found it to be the most suitable method to achieve the specific and general objectives of the research.

1.7. Limitation of the study

Every study has its limitations, and this study is no exception. Due to limited access to AU and ICC authorities for an interview, it makes it difficult for the researcher to collect empirical data, even if collecting data through the interview is vital to gathering information, especially to know the real intent of AU's decision regarding non-cooperation with ICC.

1.8. Scope of the study

The scope of the study is limited to analysing the on-going conflict between the ICC and the AU, focusing on the AU's decision adopted at the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya, on July 3, 2009. This decision, titled "Decision on the Meeting of African State Parties to the Rome Statute of the ICC" (Assembly/AU/Dec 245(XIII)), calls for non-cooperation with the ICC. The study will assess this decision in the context of general international law, examining its implications for member state obligations, particularly for those states that are members of both the ICC and the AU. It will also explore the impact of the decision on the accountability of perpetrators and analyse the potential consequences of non-compliance by state parties.

1.9. Organization of the paper

The researcher structures their thesis into five distinct chapters. The first chapter covers the introduction, background of the study, problem statement, research questions, objectives, methodology, limitations, and scope. The second chapter is dedicated to a literature review, focusing on the evolution of the ICC, exploring the relationships between the AU, ICC, and UNSC, and highlighting the AU's decision urging its members not to cooperate with the ICC. In the third chapter, the implications of the AU's decision on state obligations under general international law are analysed. The fourth chapter assesses the impact of the AU's decision on member states' obligations under the Rome Statute, the AU's Constitutive Act, and the legitimacy of the AU's argument, as well as its effect on human rights protection in Africa. The final chapter presents the researcher's conclusions and offers recommendations to address the issues identified.

Chapter Two

2. The Relationship between the ICC and the AU

2.1. Introduction

This chapter offers an overview of the relationship between the ICC and the AU. It covers the origins and development of the ICC, including the historical context and Africa's role in its creation. The chapter also examines Africa's initial engagement with the ICC, current challenges, and the controversies between the AU and the UNSC over issues of deferral powers. Additionally, it provides insights into aspects of the court's jurisdiction and the AU's decision to non-cooperate with the ICC.

2.2. The origin and Evolution of the ICC

The concept of a permanent international court is not a recent development.³⁴ The idea dates back to the 19th century when the International Committee of the Red Cross first proposed the establishment of such a court.³⁵

Following the end of WWI, the Treaty of Versailles, signed in 1919,³⁶ included provisions for an ad hoc international criminal tribunal to prosecute the German Kaiser for initiating the war³⁷ and German military personnel for violating the laws and customs of war.³⁸ In response to World War II, the United States and its allies signed the Moscow (1943) and Potsdam (1945) Declarations, calling for punishment of war crimes committed by the governments of Germany and Japan.³⁹ These led to the creation of the Nuremberg (IMT) in August 1945 and Tokyo (IMTFE) in 1946 Tribunals, a watershed moment toward establishing a permanent international criminal court.⁴⁰

³⁴ Ved P. Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead," Human Rights Quarterly, May 1998, Vol. 20, No. 2 (May 1998), pp. 413–428,

³⁵ See <https://www.aba-icc.org>; "in 1870s Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent international court in response to the devastation of the Franco-Prussian War"

³⁶ Mark Wagne, The ICC and its jurisdiction: myths, misperceptions, and realities, "max planck Yearbook of United Nations law", Vol. 7, 2003, p.410-512

³⁷ Article 227 of the Treaty of Versailles, "it is sometimes many scholars considered to be the first *ad hoc* international criminal court of modern times was the court created by the article."

³⁸ Articles 228-230 of the Treaty of Versailles provided for the trial before military tribunals of the Allied and Associated Powers of persons "accused of having committed acts in violation of the laws and customs of war".

³⁹ Guénaél Mettraux(ed.), "Perspectives on the Nuremberg Trial", European Journal of International Law, Vol. 21, Issue 4, Oxford: Oxford University Press, (2010).

⁴⁰ Professor M. Cherif Bassiouni, Chronology of Efforts to Establish an International Criminal Court, International Review of Penal Law (Vol. 86) 1992.p.1164

On December 9, 1948, the UNGA tasked the ILC with developing legal frameworks for establishing a Permanent Court.⁴¹ In 1951, the UNGA appointed a special committee, composed of representatives from seventeen states, to draft a convention for the court.⁴² Although the committee promptly submitted a draft statute, further progress was doomed by the politics of the Cold War.⁴³ However, in June 1989, UNGA asked the ILC to resume its work on drafting a statute.⁴⁴

The creation of the ICTY in 1993 and the ICTR in 1994 by the UNSC set the stage for the 1990s UN initiative that led to the Rome Statute.⁴⁵ In 1993, the ILC submitted a Draft Statute for an ICC, which the UNGA then circulated to governments for feedback. After incorporating further revisions, the ILC submitted a comprehensive text in 1994.⁴⁶

Then, UNGA established an Ad Hoc Committee and a Preparatory Committee to consolidate a text for the ICC based on the ILC's draft statute.⁴⁷ The Ad Hoc Committee reported in 1995, and the Preparatory Committee held six sessions between 1996 and 1998, finalizing the draft statute in April 1998.⁴⁸

Subsequently, the UNGA scheduled a meeting in Rome for June 1998, tasking the Conference of Plenipotentiaries with finalizing and adopting a convention to establish an ICC. Then, On July 17, 1998, the Rome Statute was opened for signature, with 120 states voting in favour, 21 abstaining, and 7 voting against.⁴⁹ The statute entered into force on July 1, 2002, after the 60th ratification, and the ICC was officially inaugurated in The Hague on March 11, 2003, with a ceremony attended by Queen Beatrix of the Netherlands and UN Secretary-General Kofi Annan.⁵⁰ This milestone represented a global effort to end impunity

⁴¹ Ved P. Nanda, The Establishment of a Permanent International Criminal Court: Challenges Ahead, Human Rights Quarterly, May 1998, Vol. 20, No. 2 (May 1998), pp. 413–428,

⁴² Ibid

⁴³ Report of the Committee on International Criminal Jurisdiction, U.N. GAOR, 9th, Supp. No. 12, at 21, U.N. Doc. A/2645

⁴⁴ <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice> last accessed on Jan 15 2024

⁴⁵ Sapam Dinlipkumar, "The Evolution of International Criminal Jurisprudence," The Journal of International Issues, Summer 2019 (April June), Vol. 23, No. 2 (2019), pp. 10–21.

⁴⁶ Report of the International Law Commission on the Work of Its Forty-Sixth Session, U.N. GAOR, 49th Sess, Supp. No. 10, U.N. Doc. A/49/10 (1994).

⁴⁷ Ved P. Nanda, The Establishment of a Permanent International Criminal Court: Challenges Ahead, Human Rights Quarterly, May 1998, Vol. 20, No. 2 (May 1998), pp. 413–428,

⁴⁸ Ibid

⁴⁹ Dr. Tim Murithi, "The African Union and the International Criminal Court: An Embattled Relationship?" IJR Policy Brief No. 8 (2013), p. 2

⁵⁰ <https://www.aba-icc.org/about-the-icc/evolution> accessed on August 15 2023

for serious international crimes.⁵¹ As of today August 2024, 124 countries are parties to the Rome Statute, including 33 African states,⁵² since Burundi withdrew effective October 27, 2017⁵³, 19 Asia-Pacific States, 19 Eastern European States, 28 Latin American and Caribbean States, and 25 Western European and other States.⁵⁴

2.3. ICC and Africa relation

2.3.1. Early relationships of Africans with the ICC

Over the past century, Africa has experienced some of the world's most complex humanitarian crises.⁵⁵ Notable examples include the prolonged civil war in Sierra Leone, South Africa's Apartheid regime, the genocide in Rwanda, and the violent conflicts in the Great Lakes Region.⁵⁶ In response, Africans have demonstrated extraordinary resilience and determination in seeking peace and reconciliation through justice and accountability.⁵⁷ This commitment is reflected in the significant and proactive role Africa played in establishing the ICC.⁵⁸

Before the Rome Conference, Africa actively engaged in promoting the ICC by organizing various conferences. For example, the SADC held regional conferences on the ICC in Pretoria in September 1997 and June 1999.⁵⁹ Additionally, Senegal hosted an African Conference in Dakar in February 1998, where a resolution was adopted expressing strong support for the ICC's establishment.⁶⁰ Even at the Rome Conference, African delegations, led by high-ranking officials, were actively involved.

⁵¹ Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (edit), "Africa and the International Criminal Court", *International Criminal Justice Series* vol. 1 (2014), P13

⁵² Chronological list of ratifications by African States: "Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic, Benin, Mauritius, Democratic Republic of the Congo, Niger, Uganda, Namibia, Gambia, Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Congo, Burundi, Liberia, Kenya, Comoros, Chad, Madagascar, Seychelles, Tunisia, Cape Verde, Côte d'Ivoire".

⁵³ <https://asp.icc-cpi.int/states> accessed on Jan 31 2023.

⁵⁴ <https://asp.icc-cpi.int/states-parties>, accessed on February 10, 2024

⁵⁵ Jakkie Cilliers, Sabelo Gumedze and Thembanani Mbadlanyana, Africa and the 'Responsibility to Protect': What role for the ICC?, *Irish Studies in International Affairs*, Vol. 20 (2009), p.55-67

⁵⁶ S.M. Monageng, "Africa and the International Criminal Court: Then and Now", T.M.C. Asser Press and the author(s) G. Werle et al. (eds.), *International Criminal Justice Series 1*, (2014), PP.13-20

⁵⁷ *ibid*

⁵⁸ Rowland J. V. Cole, "Africa's Relationship with the International Criminal Court: More Political than Legal," *Melbourne Journal of International Law*, vol. 14 (2013), p. 2.

⁵⁹ Rowland J V Cole, "Africa's Relationship with the international criminal court; More Political than legal" *Melbourne Journal of International Law* vol.14 (2013) p.2

⁶⁰ Gerhard Werle, Lovell Fernandez, Moritz Vormbaum(edt) "Africa and the International Criminal Court"; *International Criminal Justice Series 1*, Vol 1(2014),PP.13-20

The OAU, in its Human Rights Ministerial Conference, urged all African states to consider ratifying the Rome Statute.⁶¹ The ACHPR demonstrated its commitment to the ICC by consistently urging African states to ratify the Rome Statute.⁶²

African countries were pioneers in signing the Rome Statute. Senegal signed it in January 1999, becoming the first state to support the new era of international justice. The Democratic Republic of the Congo was the 60th country to ratify the statute, enabling the ICC to come into force.⁶³ In February 2005, Côte d'Ivoire, a non-state party, recognized the ICC's jurisdiction over crimes committed in the country since September 19, 2002.⁶⁴

Furthermore, African civil society was pivotal in founding the ICC and continues to promote the Rome Statute's ratification.⁶⁵ Even at the 41st ACHPR ordinary session, an NGO representative urged Sudan to cooperate with the ICC regarding Darfur perpetrator.⁶⁶ Therefore, all the above efforts demonstrate that the early relationships between Africans and the ICC were solid and supportive.

