

AFRICA AND THE INTERNATIONAL CRIMINAL COURT: MENDING FENCES



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EXECUTIVE SUMMARY

In this paper, we explore the current turbulent relationship between the International Criminal Court and Africa and focus on demystifying some of the criticisms levied against the Court in the exercise of its mandate particularly in the African situation countries.

This paper comes at a crucial time in the life of the Court as it marks ten years of existence and therefore provides specific recommendations targeting the International Criminal Court, the African Union and civil society organizations that all play a key role in improving the relationship between the Court and Africa.

June 2012 brought in a new wave of change in the Prosecutorial leadership of the Court with Fatou Bensouda, an African woman from Gambia, taking on the mantle from Moreno Ocampo. It has been opined that her appointment in this position of influence may contribute to improving the image of the Court in Africa.

African supra national bodies such as the African Union and most recently the East African Legislative Assembly, continue to push for the Court to withdraw its mandate in Africa and leave the investigation and prosecution of grave crimes to national and regional justice mechanisms. This position has its bearings in the principle of complementarity which gives states the primary jurisdiction to try grave crimes and play an active role in the fight against impunity.

However, it is important that the demand for national and regional prosecutorial mechanisms is followed by genuine, progressive and tangible steps towards bringing perpetrators of grave crimes to book.

Supra-national bodies also need to play a more proactive role not only as critics of the International Criminal Court, but as bodies committed to the fight against impunity and championing the rights of victims of grave crimes. They therefore need to consistently monitor the actions and steps taken by member states to bring individual perpetrators of such crimes to the altar of justice.

As we move towards ironing out the differences between the International Criminal Court and Africa, it is important that the lines of communication between the two sides are kept open so as to allow for an avenue through which constructive discussion on the challenges and solutions to the fight against impunity can be fostered. We hope that the recent change in the African Union and ICC Prosecutorial leadership is one step in such direction to ensure mutual support for the work of the Court in Africa.

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LIST OF ABBREVIATIONS AND ACRONYMS

AMICC	The American Non-Governmental Organizations Coalition for the International Criminal Court
AU	African Union
CSOs	Civil Society Organizations
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EALS	East African Law Society
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
NGO	Non-Governmental Organization

1.1 THE ROME STATUTE: AFRICA'S NUMERICAL LEGACY

The Rome Statute of the International Criminal Court was adopted at a diplomatic Conference in Rome on 17th July 1998 and came into force on 1st July 2002.¹ On 14th January 1999, the Senegalese National Assembly authorized its national Government to ratify the Rome Statute, making Senegal, an African country, to become the first state in the world to demonstrate support for the new era of international justice.² The Democratic Republic of Congo was also the 60th State to ratify the Rome Statute, thereby allowing it to enter into force.

As of 1st June 2012, 121 countries are now State Parties to the Rome Statute. Out of these, 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin America and Caribbean States and 25 are from Western Europe and other States.³

The above facts and statistics show that the African continent has the highest number of state parties to the Rome Statute and has played a fundamental role in firming up the Rome Statute system over the years.

The ideal expectation is that these high numbers automatically translate into tremendous support for the Court in Africa. The reality, however, is that there is an escalating trend of discord between Africa and the ICC, and, therefore, the high number of Rome Statute ratifications from the African States point to quantitative rather than qualitative support for the Court particularly within the African political circles.

1.2 STATE REFERRALS: THE LINKAGE BETWEEN AFRICA AND THE ROME STATUTE

The Rome Statute has provided for different mechanisms through which the ICC can exercise its jurisdiction in different contexts.⁴ Situations may be referred to the Court by a State Party through a State referral⁵, a UN Security Council referral⁶ and the prosecutor also has the discretion to initiate an investigation in a given situation country.⁷

Of utmost interest in Africa's relationship with the ICC are the self referrals that have been made by African State Parties to the Rome Statute. This mechanism has its bearings in Article 14 of the Rome Statute which provides that a State Party to the Rome Statute may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

