

## **THE AFRICAN UNION, THE INTERNATIONAL CRIMINAL COURT, AND THE UNITED NATIONS SECURITY COUNCIL<sup>1</sup>**

### **I. Introduction**

In the last four years, a series of events have marked increasing tension between the African Union (AU) and the International Criminal Court (ICC). Central to this tension is the United Nations Security Council (UNSC), which the African Union itself has identified as a fundamental source of its increasing hostility towards the ICC.<sup>2</sup> The objectives of this paper are threefold: (1) to lay out the factual background that has precipitated a seeming impasse between the ICC and the AU; (2) to identify the AU's key points of contention with the ICC, particularly as they relate to the UNSC; and (3) briefly to introduce some of the existing and potential future issues with which advocates of the ICC must engage to secure African participation in the single most important international justice institution of our time. This paper thus offers a starting point for discussions aimed at forming consensus on strategies for smoothing out the current AU-ICC-UNSC dynamic.

### **II. Factual Background: The Relationship Goes South**

Following the announcement of an ICC warrant for the arrest of President Omar Al Bashir, the AU requested an Article 16 deferral of all proceedings against him from the UNSC, citing the fragility of the peace process underway at time to resolve the conflict in the Sudan.<sup>3</sup> Subsequently, the AU issued a mandatory decision prohibiting all 53 of its member states from cooperating with the ICC's effort to arrest President Omar El Bashir [hereinafter "July 2009 Non-Cooperation Decision"].<sup>4</sup> As the legal basis for this decision, the AU cited Article 98 of the Rome Statute, which delimits the ICC's authority with respect to requests for surrender or assistance in cases implicating state or diplomatic immunities. In deliberate and explicit terms, the AU identified what it

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<sup>2</sup> See Dire Tladi, "The African Union and the International Criminal Court: The Battle for the Soul of International Law," *34 South African Year Book of International Law* 57, 59 (2009) ("The Security Council is central to the story of the AU and ICC collision course[.]")

<sup>3</sup> Peace And Security Council of the African Union, Communique issued following the 142nd Meeting, 21 July 2008, Addis Ababa, Ethiopia PSC/Min/Comm(CXLII), available at <http://www.africa-union.org/root/ua/actualites/2008/juillet/psc/142-communique-eng.pdf>. This deferral request was supported by the Organization of the Islamic Conference and the Arab League. See Lawrence Moss, "The UN Security Council and the International Criminal Court: Towards a More Principled Relationship," Friedrich-Ebert-Stiftung, Global Policy and Development International Policy Analysis, March 2012, at 7. In March 2005 the UNSC referred the Darfur situation to the ICC (UNSC Resolution 1593), which opened investigations there in June 2005. In March 2009 the ICC issued its first arrest warrant for President Bashir, on charges of war crimes and crimes against humanity. The ICC issued a second arrest warrant to include the charge of genocide in May 2010.

<sup>4</sup> "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)", Assembly/AU/Dec.245(XIII) Rev.1 [July 2009 Non-Cooperation Decision].

interpreted as the UNSC's failure to respond to its deferral request as the primary basis for its unprecedented course of action.<sup>5</sup> Although the UNSC had acknowledged receipt of the AU deferral request somewhat tangentially in a resolution to renew the UN-AU peacekeeping force in Darfur, it had issued no response to the AU.<sup>6</sup> It was this perceived slight that elicited the smarting response from the AU of a non-cooperation decision, in light of what the AU described as "the glaring reality that the situation in Darfur [was] too serious and complex an issue to be resolved without recourse to an harmonized approach to justice and peace, neither of which should be pursued at the expense of the other."<sup>7</sup>

Following the AU non-cooperation instruction in 2009, President Bashir traveled with impunity to Chad in July 2010 and again in August 2011,<sup>8</sup> to Kenya in August 2010,<sup>9</sup> to Djibouti in May 2011,<sup>10</sup> and to Malawi in October 2011.<sup>11</sup> All of these countries are states parties to the Rome Statute. The ICC Pre-Trial Chamber has issued decisions finding the failure of Malawi and Chad to cooperate with the arrest and surrender of President Bashir to be in violation of the Rome Statute.<sup>12</sup> Nonetheless, the AU has reiterated its instruction to AU member states to withhold cooperation with the ICC for the arrest and surrender of President Bashir, most recently at the January 2012 AU summit.<sup>13</sup> Notwithstanding the ineffectiveness of its Bashir deferral requests, the AU has pursued this approach in two other situations. It has also called on the UNSC to defer

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<sup>5</sup> To wit, the July 2009 Non-Cooperation states that:

"[The AU Assembly] decides that in view of the fact that the [UNSC deferral 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[.]"