2.3.2. The current impasses of AU with ICC

As previously noted, the initial relationship between Africans, the AU, and the ICC was notably supportive. However, this close alignment shifted once the ICC commenced its operations. Since the court began its work, the majority of its cases have arisen from Africa.⁶⁷ Although most cases brought before the ICC were self-referrals, the AU has voiced dissatisfaction with the Court's focus on prosecuting African cases.⁶⁸

The AU's antagonism towards the ICC intensified, especially following the arrest warrant for Sudanese President Omar al-Bashir.⁶⁹ The focus on the warrant and the demand for al-

⁶¹ Grand Bay (Mauritius) Declaration and Plan of Action, adopted of Action, 16, April 1999 OAU article 13(m)

⁶² ACHPR, on its 24th ordinary session in October 1998. (See <https://www.achpr.org/sessions/> 24th and 38 resolution.)

⁶³ Sharon Esther Nakandha, Assistant Programme Coordinator, ICC Project, Uganda; Africa and the International Criminal Court: Mending Fences, ASF's p. 6

⁶⁴ This declaration was made in terms of Art. 12(3) of the Rome Statute; see Declaration Accepting the Jurisdiction of the International Criminal Court (Côte d'Ivoire), 18 April 2003.

⁶⁵ Rowland J V Cole, "Africa's Relationship with the international criminal court; More Political than legal" Melbourne Journal of International Law vol.14 (2013) p.7

⁶⁶ Hannah Foster, 'NGO Statement at Official Opening of the 41st Ordinary Session of the African Commission on Human and Peoples' Rights' (Speech delivered at the 41st Ordinary Session of the African Commission on Human and Peoples' Rights, Accra, 16 May 2007.

⁶⁷ See <https://www.icc-cpi.int/situations-under-investigations> accessed January 2024

⁶⁸ Chikezi Sam Igwe, 'The ICC's Favourite Customer: Africa and International Criminal Law' (2008), 41 Comparative and International Law Journal of Southern Africa, 294, 297.

⁶⁹ Kurt Mills, "Bashir is Dividing Us: Africa and the International Criminal Court": Human Rights Quarterly, Vol. 34, No. 2 (May 2012), pp. 404–447)

Bashir's arrest became a central issue. The AU requested that the UNSC to defer the warrant, but this request received no response.⁷⁰ Consequently, the AU decided to withhold cooperation with the Court concerning al-Bashir's arrest.⁷¹ Even after Sudanese President Omar al-Bashir was ousted from power in 2019⁷², the AU's stance towards the ICC remained unchanged. These demonstrate that the current relationship between the AU and the ICC is hostile.

2.4.The AU and the role of the UNSC in the ICC

Under Article 13(b) of the Rome Statute and Chapter VII of the UN Charter, the UNSC referred the situations in Libya in 2011⁷³ and Darfur in 2005 to the ICC.⁷⁴ These referrals were based on the UNSC assessment of threats to international peace and security, as outlined in Article 39 of the UN Charter. They also aimed to hold accountable those responsible for serious human rights violations, with the goal of restoring peace and stability in the affected regions.⁷⁵ Following the referrals, the ICC Prosecutor requested arrest warrants, leading the Pre-Trial Chamber to issue warrants for four Sudanese officials, including President Omar al-Bashir. The AU Peace and Security Council (PSC) subsequently urged the UNSC to exercise its power under Article 16 of the Rome Statute to defer the ICC proceedings. However, the UNSC did not act on this request.⁷⁶

This inaction led the AU to conclude that the UNSC's involvement in the ICC process is biased, perceiving it as using the Court to target African leaders and officials from non-State Parties to the Rome Statute.⁷⁷ In response, the AU proposed amending Article 16 of the Rome Statute to grant the UNGA the power to defer proceedings and urged all of its member states not to cooperate with the ICC in the arrest and surrender of Al Bashir, citing Article 98 of the Statute as the legal foundation for its decision.⁷⁸

⁷⁰ Rowland J V Cole, "Africa's Relationship with the international criminal court; More Political than legal" *Melbourne Journal of International Law* vol.14 (2013) p.13

⁷¹ Decision on the meeting of African states parties to the Rome statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII)/ Assembly/AU/Dec 245(XIII), July 2009

⁷² <https://www.psa.ac.uk/psa/news/sudan-after-omar-al-bashir-overthrow> accessed January 2024

⁷³ See UNSC Resolution No. 1970 (2011).

⁷⁴ See UNSC Resolution No. 1593 (2005).

⁷⁵ Charles C. Jalloh, Dapo Akandeb, and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court." *African Journal of Legal Studies* 4 (2011), p. 5–50

⁷⁶ Article 16 of the Rome Statute, the Security Council may postpone inquiries and prosecutions for a maximum of 12 months, subject to any guidelines the Council may establish.

⁷⁷ Gerhard Werle, Lovell Fernandez, Moritz Vormbaum(edt) "Africa and the International Criminal Court":, *International Criminal Justice Series 1*, Vol 1(2014), pp.2

⁷⁸ Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), Sirte, July 3, 2009, paras 9–10.

Therefore, the relationship between the AU and the ICC is heavily influenced by the UNSC's role in the ICC system. The UNSC's authority to refer situations to the ICC under Article 13(b) and its potential power to defer proceedings under Article 16 have been central to the deterioration of relations between the AU and the ICC itself.

2.5. Jurisdiction of the ICC

2.5.1. Prerequisites for the exercise of jurisdiction

The ICC is designed to have jurisdiction over the most serious crimes that impact the international community,⁷⁹ including war crimes, genocide, crimes against humanity, and acts of aggression.⁸⁰ The ICC exercises jurisdiction only when a state is inactive, unwilling, or unable to prosecute alleged perpetrators.⁸¹ Inability is determined by the collapse or unavailability of national judicial systems⁸², while unwillingness is assessed when national proceedings are biased, delayed or made to shield the perpetrator.⁸³ This also shows that the ICC's relation with national criminal jurisdictions is based on the complementarity principle.⁸⁴

2.5.2. The exercise of jurisdiction by the Court

Three entities can trigger the Court's jurisdiction. First, any state party may refer a situation to the prosecutor for investigation.⁸⁵ Second, the UNSC can refer a situation under Chapter VII of the UN Charter.⁸⁶ Third, the ICC prosecutor can initiate investigations *proprio motu* based on information about crimes within the Court's jurisdiction.⁸⁷ If the Office of the Prosecutor (OTP) intends to proceed, it must first apply to the Pre-Trial Chamber.⁸⁸

⁷⁹ Eve La Haye1; “The jurisdiction of international criminal court: controversies over the precondition for exercising its jurisdiction” Netherlands International Law Review, XLVI: 1-25, 1999

⁸⁰ Rome statute article 5

⁸¹ Rome statute article 17(1)(a)

⁸² Gerhard Werle, Lovell Fernandez, Moritz Vormbaum(ed) “Africa and the International Criminal Court”:, International Criminal Justice Series 1, Vol 1(2014), pp.23

⁸³ Eve La Haye1; “The jurisdiction of international criminal court: controversies over the precondition for exercising its jurisdiction” Netherlands International Law Review, XLVI: 1-25, 1999

⁸⁴ The Rome statute preamble art 17

⁸⁵ The Rome statute article 14 and article 13(a)

⁸⁶ The Rome statute article 13

⁸⁷ The Rome statute article 15(1)

⁸⁸ Daniel D Ntanda Nsereko, The International Criminal Court: Jurisdictional and Related Issues (1999) 10 Criminal Law Forum 87, 113.

2.6. The AU decision calling its member not to cooperate with ICC

On March 31, 2005, the UNSC adopted Resolution 1593, referring the Darfur conflict to the ICC.⁸⁹ This was the first time the UNSC used its powers under Article 13(b) of the ICC Statute. The ICC Pre-Trial Chamber issued arrest warrants for four Sudanese officials, which the Sudanese government contested. The AU requested the UNSC to suspend the proceedings against Al Bashir under Article 16, but the Council did not act on this request.

In response, on 3 July 2009, the AU Assembly adopted a decision on the ICC indictment of the President of Sudan Omar Hassan Al Bashir.⁹⁰ The AU decision instructed all its member states to withhold cooperation with the ICC regarding the arrest and surrender of President Al Bashir (hereafter the AU decision). This placed African states that are party to the Rome Statute in a difficult position, balancing their AU obligations against their Rome Statute commitments.⁹¹ The AU decision also raises significant questions about the future of international law and law-making from both normative and institutional perspectives.⁹² The decision also prompts a re-evaluation of the balance between peace and justice, particularly regarding whether the ICC's pursuit of Al Bashir impacts Sudan's peace process. So, the next chapter will assess the AU decision in the context of general international law, member state obligations, and other relevant issues.

⁸⁹ S. Con. Res. 1593, UN Doc. S/RES/1593 (Mar. 31, 2005)

⁹⁰ Assembly/AU/Dec 245(XIII), Adopted on 3 July 2009 in Sirte, Great Socialist People's Libyan Arab Jamahiriya; "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".

⁹¹ Dire Tladi, The African Union and the International Criminal Court: The battle for the soul of international law (2009) 34 SAYIL.

⁹² Ibid

Chapter three

3. The Implications of the AU Decision Urging Its Member States Not to Cooperate with the ICC under General International Law Obligations

3.1. Introduction

As discussed earlier, the relationship between the ICC and the AU has been notably tense following the indictments of Omar Al Bashir. The Pre-Trial Chamber's directive to request Al Bashir's arrest and surrender from all ICC member states and UN members for those not party to the Statute was a pivotal moment in ICC-AU relations. The AU decision also forced African states to choose between their commitments to the AU and their obligations under international law. Therefore, in this chapter the researcher examines the AU Assembly's decision and its implications for international law and member state obligations in the context of general international law.

3.2. The AU decision impacts on state obligations under general international law

According to Article 38(1) of the ICJ Statute, the sources of international law include treaties, customary international law, and general principles of law.⁹³ These sources create binding legal obligations for states on the international stage.⁹⁴ As a result, in this section, I examine the implications of the AU's decision in relation to states' obligations under general international law to fight against impunity for heinous international crimes.

3.2.1. Principle of Pacta Sunt Servanda

Principle of Pacta Sunt Servanda is one of the oldest principle of international law which Known “agreements must be kept”. This principle asserts that treaties are binding on the parties that have entered into them.⁹⁵ Without such a rule, no international agreement would be enforceable.⁹⁶ Accordingly, under this principle, ICC member states are obligated to uphold the Rome Statute.