¹ The Rome Statute of the International Criminal Court is often referred to as the "International Criminal Court Statute" or the "Rome Statute"

² Also see, International Commission of Jurists, "Senegal: Senegal is the First State to Ratify the International Criminal Court's Statute" Available at <http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=2182> (last accessed on June 28th 2012)

³ See <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last accessed on June 28th 2012)

⁴ See Article 13 of the Rome Statute which highlights the circumstances under which the ICC may exercise jurisdiction

⁵ Situations of Northern Uganda, Congo and the Central African Republic were referred to the Court through this mechanism-Also see Article 14 of the Rome Statute

⁶ Situations of Darfur and Libya were referred to the Court by the UN Security Council-Also see Article 16 of the Rome Statute

⁷ Situations of Cote d'Ivoire and Kenya were initiated at the Prosecutor's own volition-Also see Article 15 of the Rome Statute

Advocacy groups such as the AMICC have opined that this provision is advantageous to the work of the Court since it allows for more comprehensive investigations with the cooperation of state authorities.⁸ The self referral mechanism also facilitates access to witnesses and evidence, the arrest of suspects as well as protection for the team of the Prosecutor and other involved parties.

This provision has led to the intervention of the ICC in three African Situation countries- Uganda, the DRC and the Central African Republic. The top leadership in these countries opted to refer the situations in their individual countries to the Court because of the absence of effective domestic institutions and adequate resources to pursue the investigation and prosecution of the perpetrators of grave crimes. Following the above referrals, the Prosecutor exercised his powers and issued arrest warrants for specific individuals in these different situation countries.

The usage of this self referral mechanism by some of the African leaders is a demonstration of the fact that many of the African countries where the ICC has intervened have voluntarily submitted to the jurisdiction of the ICC with a belief in its ability to exercise its mandate to fight against impunity.

A section of critics, however, have expressed doubt regarding the process leading up to the making of these self referrals. There are arguments that these states have been manipulated into making state referrals so as to build the profile of the ICC. The Prosecutor of the Court has been accused of putting Uganda and DRC under considerable pressure to refer cases to the ICC.⁹ Statements of this nature provide a glimpse into some of the opinions that have been put across over the years to distort the intentions and processes of the Court and further entrench the negative attitude towards the Court in Africa.

A review of the evolvement of these cases over the years, however, exposes the fallacy in such opinions. For example, in December 2008, regarding the Northern Uganda situation, the Pre-Trial Chamber decided to initiate proceedings under Article 19 (1) of the Rome Statute which provides for admissibility of cases before the ICC.¹⁰ Uganda, like the Prosecutor, argued that the case was still admissible before the Court since the leader of the Lord's Resistance Army, Joseph Kony, who was also indicted by the ICC, had failed to execute the comprehensive peace agreement and therefore the Juba Peace Agreement and the Annexure providing for the application of formal criminal and civil justice measures to individuals alleged to have committed serious crimes or human rights violations in the course of the conflict in Northern Uganda were of no legal force.

Notably, at this stage, Uganda had the opportunity to present arguments declaring that despite the referral, it had the capacity to try the suspected indictees, a move it did not pursue on the basis of sound legal assessment of its national judicial processes. It therefore opted to argue along the same lines with the Prosecutor.

The position taken by Uganda in this case was similarly adopted by the DRC in February 2009 when Germain Katanga, an indictee of the ICC, filed a motion with the Trial Court challenging the admissibility of his case before the ICC arguing that the DRC national courts had the capacity to try him for the crimes for which he was accused. The Appeals

⁸ The American Non-Governmental Organizations Coalition for the International Criminal Court "Africa and the International Criminal Court" Article found at <<http://www.amicc.org/docs/Africa%20and%20the%20ICC.pdf>> (last accessed on 25th June 2012)

⁹ "ICC, A Tool To Recolonise Africa" (1st March 2012) New Africa Magazine Article available at <http://www.newafricanmagazine.com/special-reports/sector-reports/icc-vs-africa/icc-a-tool-to-recolonise-africa> (last accessed on 18th June 2012)