July 2009 Non-Cooperation Decision at para 10.

<sup>6</sup> As Elise Keppler notes, ten days after the AU's Peace and Security Council made the deferral request, the UNSC acknowledged it in UNSC Resolution 1828, and also discussed the deferral in a public meeting of the UNSC on this resolution. Elise Keppler, "Managing Setbacks for the International Criminal Court in Africa," *Journal of African Law* (2011) at 9-10.

<sup>7</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), AU Press Release, Addis Ababa, 14 July 2009 at para 5.

<sup>8</sup> "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir," *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No.: ICC-02/05-01/09, 13 December 2011 [hereinafter "Chad Decision"] at para 2.

<sup>9</sup> "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," *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No.: ICC-02/05-01/09, 27 August 2010.

<sup>10</sup> "Pre-Trial Chamber I informs the Security Council and the Assembly of States Parties about Omar Al Bashir's visit to Djibouti," ICC Press Release, December 5, 2011, ICC-CPI-20110512-PR665.

<sup>11</sup> "Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir," *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No.: ICC-02/05-01/09, 12 December 2011 [hereinafter "Malawi Decision"] at para 5.

<sup>12</sup> Chad Decision and Malawi Decision *supra* notes 8 and 11 respectively.

<sup>13</sup> "Decision on the Progress Report of the Commission on the Implementation of the Assembly Decision on the International Criminal Court (ICC)," Doc. EX.CL/710(XX), January 2012, Assembly/AU/Dec.397(XVIII) [hereinafter "January 2012 Decision"] at para 8.

proceedings in the Kenya<sup>14</sup> and Libya situations. With respect to the situation in Libya, in July 2011 the AU issued a decision prohibiting all its member states from cooperating with the ICC in the execution of the Gaddafi arrest warrant, noting that the warrant “seriously complicate[d] the efforts aimed at finding a negotiated political solution to the crisis in Libya[.]”<sup>15</sup>

In addition to calling for AU member state non-cooperation, the AU initiated several other consequential steps in its July 2009 Non-Cooperation Decision. All of these signaled its discontent with the UNSC but nonetheless most detrimentally impact the ICC. As an initial matter, the AU took the first steps down the path that may ultimately lead to Africa’s disengagement from the ICC. It did so by escalating previously deprioritized ground work for empowering the African Court on Human and Peoples’ Rights (“The African Court”) “to try serious crimes of international concern such as genocide, crimes against humanity and war crimes” in a complementary capacity to national jurisdictions.<sup>16</sup> As a direct consequence of this, in July 2012 the AU Assembly was presented with a draft amended protocol for the creation of an International Criminal Law Section to the African Court.<sup>17</sup> Although the AU Assembly tabled this draft for consideration at its next meeting, the AU is clearly making good on its plans to develop what it considers a regional alternative to the ICC.<sup>18</sup>

The July 2009 Non-Cooperation Decision also spelled out the AU’s wish list of issues it wanted AU member states parties to the Rome Statute to pursue at the May 2010 Kampala Review Conference. These were: (1) Review of the UNSC’s referral and deferral powers under Articles 13 and 16 respectively; (2) Clarification of immunities of officials of non-states parties to the Rome Statute and of the practical application and implications of Articles 27 and 98 of the Rome Statute; and (3) The possibility of a procedure for “obtaining regional inputs in assessing the evidence collected and in determining whether or not to proceed with prosecutions[.]”<sup>19</sup> Here too, the UNSC is implicated in each issue on this list. Of note, the AU no longer appears to take issue—in principle—with the UNSC’s referral power under Article 13, having endorsed the

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<sup>14</sup> In late 2010 the Kenyan government sought a deferral of ICC proceedings regarding atrocities committed during the period following the 2007 presidential elections in that country. For a brief overview of the facts leading up to the ICC’s seizure of the Kenyan situation effected through the Prosecutor’s *proprio motu* powers see Moss (2012) at 10-11. The AU first endorsed Kenya’s deferral request in January 2011,<sup>14</sup> and subsequently made its own deferral request in this regard in July 2011, although it refrained from issuing a non-cooperation instruction to AU member states. “Decision On The Implementation of the Assembly Decisions on the International Criminal Court,” Doc. Ex.CI/670(XIX) Assembly/Au/Dec.366 (XVII), Malabo, July 2011 [hereinafter “July 2011 Decision”] at para 4.