⁹³See the ICJ statute art 38(1)

⁹⁴ Patrick Butchard; Principles of international law: a brief guide house of common library No 9010, 21 September 2020,p.2

⁹⁵ Wehberg H. “Pacta Sunt Servanda” American Journal of International Law. 1959;53(4):775-786.

⁹⁶ Shaw Malcolm, international law, Encyclopedia Britannica, (Jun 2024,) (www.britannica) accessed July 4, 2024

A treaty also must be performed in good faith by member states to uphold this principle.⁹⁷ The obligation to fulfill agreements in good faith stems from the general consent of states, as consent is the cornerstone for establishing rules that legally bind sovereign nations.⁹⁸ Fulfilling obligations in good faith requires states not only to implement the provisions of a treaty but also to refrain from actions that could undermine its object and purpose.⁹⁹ Even domestic laws cannot justify acting contrary to a treaty,¹⁰⁰ unless the treaty itself violates a fundamental internal law of the consenting country.¹⁰¹

The ICC member states are obligated to cooperate with the court in its operations.¹⁰² Currently, among the 124 States Parties to the Rome Statute, 33 are African States.¹⁰³ As members of the ICC, these states are required to act in accordance with the Statute and to refrain from undermining the Court's objectives and purposes. Therefore, the AU's decision compels state parties to violate the principle of Pacta Sunt Servanda.

The AU decision also, places member states in a difficult position, forcing them to choose between breaching their treaty obligations to the ICC and complying with the AU's directive, thereby create competing obligations. Choosing either option would lead to a violation of the principle of Pacta Sunt Servanda. Accepting the AU's decision would result in breaching treaty-based commitments,¹⁰⁴ while rejecting it would mean contravening the AU's Constitutive Act.¹⁰⁵ Consequently, this decision could lead member states to violate their international legal obligations.

3.2.2. Customary International Law

Customary International Law¹⁰⁶ is the oldest source of international law¹⁰⁷ serves as a foundation for generating rules that are binding on all states.¹⁰⁸ This law crystallizes when a

⁹⁷ Article 26 of the VCLT

⁹⁸ Lukashuk, "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law", The American Journal of International Law, Vol. 83, No. 3 (Jul., 1989), pp. 513-518

⁹⁹ Art 18 VCLT 1969, "obliges states to refrain from acts that would defeat the object and purpose of a treaty prior to its entry into force"

¹⁰⁰ Art 27 of VCLT

¹⁰¹ Art 46 of VCLT

¹⁰² Art 86 § 27 of Rome statute

¹⁰³ <https://asp.icc-cpi.int/states-parties> (accessed July 5 2024)

¹⁰⁴ African state member of the Rome statute will violate art 86 and 27 of the statute.

¹⁰⁵ Art 23(2) of AU Constitutive act

¹⁰⁶ The Statute of the International Court of Justice defines rules of customary international law as "a general practice accepted as law." It is generally agreed that the existence of custom requires the presence of two elements: State practice and a legal conviction that such practice is required or permitted by law (opinio juris).

¹⁰⁷ The statute ICJ art 38(b)

pattern of state behavior reaches a certain threshold of consistency and is accompanied by widespread expressions of consent to be bound by the rule (*opinio juris*).¹⁰⁹ So certain behaviors there must be widespread practices followed in a repeated and consistent manner by States and accepted and recognized by them as legitimate and beneficial create precedents and gain the legal authority as customary law.¹¹⁰ Failure to respect such custom is a violation of international law.¹¹¹

Customary international law plays a crucial role in filling gaps in treaty law, whether those gaps are due to a lack of substantive coverage or the absence of ratification. These rules are significant in the application, dissemination, and enforcement of international law, and they are particularly relevant for the work of courts¹¹² and international organizations.¹¹³

International criminal law grounded in different treaties and customary international law. Such law provides the framework for holding individuals to account for committing international crimes. All countries have the responsibility to uphold international criminal law and support efforts to ensure that perpetrators of international crimes are brought to justice.¹¹⁴

The legal obligations of state might arise from customary international law, treaties, and unilateral acts.¹¹⁵ The Rome Statute Article 21 of outlines the applicable law for the ICC. Scholars have observed that the phrase "the principles and rules of international law" in Article 21(1) (b) includes customary law, distinguishing it from the "general principles of law derived from national laws" in Article 21(1) (c). Thus, under Article 21(1), customary law serves as a secondary source of applicable law for the ICC, following the Rome Statute, Elements of Crimes, and the Rules of Procedure and Evidence.

Customary law also aids in interpreting the ICC's written rules in case of legal gaps, and the ICC has at times explicitly confirmed customary law in its decisions.¹¹⁶ The nature of the

¹⁰⁸ Christopher Greenwood (Prof), Sources of International Law: An Introduction, 2008 p2 (https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf) accessed July 12, 2024.

¹⁰⁹ S. James Anaya; "Customary International Law", American Society of International Law, APRIL 1-4, 1998, Vol. 92, the Challenge of Non-State Actors (APRIL 1-4, 1998), pp. 41- 44

¹¹⁰ Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", The American Journal of International Law , Oct., 2001, Vol. 95, No. 4 (Oct., 2001), pp. 757-791).

¹¹¹ Draft on conclusion on identification of customary international law with commentaries, year book of international law commission vol.2 part 2 par 5

¹¹² The International Criminal Tribunal for the Former Yugoslavia, under Article 3 of its Statute, "the court has jurisdiction over violations of the laws and customs of war".

¹¹³ Jean-Marie Henckaerts, "international humanitarian law as customary international law; Refugee Survey Quarterly", Vol. 21, No. 3, Humanitarian Values for the 21st Century (2002), pp. 186-193

¹¹⁴ What are international crimes is? United Nation Human Right Office the high commissioner (<https://seoul.ohchr.org/sites/default/files>) accessed in July 11, 2024.

¹¹⁵ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Yearbook of the International Law Commission, 2001, vol. II, Part Two. P31-143.

¹¹⁶ See Rome statute Article 21

statute also indicates that non-state party's cooperation with the ICC is not only voluntary but is also required by customary international law. Therefore, customary international law plays a significant role in applying international criminal law to perpetrators.

Customary international law obligates states to respect and ensure human rights, honor their treaty obligations, adhere to international agreements they have ratified, and cooperate in combating serious crimes under international law, such as slavery and genocide, regardless of where the crime occurred or the nationality of the perpetrators or victims.¹¹⁷ These obligations, rooted in customary international law, are binding on all states, regardless of explicit consent through treaties or agreements. Therefore, the AU's decision in the case of Al Bashir, by disregarding the obligation to cooperate in combating impunity, forces its member states to act in violation of customary international law.

3.2.3. Obligations under Multilateral Treaties

A multilateral treaty is a legally binding agreement under international law among three or more sovereign states.¹¹⁸ As a pivotal source of international law,¹¹⁹ such treaties confer rights and impose obligations upon member states.¹²⁰ Many African states are signatories to various multilateral treaties that demand accountability for perpetrators of international crimes. These legal instruments obligate each member state to act in good faith¹²¹ and not act contrary to the object and purpose of the treaty.¹²² Among them:-

i. Geneva Conventions

The 1949 Geneva Conventions¹²³ and their additional protocols¹²⁴ are remarkable in that almost every country in the world has ratified them, making these agreements some of the

¹¹⁷ R.B. Lillich, 'The Growing Importance of Customary International Human Rights Law', *Georgia Journal of International & Comparative Law* v25 (1995/96) 1, 28 ("As long as there is less than universal acceptance of the major human rights treaties-which, after all, do not form a comprehensive code of international human right law and, moreover, permit reservations and allow derogations and limitations to their coverage-there will be a need for a customary international law of human rights, to be used both on the international level and in the domestic context.")

¹¹⁸ https://www.law.cornell.edu/category/keywords/law_of_treaties.(accessed on July 10, 2024)

¹¹⁹ VCLT preamble par2

¹²⁰ VCLT art 29 "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

¹²¹ VCLT Art 26

¹²² VCLT Art 18

¹²³ The Geneva Conventions consist of four distinct treaties, each focusing on different categories of war victims. The First Convention safeguards wounded and sick soldiers on land during wartime. The Second Convention protects wounded, sick, and shipwrecked military personnel at sea. The Third Convention addresses the treatment of prisoners of war. The Fourth Convention protects civilians, particularly those in occupied

most universally accepted treaties in history.¹²⁵ All African member states have ratified the four Geneva Conventions, with Protocol I ratified by 51 states, Protocol II by 50 states, and Protocol III by one African member state.¹²⁶ Grave breaches of the Geneva Conventions are classified as war crimes, allowing for prosecution of responsible individuals by national courts or international tribunals such as the ICC.¹²⁷ Sudanese President Omar al-Bashir faced ICC charges for war crimes.¹²⁸ Therefore, the AU's decision of non-cooperation, risks undermining the fundamental purpose of the Geneva Conventions. The AU's decision for non-cooperation with ICC, particularly by member states bound by the Geneva Conventions, constitutes a clear violation of Article 18 of the VCLT.¹²⁹

ii. Genocide Convention

Genocide Convention¹³⁰ is a multilateral treaty that obliges its member states to cooperate in convicting perpetrators of the international crime of genocide.¹³¹ Member states must prosecute perpetrators, regardless of their personal status¹³², whether the crime was committed within their territory or elsewhere. They are also required to cooperate in extraditing perpetrators¹³³ and to work with international courts.¹³⁴

Sudan, having acceded to the Genocide Convention in 2003 without any reservations, cannot claim unfair treatment under a treaty it voluntarily joined. The Convention has been ratified or acceded to by 153 states, including 38 from Africa.¹³⁵ Consequently, states that are parties

territories. <https://www.icrc.org/en/publication/0173-geneva-conventions-august-12-1949> accessed July 10, 2024

¹²⁴ [The Additional Protocols \(1977\)](#) build on the Geneva Conventions to handle current military challenges. Protocol I addresses international armed conflicts and wars of national liberation, Protocol II addresses non-international armed conflicts, and Protocol III (2005) introduces the Red Crystal emblem. While not as widely approved as the original agreements, the protocols establish comprehensive guidelines for modern wars and improve civilian safety.

¹²⁵ <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280158b1a> accessed July 10, 2024

¹²⁶ https://www.un.org/en/ga/sixth/67/pdfs/statements/protocols/african_group.pdf accessed July 10, 2024

¹²⁷ See Article 49 of the First Convention, i.e. serious violations of IHL (grave breaches) are considered war crimes. https://casebook.icrc.org/a_to_z/glossary/grave-breaches#:~:text=Grave%20breaches) accessed July 10, 2024

¹²⁸ Sudanese President Omar al-Bashir has been wanted by the ICC for crimes against humanity, war crimes and genocide in Darfur, Sudan since 2005. (<https://www.coalitionfortheicc.org/cases/omar-albashi>) Accessed July 10, 2024

¹²⁹ VCLT Art 18 par 1 “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty”

¹³⁰ Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 Entry into force: 12 January 1951, in accordance with article XIII.