¹⁰ Situation in Uganda In the Case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen ICC-02/04-01/05 , 10th March 2009

Chamber rejected this argument on the basis, among others, that the DRC had made it clear that it wished for him to be tried by the ICC.¹¹

1.3 TRACING THE CURRENT ICC-AFRICA FEUD

The current turbulent relationship between the International Criminal Court and Africa was sparked off in July 2008 when the Prosecutor applied for a warrant of arrest for Omar Al-Bashir, the sitting President of the Republic of the Sudan. Al-Bashir was charged on the basis of individual criminal responsibility for committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan.¹²

The repercussions of the issuance of the Bashir arrest warrant continue to reverberate throughout the African leadership circles to date.¹³ This move challenged the notion of presidential immunity which hitherto formed the core of political discourse and was viewed by many as unchallengeable.¹⁴

However, based on the evolvement of international criminal law, the argument has been made that the rules of customary international law on personal immunities of current heads of state do not bar the exercise of the jurisdiction of the ICC with respect to an incumbent head of state.¹⁵

Following this application by the Prosecutor, the Peace and Security Council of the AU adopted a decision in relation to the ICC Prosecutor's application for a warrant of arrest.¹⁶

In this decision, the Council reiterated the African Union's commitment to the fight against impunity on the African continent and also condemned the gross violations of human rights in the Darfur region.¹⁷ It, however, emphasized that the search for justice

¹¹ Available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/pr455?lan=en-GB> (last accessed on 8th June 2012)

¹² Available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB> (last accessed on 20th June 2012)

¹³ See, for example, "Uganda: ICC Targeting African Presidents-Museveni" (17th December 2011) The Monitor, story available at: < <http://allafrica.com/stories/printable/201112180083.html> > (last accessed on 10th July 2012) in which the President is reported to have said,

"The issue of ICC is something we want to discuss among ourselves as Africans, but the way it is being implemented it seems like it is only Africans committing crimes. There are people who have committed crimes but nothing has been done on them."

Also see "Mugabe Slams "Blind" International Criminal Court" (23rd September 2011) The Zimbabwe Mail, available at:

<http://www.thezimbabwemail.com/zimbabwe/9132-mugabe-slams-blind-international-criminal-court.html> (last accessed on 10th July 2012)

The President of Zimbabwe is reported to have told the UN General Assembly that the ICC has no credibility in Africa. He said,

"The Court "seems to exist only for alleged offenders of the developing world, the majority of them Africans. The leaders of the powerful Western States guilty of international crime, like Bush and Blair, are routinely given the blind eye. Such selective justice has eroded the credibility of the ICC on the African continent."

¹⁴ See "Obasanjo backs Bashir on Darfur war charges" (28th June 2010) The East African Newspaper, available at <http://allafrica.com/stories/201006280042.html> (last accessed on 15th July 2012) The former President of the Republic of Nigeria and African Union Chairperson argued that a sitting President cannot be directly responsible for atrocities committed by rogue soldiers in a state of civil war and it would therefore be unfair for the world to ask Al-Bashir to disown the Janjaweed after it helped save Sudan from disintegration.

¹⁵ Paola Gaeta "Does President Al Bashir enjoy immunity from arrest?" Oxford Journal of International Criminal Justice Oxford University Press 2009 Volume 7 Issue 2 Pages 315-332 <http://jicj.oxfordjournals.org/content/7/2/315.abstract> (last accessed on 10th July 2012)

¹⁶ This application was made on the basis of Article 58 of the Rome Statute

¹⁷ Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at <http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf> (last accessed on 10th July 2012)

should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace, thereby pointing to the “wrong timing” of the Prosecutor’s application for a Bashir arrest warrant.

In addition, the Council reaffirmed its statement of 11th July 2008, which highlighted the African Union’s concerns regarding the misuse of indictments against African leaders in conformity with decision Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction.