<sup>15</sup> July 2011 Decision at para 6. This negotiated political solution would also “address, in a mutually-reinforcing way, issues relating to impunity and reconciliation.” *Id.*

<sup>16</sup> July 2009 Non-Cooperation Decision at para 5.

<sup>17</sup> Max Du Plessis, “A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes,” *EJIL Talk!*, August 27, 2012 available at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

<sup>18</sup> For a preliminary assessment of the draft protocol, see Max Du Plessis, “Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes,” ISS Paper 235, June 2012.

<sup>19</sup> July 2009 Non-Cooperation Decision at para 8.

“retention of Article 13 as is[.]”<sup>20</sup> Article 16, however, has remained a point of contention. In November 2009 the AU presented a proposal for its amendment to the Assembly of States Parties to the Rome Statute (ASP), to allow the United Nations General Assembly to act on deferral requests made pursuant to Article 16 if the UNSC failed to respond to a deferral request within 6 months.<sup>21</sup> The ASP refused to include the amendment proposal on the agenda of the first Rome Statute Review Conference held in Kampala but established a working group to consider the AU and other amendment proposals.<sup>22</sup> In the interim, the AU continues with its repeated calls for Article 16 deferrals.

With respect to Articles 27 and 98 on immunities, following ICC Pre-Trial Chamber decisions in December 2011 finding that the Bashir arrest warrant did not implicate Article 98,<sup>23</sup> the AU issued a press release expressing complete disagreement with this finding.<sup>24</sup> The AU subsequently issued a decision in January 2012 calling on the AU Commission to consider seeking an advisory opinion from the International Court of Justice “regarding the immunities of state officials under international law.”<sup>25</sup> At the last meeting of the AU Assembly in July 2012, it endorsed a recommendation from the Meeting of AU Ministers of Justice/Attorneys General “to approach the International Court of Justice (ICJ), through the United Nations General Assembly (UNAG), for seeking an advisory opinion on the question of immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC[.]”<sup>26</sup> The AU Assembly also requested further investigation from the AU Commission on the implications of this course of action, suggesting that the AU remains committed to pursuing an interpretation of international law that would shield senior

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<sup>20</sup> “Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), DOC. Assembly/AU/8(XIV), Assembly/AU/Dec.270(XIV), Addis Ababa, February 2010 (hereinafter “February 2010 Decision”) at para 2(II).

<sup>21</sup> For a detailed discussion of the AU’s concerns with respect to Article 16, as well as the actions it has taken in this regard, see Jalloh, Charles C., Akande, Dapo and Du Plessis, Max, “Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court,” (April 27, 2011). *4 African Journal of Legal Studies*, (2011) 5-50; *U. of Pittsburgh Legal Studies Research Paper No. 2011-14*; *Oxford Legal Studies Research Paper No. 6/2011* available at SSRN: <http://ssrn.com/abstract=1698839>

<sup>22</sup> See Jalloh, Akande and Du Plessis (2011) at 9.

<sup>23</sup> Chad Decision *supra* note 8, Malawi Decision *supra* note 11. For a discussion of these decisions, see Dapo Akande, “ICC Issues Detailed Decision on Bashir’s Immunity (...At Long Last...) But Gets the Law Wrong,” December 15, 2011, available at <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>.

<sup>24</sup> “On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic Of Chad and the Republic Of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan,” Press Release N° 002/2012, Addis Ababa, 9 January 2012 available at <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>.

<sup>25</sup> January 2012 Decision at para 10.

<sup>26</sup> “Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Doc. EX.CL/731(XXI), Assembly/AU/Dec.419(XIX), [hereinafter “July 2012 Decision”] at para 3.

officials of non-states parties to the Rome Statute from UNSC authorized ICC proceedings.<sup>27</sup>