¹³¹ Convention on the Prevention and Punishment of the Crime of Genocide preamble par 3, art 1,art 5,art7 par 2

¹³² Convention on the Prevention and Punishment of the Crime of Genocide art 4

¹³³ Convention on the Prevention and Punishment of the Crime of Genocide art 7

¹³⁴ Convention on the Prevention and Punishment of the Crime of Genocide art 6.

¹³⁵ <https://www.un.org/en/genocideprevention/genocide-convention>. (accessed July 10, 2024)

to both the Rome Statute and the Genocide Convention are obligated under Article VI of the Genocide Convention to cooperate with the ICC in the proceedings against Bashir for the charge of genocide.¹³⁶ Any African state that is a member of the Genocide Convention and votes against cooperation with the ICC is in clear violation of the Convention, undermining its purpose and objectives.

iii. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

CAT¹³⁷ is an international human rights treaty that imposes various obligations on its member states. These obligations include preventing torture,¹³⁸ not extraditing individuals to countries where they risk being tortured¹³⁹, treating torture as a serious crime within their legal systems¹⁴⁰, prosecuting those suspected of torture¹⁴¹, extraditing those suspected of torture¹⁴², and investigating when there are reasonable grounds to believe that torture has occurred¹⁴³ among other duties aimed at combating impunity.¹⁴⁴

The CAT has been ratified by 174 states, including 52 from the African continent,¹⁴⁵ indicating that the majority of the AU member states have ratified the CAT. Torture is classified as an international crime under the Rome Statute, categorized as a crime against humanity.¹⁴⁶ One of the charges against the Sudanese president by the ICC includes torture. Consequently, the AU's decision would compel African member states of the CAT to breach their obligation to cooperate, thereby undermining the primary objectives of the Convention.

The AU's decision also conflicts with the Rome Statute, another multilateral treaty, which I will discuss in the next chapter.

¹³⁶ Matthew Gillett, The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court, 23 CRIM. L.F. 63 (2012).

¹³⁷ The CAT is an international human rights instrument that was adopted by the UNG Assembly on December 10, 1984 (resolution 39/46), and went into effect on June 26, 1987.

¹³⁸ CAT Article 2

¹³⁹ CAT Article 3

¹⁴⁰ CAT Article 4

¹⁴¹ CAT Article 6

¹⁴² CAT Article 7

¹⁴³ CAT Article 12

¹⁴⁴ Hans Danelius, convention against torture and other cruel, inhuman or degrading Treatment or punishment 2008 p3 (<https://legal.un.org/avl/ha/catcidtp/catcidtp.html>) accessed July 11, 2024.

¹⁴⁵ <https://cti2024.org/region/africa/#:~:0UNCAT%20prevention%20%20torture>. Accessed July 12, 2024

¹⁴⁶ Rome statute Art.7(1)(f)

3.3. UNSC Resolution 1593 (2005)

UNSC holds the primary responsibility for maintaining and enforcing peace.¹⁴⁷ UNSC resolutions are frequently adopted to facilitate the peaceful resolution of international disputes and to address threats to global peace and security.¹⁴⁸ A resolution passes if at least nine of the fifteen UNSC members vote in favor and none of the five permanent members veto it.¹⁴⁹

Decisions made by the UNSC under Chapter VII of the UN Charter are legally binding on all states.¹⁵⁰ The binding nature of these resolutions primarily concerns international peace and security.¹⁵¹ This scope, however, is not strictly limited to these areas. Since many significant international events can be seen as threats to peace and security, the SC's binding powers could potentially be vast.¹⁵² Furthermore, under Article 103 of the Charter, the obligation to comply with a Council decision takes precedence over obligations under any other international agreements.¹⁵³ Nearly all African states are members of the UN, which means they are legally obligated to comply with UNSC resolutions.¹⁵⁴

UNSC Resolution 1593 (2005)¹⁵⁵ places the situation in Darfur under the ICC's jurisdiction without any conditions. The Council deems the investigation and prosecution of the atrocities in Darfur essential for restoring international peace and security as per Article 41 of the UN Charter.

Any regional organization with a mandate to maintain international peace and security in line with the UN Charter cannot disregard the terms and implications of this resolution. The

¹⁴⁷ UN Charter Art 2 (3), 33 (1)

¹⁴⁸ UN Charter Chapter V, Article 24(1)

¹⁴⁹ UN Charter Article 27

¹⁵⁰ UN Charter Art 25

¹⁵¹ UN charter chapter VII, Art 39-51 Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

¹⁵² Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", The European Journal of International Law , Vol. 16 No. 5, 879–906

¹⁵³ Christopher Greenwood (Prof), Sources of International Law: An Introduction

¹⁵⁴ <https://www.un.org/en/library/unms>

¹⁵⁵ UN Security Council Resolution 1593 (2005), adopted on 31 March 2005, referred the situation in Darfur, Sudan, to the International Criminal Court (ICC). The resolution passed with 11 votes in favour and 4 abstentions from Algeria, Brazil, China, and the United States. It acknowledges findings of severe violations of international law in Darfur and urges Sudan and other parties to cooperate with the ICC. The resolution stresses accountability for genocide, war crimes, and crimes against humanity and requests regular progress reports from the ICC to the Security Council. (<https://press.un.org/en>) accessed July 16 2024

resolution explicitly requires all States Parties to the Rome Statute, non-state Parties, and any parties involved in the Darfur conflict to cooperate unconditionally with the ICC.¹⁵⁶ Consequently, although Sudan is not a party to the ICC Statute, it is obligated to cooperate with the ICC due to UNSC Resolution 1593.¹⁵⁷ Since, as per Article 25 of the UN Charter, UN member must accept and implement decisions made by the UNSC. Thus, Resolution 1593 establishes a clear international legal obligation for Sudan, one that the state has not been fulfilling.¹⁵⁸

The AU also does not operate in a legal vacuum, but is one of the Regional Organizations which under Chapter VIII of the UN Charter must be consistent with the Purposes and Principles of the UN.¹⁵⁹ The ICC may establish special cooperation with states non-party to the statute based on the consent of those state or if the cases referred by the UNSC. For UNSC referrals, there are three possible scenarios. Such as referral without any cooperation instructions, mandate requiring all UN member states to cooperate according to the ICC Statute, and finally the Security Council may shape a new cooperation regime that exceeds the ICC Statute's obligations.¹⁶⁰ In the case of the Darfur referral, the UNSC required full cooperation from Sudan and all parties involved in the conflict. It also urged all states and appropriate regional and international organizations to cooperate fully with the Court.¹⁶¹

Therefore, the AU decision is a clear violation of UNSC Res. 1593 (2005), and UN Charter should not be applied by AU Member States. In other terms, this AU decision has been adopted ultra vires and invalid.¹⁶² Additionally, this decision creates competing obligations for member states of AU and UN, leading to a breach of their various international commitments.

3.4.Principle of Universality

Universal jurisdiction is traditionally defined as a legal concept that allows or requires a state to initiate criminal proceedings for certain crimes, regardless of where the crime occurred or

¹⁵⁶ Mandiaye Niang, "Africa and the Legitimacy of the ICC in Question," *International Criminal Law Review*, vol. 17, 615 (2017).

¹⁵⁷ The Pre Trial Chamber, points out, in paragraph 2 of that resolution, "the Security Council decided that 'the Government of Sudan, and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'"

¹⁵⁸ Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", *Journal of International Criminal Justice* 7 (2009), 333-352

¹⁵⁹ Art. 52, UN Charter

¹⁶⁰ Mark Klamburg (edt), Commentary on the Law of the International Criminal Court,2017 (note no. 679)

¹⁶¹ Resolution, 1593 (2005) UN doc. S/RES/1593, 2005

¹⁶² *ibid*

the nationality of the offender or victim. It overrides typical jurisdiction rules, which usually require a territorial or personal link to the crime.¹⁶³ Emerging international law indicates a shift from a state-centric model that prioritizes sovereignty to one that places greater emphasis on humanity.¹⁶⁴ The Geneva Conventions of 1949 play a pivotal role in this evolution, as they explicitly establish universal jurisdiction over grave breaches.¹⁶⁵

An international crime is universally recognized as a serious offense with global implications, transcending the jurisdiction of any single state. Due to its severity, such crimes cannot be adequately addressed by the state's usual legal processes alone.¹⁶⁶

The primary benefit of employing universal jurisdiction for prosecuting serious human rights violations is that it guarantees accountability. This is crucial when the state is not a party to the statute, a UNSC referral is unlikely, no specialized tribunal or domestic court exists, or when states lack the political will, resources, or a functional judiciary due to instability.¹⁶⁷ The establishment of the ICC to prosecute serious international crimes directly stems from this universal approach. The Statute contains the universal jurisdiction principle¹⁶⁸ and grants the ICC the authority to try individuals for international crimes, regardless of their official position.¹⁶⁹

The establishment of the ICC has reshaped international justice, limiting the ability of countries to shield individuals from accountability, even if they are not Rome Statute members. However, the AU's stance weakens the concept of universal jurisdiction, complicating the ICC's efforts and pressuring member states to breach this principle.

¹⁶³ X. Philippe, "The principles of universal jurisdiction and complementarity", International Review of the Red Cross Vol. 88 No. 862 June 2006 p379

¹⁶⁴ Jones, Pascual and Stedman, Building international order in an era of transnational threat: Power and responsibility (2009). This concept of a limited view of sovereignty, which 'brings moral value to order,' it also refer as 'responsible sovereignty.'

¹⁶⁵ The Geneva Conventions explicitly establish universal jurisdiction over grave breaches in the following articles: GC I, Article 49; GC II, Article 50; GC III, Article 129; and GC IV, Article 146. Additionally, Article 85 of Additional Protocol I extends this jurisdiction to the listed crimes.

¹⁶⁶ L. C. Green Source: "International Crimes and the Legal Process", the International and Comparative Law Quarterly , Oct., 1980, Vol. 29, No. 4 (Oct., 1980), pp. 567-584

¹⁶⁷ United Nation Human Rights Office of the Higher Commissioner, what is Universal Jurisdiction? (<https://seoul.ohchr.org>) accessed July 18, 2024

¹⁶⁸ See the preamble to the ICC Statute par. 4; par. 6; par. 10

¹⁶⁹ Dire Tladi; The African Union and the International Criminal Court; 'The battle for the soul of international law', (2009) 34 SAYIL p60-61

Chapter Four

4. Implications of AU Decision on Member State Obligations under the Rome Statute and AU Constitutive Act

4.1. Introduction

Every member state of an international organization is bound by the obligations outlined in its foundational instruments. The Rome Statute and the AU Constitutive Act are the founding documents for the ICC and the AU, respectively. These instruments outline specific obligations for their member states. So, in this chapter, the researcher will assess the impact of the AU's decisions on the commitments of its member states, focusing on both their legal duties and the legitimacy of the AU's decisions.