Despite the concerns raised by the AU, the Pre-Trial Chamber of the ICC went ahead to issue the arrest warrant for President Omar Al-Bashir in March 2009, a move which was severely criticized by the AU. Jean Ping, the AU Chairperson, is quoted to have stated as follows,

*“The AU’s position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace.”*¹⁸

Once again, the peace versus justice dilemma resurfaced in the course of the exercise of the ICC’s mandate. In Uganda, which was the first ICC situation country, a section of victim communities and academicians criticized the Court for partly contributing to the unsuccessful Juba Peace talks between the Government of Uganda and the LRA when it issued arrest warrants for the latter rebel outfit.¹⁹

Another theory that was advanced by some of Africa’s leaders following the issuance of the Bashir arrest warrant was that the ICC is a mechanism of neo-colonialist policy used by the West against free and independent countries.²⁰ Leading scholars, however, argue that while there are justified concerns over the impact of the global Court in Africa, arguments about neo-colonialism exaggerate the strength of the ICC.²¹ Furthermore, these arguments also underestimate the ability of African Governments to manipulate international justice to their own ends.²²

The ICC has since found increasingly difficult to penetrate the rankings of the AU. Requests to set up an ICC liaison office in Addis Ababa where the AU headquarters are located have so far been met with immense resistance.²³ The most recent impasse between the Court and Africa has been seen with the relocation of the 19th AU summit from Malawi to Addis Ababa.²⁴ The AU took this decision following a declaration by the new Malawian President-Joyce Banda, that Malawi would honor its Rome Statute obligations by arresting President Omar Al-Bashir of Sudan if he attended the AU summit.

¹⁸ See “World Reaction-Bashir Arrest” (4th March 2009) BBC, available at: <http://news.bbc.co.uk/2/hi/africa/7923797.stm> (last accessed on 4th June 2012) See also an opinion by Mubarak M. Musa, the Deputy Head of Mission-Consulate General Uganda, “International Criminal Court has lost its impartiality” in the Daily Monitor Newspaper (22nd June 2010) in which he argued that the ICC’s selectivity against the Sudanese Government during the quest for peace and efforts of national reconciliation in Africa.

¹⁹ Mary Kimani, “Pursuit of Justice or Western Plot: International Indictments stir angry debate in Africa” (October 2009) at Page 12 mentions that the warrants for Joseph Kony and other leaders of the LRA were seen as impeding a peaceful end to the conflict in Northern Uganda. Available at www.un.org/en/africarenewal/Volume23no/233-icc.html (last accessed on 10th July 2012)

²⁰ See, “Court Issues Bashir arrest warrant” (5th March 2009) Al Jazeera, available at: <http://www.aljazeera.com/news/africa/2009/03/20093412473776936.html> (last accessed on 11th July 2012)

²¹ See, “The ICC is Only a Small Piece in the Justice Puzzle of Africa’s Conflicts” (11th April 2011) The East African, Story available at: <http://allafrica.com/stories/201104111502.html> (last accessed on 11th July 2012)

²² Ibid Note 21

²³ See, “Addis Ababa Office Opening Still on Hold” (4th February 2011) Radio Netherlands Worldwide(RNW) Available at www.rnw.nl/international-justice/print/292628 (last accessed on 10th July 2012)

²⁴ “Ethiopia to host African Union Summit after Omar Al-Bashir Malawi Row” Found at www.bbc.co.uk/news/world-africa-18407396 (last accessed on 10th July 2012)

1.4 A JUDICIAL RESISTANCE?

The AU and other regional blocks like the EALA are now on the road towards actualizing their resistance to the ICC by clothing existing Courts such as the African Court on Human and People's Rights and the East African Court of Justice with the jurisdiction to try international crimes.