The current tension between the ICC and AU stands in stark contrast with African states' historic support for the ICC. Commentators have documented the important role African governments and regional bodies such as SADC played in making the ICC a reality.<sup>28</sup> Among the principles that the SADC region was committed to realizing in the establishment of the ICC were the *proprio motu* powers of the prosecutor, and the full cooperation of states to facilitate the work of the ICC.<sup>29</sup> The AU's predecessor, the OAU, which called on all its member states to support the establishment of the ICC, ultimately endorsed these principles.<sup>30</sup> And indeed the AU's strident criticism of the ICC and attempts from AU member states such as Sudan and Libya under Gadaffi, to effect a mass withdrawal of African governments from the Rome Statute are best understood in the context of continuing support for cooperation with the ICC among some AU member states. Most recently Malawi, under the leadership of President Joyce Banda, made clear that in light of the ICC arrest warrant President Bashir would not be welcome in Malawi, which was to host the July 2012 AU summit. After the AU moved the summit to Ethiopia rather than bar the attendance of President Bashir, President Banda chose to boycott the event, instead sending her vice president to represent her country.<sup>31</sup> In a similar vein, in mid-2009 the South African government declined to extend an invitation to President Bashir to attend then President-elect Zuma's inauguration.<sup>32</sup> Perhaps most noteworthy was Botswana's pointed and public disavowal of the AU's non-cooperation request. Following the non-cooperation decision, Botswana informed the ICC and the public at large that notwithstanding the AU's position, Botswana would abide fully with its obligations under the Rome Statute, including the arrest and transfer of President Bashir.<sup>33</sup>

But this broader support notwithstanding, the AU's discontent with the ICC in Africa remains a force to be reckoned with. As AU/ICC relations have deteriorated, scholars and practitioners alike have crystallized the complaints of the AU against the ICC and identified three dominant themes or categories of contentions to which I now turn.

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<sup>27</sup> For a detailed discussion of legal issues at stake see Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities," 7 *Journal of International Criminal Law* (2009) 333-352.

<sup>28</sup> See e.g. Max Du Plessis, "The International Court that Africa Wants," ISS Monograph 172, August 2010 at 6; Jalloh, Akande and Du Plessis (2011) at 13-15; Kai Ambos, "Expanding the Focus of the 'African Criminal Court,'" in ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES, Y McDERMOTT, N HAYES AND WA SCHABAS, EDs., ALDERSHOT, ASHGATE, 2012 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2017537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017537) at 6-8; Keppler (2011) at 7-8; and Charles Jalloh, "Lecture: Africa and the International Criminal Court: Collision Course or Cooperation," 34 *North Carolina Central Law Review* 203, 204-208 (2012).

<sup>29</sup> Du Plessis, "The International Court that Africa Wants," at 7.

<sup>30</sup> Id. For a detailed discussion of AU and African governments' support for the ICC see id at 5-11.

<sup>31</sup> <http://mg.co.za/article/2012-06-17-malawis-banda-snubs-au-summit-after-bashir-spat>.

<sup>32</sup> "Sudan's Bashir will not be invited to Zuma's inauguration: Report," Sudan Tribune, April 25, 2009 available at <http://www.sudantribune.com/spip.php?article30981>.

<sup>33</sup> Du Plessis, "The International Court that Africa Wants," at 15.

### **III. Key Points of AU ICC Contention: The UNSC Takes Center Stage**

Commentators identify three broad recurrent and interrelated themes in AU contentions against the ICC over the last four years. All three themes deeply implicate the UNSC. The first comprises criticisms that accuse the ICC of having become a court singularly devoted to the prosecution of Africans. The second comprises criticisms that the ICC is essentially a “hegemonic tool of the Western Powers,”<sup>34</sup> as opposed to an impartial judicial tribunal. And the third point of contention regards the question of where the primary authority or mandate for determining peace, security and justice in Africa lies.

#### ***a. ICC as African Criminal Court***

The ICC’s docket always has and continues to be entirely African. At present, the docket comprises situations arising in Uganda, the Democratic Republic of Congo, Sudan, the Central African Republic, Libya and Côte d’Ivoire. In July 2012 the ICC Prosecutor announced her plans to proceed with a preliminary examination of the situation in Mali, following a referral by the Malian government.<sup>35</sup> The AU, African governments and various commentators have thus leveled the criticism against the ICC that rather than being an *international* court, it is in fact an “African Criminal Court” in operation to target only Africans. As chairperson of the AU Commission, Mr. Jean Ping lamented that as a result of the singular focus on African situations, “Africa has become a laboratory to test the new international law.”<sup>36</sup> The indictment of President Bashir—a *sitting* head of state of an African country that is *not* a state party to the Rome Statute—only added further fuel to allegations of the ICC as an African-centric institution.<sup>37</sup> The UNSC was of course, pivotal in enabling proceedings against President Bashir, which would not have been possible but for the its Article 13 referral. As mentioned above, the perception within the AU of the Bashir indictment as a case of specific bias against Africans was severely exacerbated by the UNSC’s failure to provide the AU with a response to its deferral request. Recall that twice before the UNSC had used its deferral powers to immunize peacekeepers from non-states parties to the Rome Statute from ICC investigation or prosecution as a result of U.S. pressure.<sup>38</sup> Further exacerbating perceptions of bias, Following UNSC Resolution 1593 referring the Darfur situation to the ICC, US representatives pointed to the resolution’s mention of Article 16 as clear

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<sup>34</sup> I borrow this terminology from Max Du Plessis, “The International Criminal Court that Africa Wants,” at (vii).