4.2. International organization

International organizations exist on the conceptual and legal spectrum between state sovereignty and legal obligation.¹⁷⁰ While international institutional law lacks precise criteria for identifying an international organization, it is generally accepted that such organizations are established through international agreements and function under international law.¹⁷¹

Academia and practice often lack a unified concept of international organizations.¹⁷² The ILC has, on multiple occasions, opted not to establish a precise definitional framework.¹⁷³ However, in 2003, the ILC adopted a different perspective in its work on the responsibility of international organizations. This new approach defines an "international organization" as an entity governed by a treaty or other forms of international law that possesses international legal personality.¹⁷⁴ Likewise, the UN and the ICC operate as an independent entity.¹⁷⁵ Similarly, the AU is an intergovernmental organization a significant regional body that facilitates cooperation and links all 55 countries across the African continent.¹⁷⁶

4.3. Membership obligations

Each member state of an international organization has specific rights and obligations resulting from its membership. Obligations are inherent to being a member, and states are

¹⁷⁰ Ian Hurd, *International Organisations: Politics, Law, and Practice*, September 18, 2020, pp. 1–14.

¹⁷¹ Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, 2017 page 9 note 22

¹⁷² Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, 4th Revised Edition, 2003

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ <https://www.icc-cpi.int/sites/default/files/Publications/ICCAatAGlanceENG.pdf>

¹⁷⁶ A. N. Chumakov(edt), *international organization*, 2019

expected to fulfill these duties by adhering to the principle of cooperation, a fundamental modern legal principle.¹⁷⁷ This duty to cooperate is sometimes explicitly outlined in the organization's constitutive documents.¹⁷⁸

4.4. Member states obligation under the Rome statute

The Rome Statute is a multilateral treaty that imposes various obligations on its member states.¹⁷⁹ These obligations includes duty to cooperate with the ICC¹⁸⁰, implementing national measures,¹⁸¹ handing over perpetrators,¹⁸² protecting victims and witnesses,¹⁸³ execution of sentences,¹⁸⁴ ensuring non-impunity,¹⁸⁵ addressing jurisdiction and admissibility difficulties,¹⁸⁶ and making financial contributions.¹⁸⁷ These member-state obligations are critical to achieving the court's purpose and objectives. In this section, the researcher will evaluate some obligations under the statute and explore the implications of the AU's decision.

4.4.1. Duty to Cooperate with ICC

To ensure that the ICC can effectively exercise its jurisdiction over perpetrators, Part 9 of the Statute outlines a comprehensive framework for state cooperation with the ICC.¹⁸⁸ This section outlines the procedures for the Court to request states to arrest and surrender accused individuals, as well as to seek other forms of assistance and cooperation from them.¹⁸⁹

i. Duty to Cooperate of State Parties to the Rome Statute

Unlike national courts, the ICC lacks police or military forces to arrest suspects or collect evidence. Instead, the Court relies on the cooperation of national criminal justice systems.¹⁹⁰

¹⁷⁷ Henry G. Schermers & Niels M. Blokker, International Institutional Law Unity within diversity 4th Revised Edition, October 2003 p.118

¹⁷⁸ Article 2(2) of the UN Charter “All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfilled in good faith the obligations assumed by them in accordance with the present Charter”.

¹⁷⁹ See Part 9 of the Rome Statute.

¹⁸⁰ See the Rome statute Article 86-89, 93, 97 and 98.

¹⁸¹ See the Rome statute Article 88; States Parties must adopt the rules of the Rome Statute into their national laws.

¹⁸² See the Rome statute Article 89-92

¹⁸³ See the Rome statute Article 93(j)

¹⁸⁴ See the Rome statute Article 103-107

¹⁸⁵ See the Rome statute Article 27, States Parties must ensure that their laws do not grant immunity or amnesty that would obstruct the prosecution of individuals for crimes under the jurisdiction of the ICC.

¹⁸⁶ See the Rome statute Article 12-19

¹⁸⁷ See the Rome statute Article 115-116

¹⁸⁸ Dapo Akande, The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC, 10 J. INT'L CRIM. Just. 299 (2012).

¹⁸⁹ Ibid

¹⁹⁰ Annalisa Ciampi, International Cooperation and Judicial Assistance, the Obligation to Cooperate volume II, 25 July 2002, pp.1607-1637

That is why the ICC's purpose and structure underscore that full cooperation from States Parties is crucial for its effective operation.¹⁹¹

The Statute explicitly requires States Parties to cooperate with the Court.¹⁹² Article 86 clarifies that this obligation extends beyond the specific forms of cooperation outlined in Part 9 of the Rome Statute, encompassing all obligations set forth in the Statute.¹⁹³

The requirement for States Parties to "cooperate fully with the Court"¹⁹⁴ means they must act promptly and diligently, adhering to the principle of good faith that governs the fulfillment of international obligations.¹⁹⁵ Generally, States must fulfill this obligation in response to requests from the Court.¹⁹⁶

The Court's authority to request cooperation from states must be consistent with the Statute. If a request fails to meet the Statute's criteria, states may consult with the Court. In cases where a dispute arises between the Court and a requested state regarding the Court's right to make the request and the state's obligation to comply, the Court is expressly empowered to resolve the issue under Article 119 of the Statute.¹⁹⁷ As a result, member states cannot ignore their obligations under the Statute, as it is the Court's responsibility to adjudicate jurisdictional matters.

Member states were required to comply with the Court's requests for the arrest and surrender of President Al Bashir.¹⁹⁸ Even at the time the AU Assembly made its decision, thirty-four African states, holding a majority of seats in the Assembly, were parties to the Rome Statute. They had the option to reject the proposal of non-cooperation but chose not to.¹⁹⁹ This

¹⁹¹ Mark Klamburg (ed.), Commentary on the Law of the International Criminal Court, 2017 (note no. 679).

¹⁹² Rome Statute article 86 "state party 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."

¹⁹³ Annalisa Ciampi, International Cooperation and Judicial Assistance, The Obligation to Cooperate volume II 25 July 2002, pp.1607-1637

¹⁹⁴ See the Rome statute Art 86

¹⁹⁵ Annalisa Ciampi, International Cooperation and Judicial Assistance, The Obligation to Cooperate volume II 25 July 2002, pp.1607-1637

¹⁹⁶ Rome statute Article 87, "The Court shall have the authority to make requests to States Parties for cooperation."

¹⁹⁷ Annalisa Ciampi, International Cooperation and Judicial Assistance, the Obligation to Cooperate volume II, 25 July 2002, pp.1607-1637

¹⁹⁸ See Rome Statute article 86 and 89,

¹⁹⁹ <https://www.icc-cpi.int/>

decision suggests that these member states implicitly violated their duty to cooperate with the Court and undermined the statute's objectives.²⁰⁰

When the Court issued an arrest warrant for Al Bashir, several African states aligned with the AU's decision, disregarding their obligations under the Rome Statute. This illustrates how AU decisions can shield perpetrators and provide them with impunity in Africa. Al Bashir made his first trip to a Rome Statute state party, Chad²⁰¹ followed by visits to Kenya²⁰² and Djibouti.²⁰³ However, none of these states took action to arrest him, violating their duties under the Rome Statute.²⁰⁴

If a member state of the ICC chooses to neither cooperate with the Court nor arrest the suspect, opting instead to follow the AU's decision, it derogates from its obligations under the Rome Statute. Conversely, if the state ignores the AU's decision, it breaches its duty to comply with the AU Constitutive Act. This creates a situation where the AU decision imposes competing obligations, forcing a state to breach one set of obligations while fulfilling another.

ii. Duty Cooperation of non-state parties to the Rome statute

Non-state parties to the Rome Statute still have legal obligations to the Court in certain situations. These states can accept the Court's jurisdiction for specific cases or agree to cooperate through an ad hoc arrangement or agreement.²⁰⁵ This suggests that cooperation with the Court by non-States Parties is voluntary. Once a non-State Party enters a voluntary cooperation agreement, it assumes an international responsibility to comply with the Court's requests.²⁰⁶

²⁰⁰ Kurt Mills, "Bashir is Dividing Us, Africa and the International Criminal Court", Human Rights Quarterly, May 2012, Vol. 34, No. 2, pp. 404-447

²⁰¹ Prosecutor v. Bashir (Decision rendered under Article 87-7 of the Rome Statute concerning the refusal of the Republic of Chad to cooperate with the Court's requests regarding the arrest and surrender of Omar Hassan Ahmad Al Bashir), ICC-02/05-01/09 (13 December 2011).

²⁰² Prosecutor v. Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya), ICC-02/05-01/09 (27 August 2010).

²⁰³ Prosecutor v. Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to Djibouti), ICC-02/05-01/09 (12 May 2011).

²⁰⁴ Kurt Mills, Bashir is Dividing Us, Africa and the International Criminal Court, Human Rights Quarterly, May 2012, Vol. 34, No. 2, pp. 404-447

²⁰⁵ See the Rome statute Art 87(5)

²⁰⁶ Professor Antonio Cassese, Professor Paola Gaeta, Mr John R.W.D. Jones (edt) The Rome Statute of the International Criminal Court, commentary 2002 voll.2, 1608-1637

The obligation to provide cooperation and judicial assistance to the ICC can also be imposed on all UN member states via a UNSC resolution under Chapter VII of the UN Charter, as was done with the ICTY and ICTR.²⁰⁷ Article 13(b) of the ICC Statute also enables the UNSC to refer situations involving crimes within the ICC's jurisdiction, even if they occur outside the territories of state parties or are committed by non-nationals of state parties. This provision allows the ICC to act without needing a direct connection to a state party.²⁰⁸ Additionally, if the UNSC deems cooperation necessary to address a threat to international peace, it may mandate cooperation in cases referred by a state or initiated by the Prosecutor alone.²⁰⁹

In the case of Sudan, the UNSC, through Resolution 1593, mandated that all involved countries fully cooperate with the ICC and its Prosecutor.²¹⁰ As these states are parties to the UN Charter and have accepted the Council's authority under Article 25, the UNSC's power to impose cooperation obligations with the ICC is unquestionable, much like it did with earlier ad hoc tribunals it established.²¹¹ Consequently, Sudan is under an international legal obligation to cooperate with the ICC. As a Charter obligation, this duty takes precedence over any other commitments.²¹²

Therefore, the refusal of Sudan, other African states, and the AU's decision to restrict cooperation with the Court constitutes clear violations of international law. The AU's decision cannot serve as a defense, as it merely creates competing obligations.