Days before the recent 19th summit of the AU, the President of the African Court on Human and People's Rights announced that the Court would request the 19th AU Summit to merge the African Court of Justice and the African Court on Human and People's Rights and give it the jurisdiction to try criminal cases. According to the President, this move will allow for Africans accused of war crimes and crimes against humanity to be tried by the African Court instead of being sent to the ICC.²⁵ Article 28A of the "Draft Protocol on the Statute of the African Court of Justice and Human Rights," (hereinafter referred to as the "Draft Protocol") seeks to give the Court the power to try persons for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression, among others.²⁶ On July 13th 2012, in its Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, the Executive Council of the African Union requested the Commission in collaboration with the African Court on Human and Peoples' Rights to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court on Human and Peoples' Rights and submit it for consideration by the policy organs at the next summit slated for January 2013²⁷

At the regional level, in April 2012, the EALA also passed a resolution in which it requested that the East African Council of Ministers to immediately embark on the process of requesting the transfer of proceedings for the accused four suspects in respect of the 2007 Kenya Post Election violence from the ICC.²⁸ Citing and congratulating the people of Kenya upon a successful and speedy transition from the post election violence, they posited that the country was now able to locally resolve the matter given that the Coalition Government was largely successful and the fact that there was constitutional order. They therefore resolved that Article 27 of the East African Treaty be amended to give the East African Court of Justice the jurisdiction to also try international crimes. The EAC Council of Ministers has also gone ahead to start on the implementation of the resolution of the EALA by directing the EAC Secretariat to "develop a comprehensive technical paper that addresses both policy and legal issues" related to the consideration for extending the jurisdiction of the EACJ.²⁹

²⁵ See "Africa to create criminal court" (15th July 2012) Daily Monitor Newspaper

²⁶ See "Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights" Available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> > (last accessed on 15th June 2012)

²⁷ See Executive Council, **Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc. EX.CL/731(XXI)a, July 13, 2012, available at** [http://www.au.int/en/sites/default/files/EX%20CL%20Dec%20696-725%20\(XXI\)%20E%20-%20amended%20by%20OLC.pdf](http://www.au.int/en/sites/default/files/EX%20CL%20Dec%20696-725%20(XXI)%20E%20-%20amended%20by%20OLC.pdf) (last accessed 3 August 2012)

²⁸ See the East African Legislative Assembly, "Resolution of the Assembly seeking the EAC Council of Ministers to implore the International Criminal Court to transfer the case of the accused four Kenyans facing trial in respect of the aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to reinforce the treaty provisions" Available at http://www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html (last accessed on 17th June 2012)

²⁹ See the current update on the East African attempts to extend the jurisdiction of the East African Court of Justice, "25th Extra-Ordinary Meeting of Council of Ministers Concludes" East African Community Available at <http://www.eac.int/index.php/about-eac/eacnews/1041-25th-extraordinary-meeting-of-council-of-ministers-concludes.html> (last accessed on 30th June 2012)

1.4.1. The Principle of Complementarity vis-à-vis African Justice Demands

Both the AU and the EALA use the principle of complementarity as a basis for their decision to extend the jurisdiction of the African Court of Human and People's Rights and the EACJ respectively to cover the crimes that currently fall under the jurisdiction of the ICC.

The principle of complementarity forms the basis upon which the ICC exercises its jurisdiction. Reference to this principle is first made in the Preamble to the Rome Statute, wherein, it is stated as follows,

*"The State Parties to this Statute, (...) Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions..."*³⁰

This principle mirrors the admissibility provisions under Article 17 of the Rome Statute, which lays down the guidelines that the ICC follows to determine the inadmissibility of a case. Accordingly, in direct relation to the principle of complementarity, the Court will declare a case inadmissible where it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution or where the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to genuinely prosecute. This principle connotes that the ICC is a Court of last resort and will therefore not intervene in a given country where such a country is either able or willing to investigate and prosecute perpetrators of grave crimes.

In this regard, the EALA, in its resolution, called on the East African Council of Ministers to immediately embark on the process of requesting the transfer of the proceedings for the accused four suspects in respect of the 2007 general elections from the ICC and instituting them in the EACJ on the basis that the acts complained of are contraventions of the Treaty.³¹ The Assembly also declared its support for the call by the Kenyan Government to have a local mechanism to handle the post 2007 election violence.