<sup>35</sup> “ICC Prosecutor Fatou Bensouda on the Malian State Referral of the Situation in Mali Since January 2012,” ICC Press Release July 18, 2012, ICC-OTP-20120718-PR829. For a brief discussion of the Mali referral see Otilia Anna Maunganidze and Antionette Louw, “Implications of Another African Case as Mali Self-Refers to the ICC,” ISS News Release, available at <http://allafrica.com/stories/201207240748.html>.

<sup>36</sup> Max Du Plessis “The International Criminal Court that Africa Wants,” at 13 fn 23.

<sup>37</sup> In addition to the UNSC’s role in fueling claims of an African Criminal Court, it is worth noting that the approach of former Prosecutor Louis Moreno Ocampo did nothing to smooth over the AU’s perception of bias. At the July 2010 AU summit AU spokesperson Jean Ping accused the ICC Prosecutor of “double standards” and essentially of engaging in “bullying against Africa.” Cited in Du Plessis at 18.

<sup>38</sup> Resolution 1422 and Resolution 1487.

protection for US Citizens. The US ambassador at the time stressed that: “[n]o United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.”<sup>39</sup> Conversely, repeated AU requests for a deferral in the Bashir case, and indeed in the Kenyan and Libyan cases, have essentially been ignored by the UNSC.

Most commentators reject claims that the ICC exists for the sole or even primary purpose of prosecuting Africans and they have offered persuasive arguments to the contrary.<sup>40</sup> They have done so by pointing to past and continuing support of African governments and civil society for the establishment and operation of the ICC. They have also refuted these claims by pointing to the procedural history of the ICC’s current docket, which they argue demonstrates independent legal reasons for the current composition of the docket.<sup>41</sup> Of the seven situations before the ICC, the DRC, Uganda, and Central African Republic situations were all self-referrals. The unfolding Mali situation would be the fourth. And although the Prosecutor under Article 15 initiated investigations in the Côte d’Ivoire situation, Côte d’Ivoire voluntarily granted the ICC jurisdiction to initiate investigations there.<sup>42</sup> It is additionally worth noting that weak legal and judicial institutions in Africa mean that Africans are more likely than their counterparts in other regions to end up before the ICC as a function of its complementarity regime.<sup>43</sup> Finally Max Du Plessis also points to the procedures/rules that govern case selection as protection against potential bias in case selection.<sup>44</sup> He has concluded that “[t]he complaint about the ICC’s affection for African cases is accordingly a complaint that appears to be overblown.”<sup>45</sup> While this may be true, the perception that the ICC is an African court persists, and remains a powerful fodder for African leaders who seek to rally opposition for the ICC.

### ***b. ICC as Hegemonic Tool of the Western Powers***

Closely related to the claim that the ICC is an “African Criminal Court” are broader claims that the ICC is in fact a hegemonic tool of western powers.<sup>46</sup> President Paul Kagame of Rwanda, for example is among those African leaders that have most explicitly and vociferously expressed this criticism of the ICC.<sup>47</sup> Labeling the ICC a

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<sup>39</sup> Cited in Du Plessis “The International Criminal Court that Africa Wants,” at 70.

<sup>40</sup> See e.g. Kai Ambos (2012); Max Du Plessis, “The ICC Africa Wants,”; Jalloh (2012); and Kepler (2011).

<sup>41</sup> See e.g. Max Du Plessis, “The ICC Africa Wants,” at 26.

<sup>42</sup> <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

<sup>43</sup> The Preamble of the Rome Statute and Article 17 establish the ICC jurisdiction as complimentary to that of national courts, such that only in cases where states are genuinely unable or unwilling to prosecute, will a case be admissible before the ICC.

<sup>44</sup> Max Du Plessis “The ICC Africa Wants,” at 28. Among these is article 17(1)(d), which some see as tempering the *proprio motu* powers of the Prosecutor by introducing a gravity threshold to the admissibility requirements. Id at 34 More importantly Articles 15, 53 and 58 of the Rome Statute impose Pre-Trial Chamber judicial oversight of the *proprio motu* and other prosecutorial powers and duties of the prosecutor.

<sup>45</sup> Du Plessis, “The ICC Africa Wants,” at 45.