4.4.2. Obligation to fight impunity

International criminal tribunals focus on justice and retribution. Prosecuting international crimes acts as a deterrent to future atrocities, which is a fundamental reason for the establishment of the ICC.²¹³ International criminal tribunals operate on behalf of the international community.²¹⁴ The obligation to combat impunity is reinforced by various

²⁰⁷ *ibid*

²⁰⁸ Dapo Akande, The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC, 10 J. INT'L CRIM. JUST. 299 (2012)

²⁰⁹ Professor Antonio Cassese, Professor Paola Gaeta, Mr John R.W.D. Jones (edt) The Rome Statute of the International Criminal Court commentary 2002 voll.2, 1608-1637

²¹⁰ UNSC Resolution 1593

²¹¹ Dapo Akande, The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC, 10 J. INT'L CRIM. JUST. 299 (2012)

²¹² UN Charter Art.103

²¹³ André Mbata Mangu; The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa, "An Overview Africa Development, Vol. 40, No. 2, International Criminal Justice" (2015), pp. 7-32

²¹⁴ Emanuele Cimiotta; The Relevance of Erga Omnes Obligations in Prosecuting International Crimes, ZaorRV 76 (2016),p. 687-713

conventions, including through the duty to extradite or prosecute.²¹⁵ Some scholars suggested that the Court would be a watchdog court monitoring its States parties' duty to investigate and prosecute perpetrators of international crimes, by means of the principle of complementarity.²¹⁶

The ICC plays a crucial role in addressing impunity for international crimes.²¹⁷ By providing a platform for international justice, the ICC helps to ensure that individuals who commit atrocities are held accountable, especially in situations where national courts are unable or unwilling to prosecute.²¹⁸ The ICC contributes by ensuring that the most severe crimes are punished and by promoting respect for international law.²¹⁹ States also need to collaborate with the ICC to address serious violations, rather than allowing perpetrators to escape justice. Without such cooperation, the impunity gap will remain open.²²⁰ So, acting in line with the Statute or cooperating with the Court is a way of fighting impunity.

Furthermore, UN member states have pledged to collaborate with relevant international tribunals to address impunity for serious crimes, especially those of international significance, in accordance with the rule of law.²²¹ The AU Constitutive Act also condemns and rejects impunity.²²² Therefore, it is essential to prosecute perpetrators through national, regional, or international mechanisms, in line with international law, to ensure accountability.²²³

Therefore, despite the Rome Statute, the AU Constitutive Act, and other international legal instruments advocating for the fight against impunity and the enforcement of accountability for international crimes, the AU's decision to encourage its member states not to cooperate with the ICC reveals a preference for shielding perpetrators from accountability.

²¹⁵ Emanuele Cimiotta; "The Relevance of Erga Omnes Obligations in Prosecuting International Crimes", *ZaorRV* 76 (2016), p. 687-713

²¹⁶ *ibid*

²¹⁷ Rome statute preamble par 5

²¹⁸ Makau Mutua, *The International Criminal Court in Africa: challenges and opportunities* September 2010 p1-10

²¹⁹ Sang-Hyun Song, "The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law" December 2012, No. 4 Vol. XLIX (<https://www.un.org/international-criminal-court-ending-impunity-and-establishing-rule-law>) accessed in July 28, 2024

²²⁰ See Rome statute preamble par6

²²¹ Principles of international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity Adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973

²²² See AU Constitutive act art 4(0)

²²³ A/67/L.1 (Resolution adopted by the General Assembly on 24 September 2012) par. 22

4.4.3. Obligation to arrest and surrender of perpetrator

Article 63 of the Statute requires that ICC proceedings be held with the indicted person present, specifically the suspect during the pre-trial stage and the accused after charges have been confirmed. Without arrests, the judicial process cannot proceed; ICC judges are unable to determine guilt or innocence, and victims do not have the opportunity to be heard.²²⁴

States Parties to the Statute are required to fully cooperate with the ICC²²⁵ and to have national laws in place to execute all cooperation requests from the Court.²²⁶ Furthermore, UNSC Resolution 1593 obligates states to cooperate with the ICC, including fulfilling requests for the arrest and surrender of Al Bashir.²²⁷

On the other hand, when an alleged perpetrator remains at large, it compromises the collection and preservation of evidence and threatens the safety and well-being of potential witnesses and victims. It also enables the perpetrator to possibly continue committing crimes and fails to deter other or future offenders. As a result, failure to execute arrest warrants fosters a climate of impunity.²²⁸ Therefore, member states of the ICC and the UN Charter are obligated to arrest Al Bashir. The AU's decision not to cooperate in his arrest constitutes a clear violation of international law.

4.5. AU Constitutive Act

The AU Constitutive Act gives the African Union the power to create common policies, oversee their implementation, and ensure that member states adhere to them.²²⁹ The AU Assembly is also authorized to make binding decisions²³⁰ and prevent any member from failing to meet its obligations.²³¹ However, this authority does not extend to making decisions that would force a member state to breach other treaty obligations or create conflicting commitments.

The AU Constitutive Act outlines various objectives that member states are required to uphold as part of their commitment to the union. One key goal is to promote cooperation

²²⁴ <https://www.icc-cpi.int/sites/default/files/bookletArrestsENG.pdf> accessed July 28, 2024

²²⁵ See the Rome statute Article 86

²²⁶ See the Rome statute Article 88

²²⁷ See the Rome statute Article 59 and 89

²²⁸ <https://www.icc-cpi.int/sites/default/files/bookletArrestsENG.pdf> accessed July 28, 2024

²²⁹ AU constitutive Act, Art 9(1) (a) (e)

²³⁰ AU constitutive Act, Art 7

²³¹ AU constitutive Act, Art. 23(2)

between member states and relevant international organizations to enhance Africa's global standing and address international issues effectively.²³² This demonstrates how the AU Constitutive Act encourages cooperation between African states and global organizations. The AU Constitutive Act also obligates member states to work together in promoting peace, security, and stability. This includes preventing conflicts, resolving disputes through peaceful means, and supporting the AU's mechanisms for conflict prevention, management, and resolution.²³³

Furthermore, the AU can be seen as a regional organization that plays a crucial role in maintaining peace and security in Africa, adhering to the principles and purposes of the UN.²³⁴ Member states commit to promoting and protecting human and people's rights in line with established human rights instruments.²³⁵ Article 4(h) of the AU Constitutive Act mandates the AU to intervene in cases of grave circumstances, such as war crimes, genocide, and crimes against humanity, as well as serious threats to legitimate order, to restore peace and stability within AU member states. Additionally, Article 28 of the Protocol on the ACJHR requires the AU to uphold human rights instruments.

With this analysis, it is clear that the presence of international crimes provides a basis for the AU to take appropriate actions, including intervention and to facilitate the prosecution of those responsible for such crimes. Therefore, as per the AU Constitutive Act, member states need to cooperate with international organizations to ensure human rights protection and punish perpetrators. This demonstrates how the AU's decision contradicts its own founding principles.

The ICC and the AU share are international organizations whose goals include curbing impunity.²³⁶ Unfortunately, despite legal obligations for African nations to cooperate with the ICC, a significant challenge the Court faces in Africa is the lack of cooperation, which obstructs the accountability of those responsible for international crimes.

Following the AU's decision urging member states not to cooperate in the arrest and surrender of President Omar Al Bashir, countries such as Chad, Kenya, Djibouti, and Malawi hosted Bashir during state visits without arresting him. This happened despite the ICC's

²³² See the AU constitutive act Article 3(e)

²³³ See the AU constitutive act Article 3(f) & (h)

²³⁴ See Article 52(1) of the UN Charter.

²³⁵ See the AU Constitutive Act Article 3(h)

²³⁶ preamble of Rome statute and AU constitute act

requests for assistance and these countries' obligations under the Statute to fully cooperate with the Court in investigating and prosecuting crimes within its jurisdiction.²³⁷ This situation illustrates how some African states have disregarded their international obligations

Generally the AU's decisions are expected to align with their objective, which includes ensuring that member states work towards common regional goals. In this context, the AU's decision need to encourage international cooperation, prevent inter-state conflict that might arise if an AU member states arrests Al-Bashir, and promote and defend African common positions, peace, security, and stability on the continent.²³⁸ Therefore, the AU Assembly contrarily make a decision for non-cooperation with the ICC it will be contradict with its objective of the constitutive act.

4.6. The legality reasons given by the AU for the decision

The AU offers certain justifications for its decisions on non-cooperation. This section will assess the legality of these justifications.

4.6.1. Peace vis-a-vis justice

The AU argues that prosecuting Al Bashir complicates or undermines their peace negotiations efforts in Sudan.²³⁹ Proponents also claim that prosecuting key leaders responsible for atrocities makes it difficult to persuade those in power to end or reduce violence. However, the ICC significantly promotes international justice and peace and has a major impact on crime prevention, as its prosecutions pose a clear threat to high-ranking individuals who commit serious crimes.²⁴⁰

The ICC aims to end impunity. Peace-building efforts that ignore justice are likely to fail. The Rome Statute seeks to achieve both peace and justice through distinct mechanisms.²⁴¹ It establishes the ICC's jurisdiction over international crimes to uphold justice. Concurrently, it empowers the UNSC to defer prosecutions in the interest of maintaining international peace

²³⁷ Alexander K. A. Greena Walt, Introductory note to the ICC: Decisions under Article 87 (7) of the statute on the failure by the Republic of Malawi and the Republic of Chad to comply with the cooperation request issued by the court concerning the arrest and surrender of Al-Bashir and AU response, "International Legal Materials", Vol. 51, No. 2 (2012), pp. 393-417

²³⁸ AU Constitutive Act, Art 3

²³⁹ The AU Peace and Security Council argued that "the arrest warrant could undermine efforts for peace in Darfur and urged the UNSC to invoke Article 16 of the Statute to suspend the indictment for a year, stating that prosecution might not serve the interests of victims, justice, or peace". After the arrest warrant was issued, the Peace and Security Council released a communiqué regretting the decision. (AU Doc. PSC/MIN/Comm.(CXLII)p2,3,7, 9) and AU Doc. PSC/PR/C Comm. (CLXXV), par. 1–3, 5, and 6.

²⁴⁰ Catherine Gegout, The International Criminal Court: limits, potential and conditions for the promotion of justice and peace "Third World Quarterly," Vol. 34, No. 5 (2013), pp. 800-818

²⁴¹ Rome statute preamble

and security under Chapter VII of the UN Charter.²⁴² Thus, it is unreasonable to argue that prosecution will undermine peace efforts.

The AU's decision not to cooperate with the ICC, citing the UNSC's failure to act on its deferral request also is not reasonable; because it just blaming the Court for the Security Council's inaction. The AU's deferral request was directed to the UNSC, not the Court, which only performs judicial functions.²⁴³ Acting on a deferral request does not mean granting it; the UNSC can only grant a deferral²⁴⁴ if it determines it will contribute to the maintenance or restoration of international peace and security.²⁴⁵

Furthermore, Article 16 of the Rome statute allows the UNSC to choose the best means to maintain or restore peace in specific situations. The UNSC referred the Darfur case to the ICC, it acknowledged that enduring peace necessitates justice, and any comprehensive resolution for Darfur must include it.²⁴⁶ The UNSC's response to the Darfur conflict was a test of its commitment to combat international crimes effectively and protect civilians.²⁴⁷ So, the referral was part of a broader strategy that combined criminal prosecutions with targeted sanctions and peacekeeping efforts.