The AU, through the Peace and Security Council, also presented the same argument when reacting to the Prosecutor's application for an arrest warrant against President Omar Al-Bashir.³² The Council noted that the ICC is complementary to national jurisdictions which, therefore, have the primary responsibility of investigating or prosecuting cases over which they have jurisdiction. Following this, the Council urged the Government of the Sudan to take immediate and concrete steps to investigate human rights violations in Darfur and bring the perpetrators of such violence to justice.

It is, however, important to note that complementarity as defined in the Rome Statute envisages national, rather than regional and continental efforts to investigate and prosecute international crimes. This, therefore, leaves the complementarity arguments advanced to justify the extension of the jurisdiction of the two Courts in a legal limbo.

Despite this legal dilemma, these efforts to try grave crimes at jurisdictions higher than national ones mark a remarkable advancement in the fight against impunity. What remains to be seen is whether these moves by the AU and the EALA demonstrate a genuine commitment by African States to try and not to shield the perpetrators of such crimes. The current functioning of both Courts partly explains the skepticism expressed by many human rights actors on the moves to expand the jurisdiction of regional Courts to try international crimes.

³⁰ Paragraph 10 of the Rome Statute

³¹ *Op. cit.*, Note 28

³² *Op. cit.* Note 17

In this perspective, the main challenge with expanding the jurisdiction of the African Court of Human Rights lies in its dismal performance and legitimacy since its establishment in 2008. It has been reported that out of 54 African countries, only 26 have ratified the Protocol that creates the Court and only 5 of the 26 countries have made the Special Declaration allowing individuals and NGOs to file cases at the Court.³³ Furthermore, since its creation, the Court has only received 22 applications for contentious matters and three applications for advisory opinions because the African Continent “does not know it”. The Court has 11 judges recruited on part time basis for lack of funds and these meet in four annual sessions. The above facts show that to expand the jurisdiction of the Court to cover international crimes might place an unachievable amount of workload on a Court that has to date failed to make a milestone in the execution of its current mandate.

Similarly, it is important to note that as it stands today, the East African Court of Justice does not possess the jurisdiction to deal with human rights cases since the Zero Draft Protocol that seeks to operationalize and extend the jurisdiction of the EACJ has not yet been passed.³⁴ It would therefore be an uphill task for its jurisdiction to be expanded to cover the trial of international crimes at a time when it is not clothed with human rights jurisdiction

Lastly, it is also becoming increasingly apparent that the African leaders are prematurely invoking the principle of complementarity without taking the initial steps to ensure that the existing structures they propose to try such crimes have the actual legal mandate and capacity to exercise international criminal jurisdiction. It is for such reasons that institutions such as the EALS have urged the EALA not to pursue the transfer of cases from the ICC, unless and until the EACJ is fully seized of the envisaged jurisdiction, capacity and competence to adjudicate international criminal cases as shall be certified by the ICC.³⁵

The Africa-ICC relationship therefore still remains a fragile one with propensity to cause unprecedented havoc in the world of diplomacy and politics in the years to come if it is not dealt with. Africa continues to threaten a complete breakaway from the Court whereas the ICC continues to reassure the continent’s leaders that it is an impartial instrument of justice.

1.4.2 A Critique of Select Provisions of the Draft Protocol

As earlier highlighted, the proposals within the draft protocol are evidence of the positive ripple effects of the principle of complementarity and demonstrate the commitment of states towards the fight against impunity. It is, however, important to constructively critic select provisions of the draft protocol so as to minimize the prospect of practical implementation challenges and credit the framers of the draft protocol for aspects that are progressive moves towards ensuring justice for victims of serious crimes.

a) Article 46 B.2: Presidential immunity

This is perhaps the most interesting aspect of the draft protocol since it recognizes that presidential immunity does not shield any accused person, whether as Head of State or Government, Minister or as a responsible Government Official. It neither relieves such

³³ *Op. Cit.*, Note 26

³⁴ “A Critique of the East African Court of Justice as a Human Rights Court” A paper presented by Hon. Lady Justice Leticia S. B. Bbosa at a conference organized by Kituo Cha Katiba on Human Rights Institutions in Eastern Africa Available at http://www.ici.org/IMG/Speech_BOSSA.pdf (last accessed on 24th June 2012).