<sup>46</sup> For a discussion of this critique see Dire Tladi, “The African Union and the International Criminal Court: The Battle for the Soul of International law,” at 61-62.

<sup>47</sup> Du Plessis “The ICC Africa Wants,” at 20; Jalloh (2012) at 7.

court that “has been put in place only for African countries, only for poor countries” he forcefully stated in the wake of the Bashir arrest warrant that his country could not be part of the “colonialism, slavery and imperialism” embodied by the ICC. Some have leveled the neo-colonialism critique in a manner that more directly identifies the UNSC as the vehicle of imperial influence. Despite South Africa’s vote in favor of UNSC resolution 1973 on the situation in Libya, which followed shortly after the Libya referral, among the factors that drove it ultimately to oppose intervention in Libya was domestic criticism that by supporting this UNSC intervention, South Africa took on the role of “an imperialist weakest link to the African continent.”<sup>48</sup>

At the core of the neo-imperialism critique of the ICC is the institutional effect that results from Articles 13 and 16 of the Rome Statute. Article 13 authorizes the UNSC authority to refer cases involving non-Rome Statute States Parties to the ICC and Article 16 authorizes the UNSC to defer an ICC proceeding for a year, when the UNSC is acting under its UN Charter Chapter VII powers. Others have noted that “[t]he skewed institutional power of the Security Council creates an environment in which it is more likely that action will be taken against accused from weaker states than those from powerful states, or those protected by powerful states.”<sup>49</sup> Thus for those who perceive the ICC to be a puppet, the UNSC plays the role of puppet master. Indeed the differential impact that results from the distribution of power within the UNSC has already begun to play itself out. As mentioned above, two UNSC deferrals at the behest of the U.S. stand in stark contrast to the UNSC’s silence with respect to the multiple AU deferral requests. The profound politicization of UNSC referrals and deferrals has become only more evident in the cases of Libya and Syria, where UNSC permanent members have variously adopted positions that reflect their own domestic political or economic interests more than the operation of any legal principle.<sup>50</sup> The legal and political ramifications of UNSC politics are exacerbated by the fact that three of the veto-wielding members of the UNSC are not states parties to the Rome Statute. Yet the latter have and will continue to have a decisive hand in determining who may and may not be the subject of ICC proceedings.

It is thus no surprise that concern over the UNSC’s role within the ICC institutional framework has been a point of consensus among AU member states. One commentator has noted that the role of the UNSC took center stage at the AU Experts Meeting in November 2009, following the AU non-cooperation decision.<sup>51</sup> It was on the basis of recommendations made at this meeting that the subsequent AU Ministerial Meeting also held in November 2009 adopted a recommendation that Article 16 of the

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<sup>48</sup> Max Du Plessis and Antoinette Louw, “Justice and the Libyan Crisis: the ICC’s Role Under Security Council Resolution 1970,” ISS Briefing Paper, May 2011 at 4 (citing ANC Youth League criticism of South Africa’s support for UNSC 1973).

<sup>49</sup> Du Plessis, “The ICC Africa Wants,” at 67.

<sup>50</sup> See for example Moss (2012) at 10-12 (discussing the shifting positions of the US, the UK and France from one of strong support for the prosecution of Col. Gaddafi and Saif al-Islam Gaddafi, to one that sidelined prosecutions in favor of peace settlements building relationships with Libya’s transitional government; and discussing the political impossibility of a UNSC Syria referral).

<sup>51</sup> Du Plessis “The ICC Africa Wants,” at 72.

Rome Statute be amended to authorize the UNGA to take a deferral decision if the UNSC failed to do so within six months.<sup>52</sup>

Some commentators reject the characterization of the ICC as a tool of western imperialism, again citing among other things the strong involvement of African governments and civil society organizations in the drafting of the Rome Statute and the establishment of the ICC; the impressive number of African states parties to the Rome Statute; and the dominance of self-referrals among the situations before the ICC.<sup>53</sup> In the case of Uganda and DRC, Max Du Plessis has pointed to these self-referrals as examples of African countries themselves using the ICC as a tool to advance domestic political ends, thus making claims of a western imperial agenda particularly ironic.<sup>54</sup> Yet while dismissing claims of neo-imperialism, he has nonetheless conceded that the central institutional role of the UNSC remains an open portal through which the politics of the UNSC threatens the actual and perceived independence of the ICC.<sup>55</sup> A popular conclusion however is nonetheless that a less than perfect Court that targets only a subset of the world's international criminals is better than nothing.<sup>56</sup> A corollary of this is that a flawed ICC deserves the support of anyone purporting to represent the interests of Africans, who in the absence of the ICC, would otherwise have limited hope for holding accountable those most responsible for the worst atrocities on the continent. Responses in this vein, however, arguably remain unsatisfactory in light of the continuing threat that the politicization—actual or perceived—of the ICC by the world's most powerful nations on the UNSC poses to the legitimacy of the Court, which in many ways is the primary currency an international tribunal such as the ICC must rely upon to execute its mandate.