Even if the AU argued that the arrest warrant against Al-Bashir might complicate the peace process, Sudan's peace situation was already fragile, and deferring the warrant wouldn't provide a solution. Additionally, as of today despite Al-Bashir being ousted from power, Sudan remains in conflict, and Al-Bashir has not surrendered to the ICC even after losing his authority.²⁴⁸ Sudan remains engulfed in a civil war that erupted in April 2023 between the Sudan Armed Forces (SAF) and the Rapid Support Forces (RSF). Numerous towns and villages have been devastated and severe human rights violations are occurring.²⁴⁹ Despite

²⁴² Dire Tladi; The African Union and the International Criminal Court: The battle for the soul of international law, (2009) 34 SAYIL p60-61

²⁴³ Ibid

²⁴⁴ See Rome statute art 16

²⁴⁵ See Article 39 of the Charter of the United Nations

²⁴⁶ African Union Panel of the Wise, Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity, "The African Union Series, New York: International Peace Institute", February 2013. www.ipinst.org

²⁴⁷ Lutz Oette, "Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond," Journal of International Criminal Justice June 20, 2015, p345-364 (<http://jicj.oxfordjournals.org>)

²⁴⁸ Al-Bashir, who ruled for nearly 30 years, was replaced by a transitional military government on April 11, 2019. On December 14, 2019, he was convicted of corruption and sentenced to two years in a correctional centre. The ousted leader has long been sought by the ICC. However, a Khartoum prosecutor rejected his extradition, deeming it "unnecessary." <https://www.aljazeera.com/news/2021/10/25/timeline-sudan>. (accessed August 2, 2024)

²⁴⁹ <https://operationbrokensilence.org/blog/sudan-crisis-2024> accessed August 2024

this, the African Union has not altered its position on the matter. Therefore, the AU's argument for the decision has no legal basis in securing peace in Sudan.

4.6.2. Immunity

Another argument presented by the AU for its decision is sitting heads of state should have immunity from prosecution.²⁵⁰ However the substantive claim regarding head of state immunity is held by the state, not the individual. Therefore, Bashir can't assert this claim as a personal right.²⁵¹

The UNSC Res.1593 mandates Sudan to "fully cooperate and provide any necessary assistance" to the ICC, without exceptions for head of state immunity. So, Sudan is under obligation as per Articles 25 and 103 of the UN Charter. Since immunities can be waived by the relevant state and do not have the status of *jus cogens*,²⁵² they do not override the provisions of the Charter.²⁵³ Consequently, Resolution 1593 prevents Sudan from asserting head of state immunity.²⁵⁴

On the other hand, state parties to the statute are obligated to respect the ICC's exclusive authority to adjudicate the applicability of immunities in specific cases.²⁵⁵ The determination of immunity issues falls within the jurisdiction of the ICC, rather than the AU or individual state parties. Furthermore, the requested state is required to notify the Court and provide pertinent information to facilitate the resolution of immunity concerns.²⁵⁶ Consequently, the AU's decision regarding immunity of Al Bashir is deemed *ultra vires*.

The AU cannot use Article 98(1) of the Statute to justify its decision. The notion of immunity for heads of state before international courts has been widely rejected²⁵⁷ there has been an increase in prosecutions of heads of state by international courts, reflecting broad acceptance

²⁵⁰ Assembly/AU/Dec.245(XIII) Rev.1 par 8

²⁵¹ Matthew Gillett, The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court, 23 CRIM. L.F. 63 (2012).

²⁵² See Article 53 of the Vienna Convention on Treaties (1980)

²⁵³ Article 32 (2) of the Vienna Convention on Diplomatic Relations stipulate that immunities must be expressly waived. However, in cases of conflict, states' obligations under the UN Charter take precedence over the provisions of the Vienna Convention on Diplomatic Relations, as these provisions do not hold the status of *jus cogens*.

²⁵⁴ Matthew Gillett, The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court, 23 CRIM. L.F. 63 (2012).

²⁵⁵ Article 119(1) of the Statute, provides that "any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court".

²⁵⁶ Rules of Procedure and Evidence no.195 "when a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98"

²⁵⁷ https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf accessed on August 4, 2024

of such prosecutions.²⁵⁸ With over 124 State Parties to the Statute, each having ratified Article 27, renounced any claims to immunity for their top officials.²⁵⁹ The ICC seeks the arrest of individuals for international crimes, and customary international law no longer provides immunity for heads of state in such cases.²⁶⁰

Member States have authorized the ICC to prosecute serious international crimes. Refusing to surrender a Head of State undermines this mandate. Customary international law now includes an exception to Head of State immunity when international courts seek to arrest individuals for international crimes.²⁶¹ Therefore, invoking Article 98(1) of the Statute by the AU or states is irrelevant, as there is no conflict between obligations to the Court and customary international law.

4.6.3. Does the ICC Disproportionately Focus on Africa?

The AU has criticized the ICC for focusing exclusively on crimes committed in Africa.²⁶² While it is true that many cases before the ICC are from Africa due to the prevalence of atrocity crimes there, the ICC has also conducted preliminary investigations globally. These include investigations in Iraq, Venezuela, Colombia, Afghanistan, Georgia, Sri Lanka, Gaza, Honduras, South Korea, Bangladesh/Myanmar, the Republic of the Philippines, and Ukraine.²⁶³

On the other hand, the ICC's operations can be challenged through admissibility procedures.²⁶⁴ The complementarity principle ensures that the ICC's jurisdiction is secondary to national jurisdictions. A case is admissible before the ICC only if a State Party is unwilling or unable to prosecute the perpetrator independently and effectively.²⁶⁵ This means the ICC intervenes only when a state is inactive, reluctant, or unable to handle the case. So, states or suspects can challenge the admissibility of cases before the ICC if a state is able to

²⁵⁸ Herbert W. Briggs, "Power Politics and International Organization" The American Journal of International Law, Oct, 1945, Vol. 39, No. 4 (Oct., 1945), pp. 664-679

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ The ad hoc tribunals e.g. Principle III of the Nuremberg (<https://ihl-databases.icrc.org/en/ihl-treaties/nuremberg-principles-1950/principle-iii?>) accessed in August 4, 2024

²⁶² Catherine Gegout, "the International Criminal Court: limits, potential and conditions for the promotion of justice and peace" Third World Quarterly, Vol. 34, No. 5 (2013), pp. 800-818

²⁶³ <https://www.icc-cpi.int/situations-under-investigations> (accessed in August 5, 2024)

²⁶⁴ See Rome Statute Article 17 and 19

²⁶⁵ André Mbata Mangu; The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa, "An Overview Africa Development, Vol. 40, No. 2, International Criminal Justice" (2015), pp. 7-32)

investigate and prosecute the perpetrator case.²⁶⁶ However, the AU does not argue that African states can handle these cases effectively; instead, it criticizes the ICC solely based on the number of cases.

Furthermore, many cases brought before the ICC are self-referrals. For example, the cases of Joseph Kabila in the DRC (2004)²⁶⁷, Yoweri Museveni in Uganda (2004),²⁶⁸ François Bozizé in the Central African Republic (2005)²⁶⁹, and the government in Mali (2012)²⁷⁰ were referred by their respective state governments. This indicates that African state leaders often use the ICC to act against rebels, reinforcing their own regimes and authority, effectively turning the ICC into a political instrument.²⁷¹ Additionally out of the nine situations before the Court, only the Kenya situation did the Office of the Prosecutor initiate the investigation independently.²⁷² Therefore, it is inaccurate to conclude that the ICC has targeted African leaders.

Also, Seeing ICC norms as merely an effort to advance Western interests ignore the strong support from Africa, where thirty-three out of fifty-five countries have ratified the ICC statute. It's important to acknowledge that the Rome Statute isn't just a Western construct; it's a shared heritage of humanity, including Africa.²⁷³ Therefore, the AU's use of this argument lacks a solid legal foundation and undermines member states' obligations under the Statute.

4.7. The AU decision in line African Human Right legal instrument

Human rights must be safeguarded at the international, regional, and national levels. The key African human rights instruments, including the African Charter on Human and Peoples'

²⁶⁶ Ekaterina Trendafilova; Africa and the International Criminal Court: A Judge's Perspective volume 1p.23 , e.g Kenya and Libya have challenged admissibility by arguing that the cases were inadmissible due to ongoing domestic investigations or prosecutions. (Article 17(1)(a) of the Rome Statute).

²⁶⁷ By Pascal Kambale & Anna Rotman, the International Criminal Court and Congo: Crimes of War Project October 2004 (<https://www.legal-tools.org/doc/7ed751/pdf/>) accessed in August 5, 2024

²⁶⁸ <https://www.icc-cpi.int/news/icc-president-uganda-refers-situation-icc>; (accessed in August 5, 2024)

²⁶⁹ <https://www.aba-icc.org/situations/central-african-republic> The Situation in CAR focuses on alleged atrocity crimes committed during an armed conflict which involved CAR government forces under President Ange-Felix Patasse, rebel forces under General Francois Bozize, and the Mouvement de Libération du Congo (MLC). (accessed in August 5, 2024)

²⁷⁰ <https://www.icc-cpi.int/situations/mali> the situation in Mali was referred to the ICC by the Government of Mali in July 2012, with investigations opening in January 2013.

²⁷¹ Catherine Gegout, "the International Criminal Court: limits, potential and conditions for the promotion of justice and peace" Third World Quarterly, Vol. 34, No. 5 (2013), pp. 800-818

²⁷² <https://www.toaep.org/pbs-pdf/56> accessed in August 5, 2024

²⁷³ Dire Tladi; The African Union and the International Criminal Court; "The battle for the soul of international law", (2009) 34 SAYIL p67

Rights (Banjul Charter),²⁷⁴ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),²⁷⁵ the African Charter on the Rights and Welfare of the Child²⁷⁶, the African Youth Charter,²⁷⁷ and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,²⁷⁸ have been established to safeguard human rights across the continent.

The AU is expected to act in way ensuring the implementation of those human right instruments, and ensuring accountability for human rights violations or the perpetrator. However, the AU still lacks a robust mechanism to hold perpetrators accountable. Even regional efforts to address specific crises in Africa have often been undermined by a lack of political will and leadership, leaving countless civilians trapped in conflict without support.²⁷⁹ So, the AU's decision is a clear indication of this shortcoming.