³⁵ See, “Statement by the East Africa Law Society on EALA’s resolution seeking the transfer of the cases of the 4 accused Kenyans facing trial at the ICC, in respect of the aftermath of the 2007 Kenya Elections to the EACJ: A rejoinder by EALA-May 2nd 2012, Modern Ghana Available at <http://www.modernghana.com/news/392696/1/statement-by-the-east-africa-law-society-on-ealas-.html> (last accessed on 28th June 2012).

person of criminal responsibility nor mitigates punishment. The draft protocol clearly shows a shift in the AU's perceptions of the concept of presidential immunity which many of them at the height of the Bashir debacle, thought could act as a shield against criminal prosecution.

b) Article 46H: Complementarity

The draft protocol also delves into the question of complementarity and to that end provides that the jurisdiction of the Court shall be complementary to that of the National Courts and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.

Still in this regard, Article 6 of the Draft Protocol provides for pending cases before either the African Court on Human and People's Rights or the African Court of Justice and Human Rights to be taken over by the relevant section of the African Court of Justice and Human and Peoples' Rights.

These two provisions do not envisage the fate of African cases that are currently before the ICC and this leaves the purpose of this draft protocol at crossroads. The Court as earlier highlighted also has the jurisdiction to try crimes against humanity, war crimes, the crime of aggression and the crime of genocide, all of which currently fall under the ICC's jurisdiction.

It therefore appears that these provisions are a technical maneuver to oust the jurisdiction of the ICC. The result is that the proposed widened mandate of the African Court is likely to result in competing jurisdiction and duplicity of the work of the ICC and that of the African Court.

c) Article 16: NGO representations

This Article is progressive in as far as it gives NGOs the opportunity to submit cases to the Court. However, on the downside, the provision does not take into account circumstances under which an NGO may want to forward a case in a country that has not accepted the jurisdiction of the Court.

d) Article 22B: Victims Rights

The draft protocol has also to a great extent taken into account the interests of victims under this provision. Clause 9 of this Article provides for victim and witness unit protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony they will give. The draft protocol has also provided for compensation and reparations to victims under Article 45. Furthermore the draft protocol has also provided for a trust fund to offer legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.

It is, however, important to point out that building a comprehensive victim oriented system of the nature envisaged in the draft protocol requires the AU to earmark a specific source of funding for this purpose. It is important to also note that many of the African countries that have been conflict ridden over the last decade are yet to establish fundamental national victim oriented structures.³⁶ It is therefore highly unlikely that such countries will prioritize such structures at the regional level.

Still in regard to the question of victim's rights, it is notable that the draft protocol does not specifically or indirectly provide for victim participation in the Court's processes. This

³⁶ In Uganda, civil society is still grappling with the Government to prioritize the award of reparations for victim communities

therefore alienates victims from the benefits of having their voices heard in Court of Law as is the case at the ICC.

e) Article 46C: Corporate Liability

The draft protocol has made provision for corporate criminal liability under Article 46C of the draft protocol. This provision, whose implementation may be difficult, still has the potential to resolve some of the underlying perpetrators of conflict in Africa that include corporate arm suppliers.

f) Article 28: Crimes triable by the Court

In addition, in as much as the expansion of the Court's criminal jurisdiction is impressive given that it will try a cross-section of crimes over and above the current jurisdiction of the ICC; it is material to note that the draft protocol has also provided for the trial of the crime of unconstitutional change of Government. There is a high likelihood that a provision of this nature will be misused to abuse the democratic right of citizens to agitate for constitutional reform.