### *c. The Mandate to Secure Peace and Justice in Africa*

Criticisms in this broad category express concern that through the ICC, actors such as the UNSC usurp what is rightfully understood as an African mandate to secure peace and justice on the continent. Although the Bashir indictment was personally unsettling to AU member state presidents as a warning of their own vulnerability to prosecution, the AU has complained that this indictment severely undermines the efforts of Africans to solve their own problems.<sup>57</sup> Both the 2009 Non-Cooperation Decision and the 2009 AU Press Release<sup>58</sup> express this criticism of the ICC indictment and of the UNSC inaction following the AU's deferral request. As mentioned above, the substance of the AU's complaint was concern that efforts to pursue justice through the ICC threatened an ongoing AU-led fragile process to secure peace, and failed to take into

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<sup>52</sup> Id.

<sup>53</sup> See, e.g. Max De Plessis, "The ICC Africa Wants,"; Ambos (2012) passim; Jalloh (2012) at 210.

<sup>54</sup> Du Plessis "The ICC Africa Wants," at 38.

<sup>55</sup> See, e.g. id at 74.

<sup>56</sup> For example, see the briefing paper by Human Rights Watch "drafted with substantial input from organizations that are among the most active members of an informal network of African civil society organizations and international organizations with a presence in Africa working together on Africa and the International Court since August 2009." HRW, "Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court," November 2010.

<sup>57</sup> Du Plessis "The ICC Africa Wants," at 50 – 51.

<sup>58</sup> *Supra* note 6.

account the complexity of the situation in Darfur, whose seriousness required a harmonized approach. Although some commentators have argued that this boils down to the perennial peace versus justice debate, this characterization misses the fundamental issue, which is rather that of *who* decides the sequencing. The remarks at the July 2010 AU Summit of the late former Malawian President Bingu wa Mutharika, then chairperson of the AU, illustrate this: “To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for for so many years . . . There is a general concern in Africa that the issuance of a warrant of arrest for . . . al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union charter. Maybe there are other ways of addressing this problem.”<sup>59</sup>

The AU’s response to the UNSC Libya referral also evidences this point. In February 2011 the UNSC referred the Libyan situation to the ICC in unanimously adopted resolution.<sup>60</sup> The three African states holding seats on the UNSC at that time—Nigeria, Gabon, and South Africa—thus voted in favor of the referral, while the African Union remained conspicuously silent on this issue.<sup>61</sup> However UNSC Resolution 1973, which imposed a no-fly zone over Libya and authorized the use of “all necessary measures”<sup>62</sup> for the protection of civilians, would elicit strident opposition from the African Union. In particular, the AU condemned “any foreign military intervention”<sup>63</sup> and “[e]xpress[ed] its conviction” that the situation in Libya called for urgent *African* action.<sup>64</sup>

The Constitutive Act of the AU identifies the objectives of this regional body as, among others, to “defend the sovereignty, territorial integrity and independence of its Member States” and to “promote peace, security, and stability on the continent[.]”<sup>65</sup> The Act also establishes principles that govern the functioning of the AU, and these include “peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly; . . . the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; . . . [and] the right of Member States to request intervention from the Union in order to

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<sup>59</sup> Quoted by Du Plessis “The ICC Africa Wants,” at 18.

<sup>60</sup> UNSC Resolution 1970.

<sup>61</sup> Max du Plessis and Antoinette Louw, “Justice and the Libyan Crisis: the ICC’s Role Under Security Council Resolution 1970,” ISS Briefing Paper, 31 May 2011 at 2. This referral notably welcomed “the condemnation by the Arab League, [and] the African Union . . . of the serious violations of human rights and international humanitarian law” that were being committed in Libya. UNSC 1970. Also noteworthy was the jurisdictional immunity granted by the UNSC referral to “nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court,” unless such the respective state expressly waived its exclusive jurisdiction. UNSC Resolution 1970 at para 6.

<sup>62</sup> UNSC Res 1973 at para 4.