Al-Bashir's indictment stems from severe human rights violations in Darfur since 2001, where brutal attacks by the Janjaweed militia led to widespread displacement.²⁸⁰ The UNSC referred the Darfur situation to the ICC, highlighting the displacement of over 1.65 million people and more than 200,000 refugees in Chad.²⁸¹ The ICC issued arrest warrants in 2009 and 2010 for crimes including murder, torture, and genocide.²⁸² The ICC serves as a court of last resort for human rights, but the AU's decision to urge non-cooperation with the ICC reveals a troubling inconsistency with its human rights instruments.

²⁷⁴ The Charter, adopted by the OAU on June 1, 1981, and which came into force on Oct, 21, 1986, has been ratified by all member states of the AU. <https://au.int/en/treaties/african-charter-human-and-peoples-rights> accessed in August 9, 2024

²⁷⁵ This protocol, adopted by the AU on July 01, 2003 and which came into force on Nov, 25, 2005, has been ratified by 44 member states of the AU. <https://au.int/en/newsevents/20230705/maputo-protocol> accessed in August 9, 2024

²⁷⁶ This charter adopted by OAU July 1990 entered into force on 29 Nov, 1999 <https://au.int/sites/default/files/treaties/36804-treaty>. Now 50 AU member states have ratified the Charter, (<https://www.acerwc.africa>) accessed in August 9, 2024

²⁷⁷ This protocol, adopted by the AU July 02, 2006 and which came into force on August 08, 2009, has been ratified by 38 member states of the AU. <https://au.int/en/treaties/african-youth-charter> accessed in August 9, 2024

²⁷⁸ The Kampala Convention, adopted by the AU on Oct 23, 2009, and which came into force on Dec 06, 2012, has been ratified by 33 member states of the AU. <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> accessed on August 9, 2024

²⁷⁹ <https://www.hrw.org/news/2023/01/12/africa-conflicts-violence-threaten-rights>

²⁸⁰ Courtney Hillebrecht & Scott Straus, "Who Pursues the Perpetrators? State Cooperation with the ICC", *Human Rights Quarterly*, (2017) vol. 39 p.162

²⁸¹ <https://www.ushmm.org/genocide-prevention/blog/icc-issues-arrest-warrant-for-sudanese-president-bashir>

²⁸² <https://www.icc-cpi.int/darfur>

The African Court of Justice and Human and Peoples' Rights has proposed prosecuting international crimes.²⁸³ However, it prevents the Court from charging any serving AU head of state, government, or senior state officials during their tenure,²⁸⁴ which suggests that African leaders are shielding themselves from accountability. Additionally, the prolonged delay in signing the Protocols and Statutes, along with the slow process of obtaining the necessary fifteen ratifications for the Court's operation, further indicates that African leaders may not be fully committed to combating impunity.²⁸⁵ As a result, the African Court is unlikely to be a viable option for convicting perpetrators like Al-Bashir. The disregard of ICC requests by African states and the support for the AU's non-cooperation decision leave the victims in Sudan in a precarious situation, without a clear path to justice and potentially enabling human rights violators to evade accountability.

Generally, the AU's decision to shield President Bashir of Sudan has set a troubling precedent for African heads of state and government. It undermines state parties' obligations under human rights legal instruments, fosters impunity for perpetrators of international crimes, and creates a dangerous environment where human rights violators can act with relative safety.

4.8. Regimes Conflicts

All states are legally obligated to uphold duties arising from international legal instruments they accept.²⁸⁶ Regimes conflicts under international legal obligations emerge when a state's parties bound by two treaties faces contradictory obligations and cannot fulfill its commitments to both simultaneously.²⁸⁷

The AU member states have ratified treaties that require cooperation with the Court, while the AU has issued a decision urging non-cooperation. Article 23(2) of the AU Constitutive Act and its purpose and objective of the act, impose obligation on member states to comply with assembly decision. This creates a regime conflict between the AU's decision and other international legal obligations of member states to arrest and surrender President Bashir to the ICC.

²⁸³ See the Protocol on the Statute of the African Court of Justice and Human and people Rights article 3 and 14

²⁸⁴ Ibid Article 46a bis "no charges shall be commenced or continued before the court against any serving AU Head of state or Government or anybody acting or entitled to act in such capacity or other senior state officials based on their function during their tenure office".

²⁸⁵ André Mbata Mangu; The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa, "An Overview Africa Development, Vol. 40, No. 2, International Criminal Justice" (2015), pp. 7-32

²⁸⁶ VCLT art 26-27

²⁸⁷ Erich Vranes, The Definition of 'Norm Conflict' in International Law and Legal Theory, EJIL (2006), Vol. 17 No. 2, 395-418

The AU member states ratify several human rights instruments that obligate them to act in ways that uphold the purpose and objectives of these treaties. However, the AU's decision undermines these objectives by potentially allowing perpetrators to evade accountability.

Moreover, AU member states are bound by Article 25 of the UN Charter to comply with UNSC resolutions. Since the situation in Sudan was referred to the ICC through UNSC Resolution 1593 (2005), AU member states are obligated to adhere to this directive. This creates further conflict between the AU's position and the obligations of its member states under international law, potentially leading to breaches of various commitments. However, under Article 103 of the UN Charter, member states are required to prioritize their UN Charter obligations over any other regional legal commitments. As a result, member states need to balance these Regimes conflict in line with the UN Charter.

In general, this regime conflict generates legal uncertainty and diplomatic tensions, both within Africa and in the broader international community. The fragmentation of ICC jurisdiction undermines the effectiveness of international criminal law by creating conflicting legal obligations and potentially enabling impunity for perpetrators.²⁸⁸ Therefore, African states are required to cooperate with the ICC to fight impunity by neglecting the AU decision.

²⁸⁸ Jacky Fung Wai Nam, Jurisdictional Conflicts between the ICC and the African Union: Solution to the Dilemma, 44 Denv. J. Int'l L. & Pol'y 41 (2015)

Chapter five

5. Conclusion and Recommendation

5.1. Conclusion

The ICC was widely welcomed at its establishment, with strong support from Africa. However, as the Court began its operations, most of its cases originated from Africa, primarily due to on-going atrocities on the continent and weaknesses in national and regional judicial systems. This focus on African cases eventually led to tensions between the ICC and the AU.

The AU's decision to urge its members not to cooperate with the ICC regarding the arrest of Sudanese President Omar al-Bashir presents complex legal challenges. This decision underscores the tension between the obligations of AU member states under the AU Constitutive Act and their responsibilities as parties to the Rome Statute of the ICC, as well as their duties under general international law. It also risks causing member states to breach their international legal obligations.

The study has explored the underlying reasons for the confrontation between the AU, the ICC, and the UNSC. It has assessed the legality of the AU's non-cooperation decision, its implications for member state obligations, and the alignment of the AU's stance with its own objectives and the general principles of international law.

The analysis reveals that the AU's decision creates a significant conflicting of obligations for its member states that are also parties to the Rome Statute. While the AU has the authority to issue binding decisions for its members, this particular decision seems to contradict the explicit duty of ICC State Parties to cooperate with the Court. This also creates conflicting obligations for AU member states, as they are required to comply with UNSC Resolution 1593. This raises questions about the compatibility of the AU's stance and the obligations of its member states with the ICC statute, the UN Charter and the AU Constitutive Act, which emphasize the promotion of international cooperation.

The study also revealed that the AU's rationale for non-cooperation lacks a solid legal foundation. For instance, their claim about prioritizing regional peace efforts is debatable, as justice and accountability are crucial for attaining lasting peace and reconciliation. Moreover, the AU's criticism of the ICC for allegedly targeting African leaders is unjustified, especially

when no alternative measures for justice for African victims are proposed. Immunity, likewise, cannot serve as a valid defence for those perpetrators. The AU's also decision risks undermining its own objectives related to human rights protection and the fight against impunity.

When making such decision, the AU must provide options for the victims in Sudan and ensure that those responsible for international crimes are held accountable. However, even after Al Bashir was removed from power, the AU has not made any attempts to ensure accountability.

In conclusion, the tensions between the AU and the ICC underscore the necessity of carefully balancing regional and international obligations, along with the principles of complementarity, state sovereignty, and the global community's duty to ensure accountability for the most serious crimes a major challenge in Africa.

5.2.Recommendation

- Africa has witnessed extensive human rights violations and atrocities, making justice for victims an urgent priority. With Sudan still grappling with on-going human rights abuses due to the civil war, the AU should prioritize strengthening criminal justice systems within the region, rather than politicizing the role of the ICC.
- The AU's decision has resulted in member states breaching various international legal obligations. Therefore, when making decisions, the AU should prioritize legal considerations over political interests.
- The AU should avoid attempting to resolve conflicts through non-legal means, as this can inadvertently create safe havens for perpetrators.
- The ICC is a preferred option when domestic and regional courts are unable to effectively address impunity and provide justice to victims. In this context, the AU's decision discourages its members from seeking justice without offering an alternative solution for victims in the region.
- Many atrocity crimes in Africa are often perpetrated by ruling governments. Holding heads of state accountable for these crimes sends a powerful message that the international community will not tolerate impunity. The AU's decision in this regard warrants careful consideration.

- The AU should engage with the UNSC to address concerns about deferrals and advocate for reforms in UNSC powers, rather than making decisions that undermine the ICC's judicial efforts and strain the relationship between Africa and the Court
- AU Member States must be ready to prosecute international crimes and should commit to establishing a strong regional criminal court or enhancing their national judicial systems rather than merely criticizing the ICC.
- The AU should recognize that the ICC cannot address any shortcomings in the Rome Statute; its role is to interpret and apply the Statute as a judicial body. Therefore, using the issue of deferral as a justification for the AU's decision to withhold cooperation member state obligation is not a rational approach.
- The ICC's independence has been threatened by external attempts to control it. Some states, including in Africa, have misused the court for political purposes, undermining its role in international justice. To preserve its integrity, the international community should refrain from instrumentalizing the Court.
- The enforcement of ICC decisions is crucial. Although the Court may issue arrest warrants or deliver judgments, its ability to enforce penalties or ensure compliance depends significantly on international cooperation and the willingness of states to implement its rulings. For example, Article 87(7) underscores the ICC's limited enforcement mechanism. In cases of complete noncompliance by a State Party, the Court can only acknowledge the issue and refer it to the Assembly of States Parties or the UNSC. While the Assembly can address issues such as the Court's budget, amend the statute, and adjust the number of judges, it lacks clear authority to take direct action against noncompliant State Parties. Therefore, the ICC needs more effective enforcement mechanisms to deter future atrocities and contribute meaningfully to reconciliation and stability in conflict-affected regions.
- Since the UN and the ICC signed a cooperation agreement in 2004, the UN can leverage this arrangement to mobilize states in Africa to support the ICC's objectives. The political pressure that comes with UN support can be significant. Therefore, the UN should actively support the ICC in encouraging cooperation from African states to uphold international peace and security.
- Enhancing positive dialogue among stakeholders, clarifying the legal framework, and exploring alternative accountability mechanisms that address the concerns of both the AU and the ICC are essential.

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