Notably, in countries like Libya and Cote D'Ivoire, the investigations by the ICC arose from acts of grave human rights violation alleged to have been committed by the top leadership in these countries when the citizens attempted to push for crucial reforms. This provision may therefore be used to foster political patronage.

From the above assessment, it is clear that there is no fundamental difference between most of the provisions of the draft protocol and the Rome Statute. What remains to be discerned is the actual motive of African leaders in making proposals to have regional Courts trying international crimes.

1.5 RECOMMENDATIONS

1.5.1 International Criminal Court

The ICC needs to continue playing an impartial role in the fight against impunity in Africa and the rest of the world and proactively follow up situations in other jurisdictions where crimes have been committed. The Court should maintain an apolitical role in the fight against impunity so as to maintain its credibility among African state leaders and the victim communities. In this regard, the Court should carry out impartial investigation in all jurisdictions where grave crimes are alleged to have been committed.

In addition there is need for the Court to proactively communicate and interact with different African leadership structures and to further strengthen its outreach information to the victim communities. Bi-lateral talks between Africa and the Courts will assist the Court to explain its investigatory and prosecutorial strategies with the aim of enabling the powers to understand how the Court operates. This could also serve as a forum through which Africa can allay its fears of the Court and also assist the Institution to formulate solutions to the challenges it faces.

The International Criminal Court also needs to demonstrate genuine support to the principle of complementarity by assisting States and regional bodies in building domestic initiatives that can exercise mandate over perpetrators of international crimes. Currently, it appears that the Court has not proactively taken on the role of assisting national courts to develop strong domestic systems to foster accountability. This could be attributed to the restrictive provisions of the Rome Statute which albeit recognizing the role of the ICC and individual states in the fight against impunity, does not contain a distinct provision

that mandates the Court to assist national jurisdictions to develop strong national accountability mechanisms.

1.5.2 African Leadership

The African leaders, through bodies such as the African Union and regional organs like the East African Legislative Assembly need to view the Court not as a competitor in the exercise of justice but rather as an institution that can work hand in hand with them to fight against impunity on the African continent. In this regard, it is important for African leaders to understand the mandate of the Court so as not to create antagonism. The Court only exercises its mandate against those who are “most responsible” for committing international crimes and therefore States still have the opportunity to try other suspects who are “less responsible”.

Still in relation to the above, the African Union needs to support the ICC in the exercise of its mandate by allowing it to open an African Liaison Office that will smoothen its work on the African continent and also keep the lines of communication between the Court and the African Union open.

It is also important for the African leaders to closely monitor the work of institutions such as the African Court of Justice and Human Rights and the East African Court of Justice to ensure that they effectively carry out their role as champions of the fight against impunity on the continent. It is important for highly qualified and experienced judges to be appointed to such institutions so as to ensure that they can efficiently exercise the mandate of the Court and also improve the human rights record of the continent.

The African leaders, at both the national and regional level, need to prioritize the needs of victims of grave international crimes. They should therefore focus on establishing structures that can not only genuinely prosecute perpetrators of international crimes but also respect the rights of victims to truth and reparations for the harm that they have suffered. In essence, prosecutorial measures should be pursued alongside other transitional justice mechanisms that can make the justice process more comprehensive.

1.5.3 Civil Society Organizations

Civil Society Organizations have a role to play as a mouthpiece for the Court, the African Governments and the victim communities. As a group that interacts with each of these bodies, they are privy to information on the perceptions of the Court’s intervention in Africa and therefore can clarify on any controversial areas to each of the parties.

Furthermore, civil society organizations also have the duty of monitoring the different initiatives in Africa that are focused on actualizing the principle of complementarity. They should therefore advise Governments on the approaches to adopt in order to ensure the proper investigation and prosecution of grave crimes.

1.6 CONCLUSION

Although the relationship between Africa and the ICC still remains controversial for some of the reasons listed above, it is important for all the stakeholders in the justice process to look at the fight against impunity as their main objective as they pursue different justice avenues.