<sup>63</sup> AU PEACE AND SECURITY COUNCIL 265TH MEETING, ADDIS ABABA, ETHIOPIA, 10 MARCH 2011, COMMUNIQUE, PSC/PR/COMM.2(CCLXV), at para 6

<sup>64</sup> Id at para 7.

<sup>65</sup> Articles 3(d) and 3(f) of the Constitutive Act of the AU.

restore peace and security[.]”<sup>66</sup> Thus central to the AU’s mandate and ethos is what former President Thabo Mbeki and other leaders have termed “African solutions to African problems.” On the other hand, Chapter VII of the UN Charter takes legal precedence over the AU Constitutive Act.<sup>67</sup> Although Chapter VII makes clear the subordinate authority of the AU in matters relating to international peace and security, the AU remains adamant in its pursuit to “ensure that African proposals and concerns are properly considered by the United Nations Security Council[.]”<sup>68</sup>

#### **IV. Critical Issues Moving Forward**

Commenting on the first steps that she has taken on since assuming her role as ICC Prosecutor, Ms. Fatou Bensouda responded that she has “prioritized what to do in terms of [the ICC’s] relationship with the African Union and African states, since most of our work is there now[.]” As others have discussed elsewhere, the strength of the relationship between the ICC on the one hand, and the AU and AU member states on the other, is mutually important and beneficial to both sides.<sup>69</sup> The cooperation of African states, and the support of the AU in so far as it influences its member states—which comprise 54 of the 55 countries in Africa<sup>70</sup>—are critical to the ability of the ICC to do its job. With all of its cases in Africa, and in the absence of its own military force, the ICC must rely on AU member states to execute the arrest and surrender of suspects. The logistical and political realities posed by international prosecutions would be insurmountable absent state cooperation to facilitate pretrial investigations. Beyond these practical considerations, the ICC needs the support of the AU and its member states for reasons of an existential nature. African disengagement from the ICC, which currently remains hypothetical though perhaps not inconceivable, would severely undermine the normative premise of the Rome Statute. In so far as the premise of the ICC is that of an independent impartial tribunal, mass disengagement by the largest regional bloc of states parties would have a negative impact on the legitimacy and future of the Court. For their part, African member states need the ICC because to the extent they are committed to impunity, it arguably offers for many the only existing viable forum for the expensive enterprise that is the prosecution of the most serious international crimes. For this reason, the ICC is also important for African victims of international crimes. In this final section I identify some key questions and issues whose resolution is critical to ensuring a positive future for the AU/ICC relationship as mediated by the UNSC.

***Has the AU-ICC-UNSC Problem Been Overblown?*** An important starting point may be to consider whether commentators and the media have overblown the current and

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<sup>66</sup> Articles 4(e), (h) and (j) of the Constitutive Act of the AU.

<sup>67</sup> Article 34 of the UN Charter states: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

<sup>68</sup> January 2012 Decision at para 5.

<sup>69</sup> Jalloh (2012), Ambos (2011), Du Plessis, “The ICC Africa Wants”.

<sup>70</sup> “African Union Welcomes South Sudan as the 54<sup>th</sup> Member State of the Union,” AU Press Release N 79/2011, July 27, 2011 available at <http://www.au.int/en/content/african-union-welcomes-south-sudan-54th-member-state-union>.

likely future ramifications of the AU's non-cooperative stance with respect to the ICC. If, as some argue, the AU's hostility is but one position among many more supportive influential African voices such as those of civil society organizations, for example,<sup>71</sup> it maybe that the continuing focus on the AU is a red herring, serving to distract from genuine challenges of consequence. After all, despite the damage the AU decisions may have inflicted on the ICC, the latter's position as the go-to international criminal justice mechanism of our time remains largely unchallenged. Thus it may be worthwhile to re-evaluate the level of attention the AU-ICC-UNSC dynamic deserves, in the context of ensuring a functioning, impartial tribunal available even to African victims of international crimes. In this regard it may also be useful to reach consensus on the question: ***What do we make of the AU's attempts to create a regional alternative to the ICC?*** As the AU prepares further to consider the draft protocol granting the African Court jurisdiction over international crimes, evaluation of the international justice implications of this development seems exigent.

***If the Threat Posed by the Deteriorating Relationship is Real, How Can the Political Effects of the UNSC be Managed, Contained or Eliminated?*** As shown above, the political influence of the UNSC is among the key sources of the AU's hostility towards the ICC. This political influence is institutionally entrenched within the Rome Statute, and may be inevitable under the international regime established by the UN Charter. All this notwithstanding, important questions remain regarding what options are available for managing or containing the political influence of the UNSC, even if it cannot be eliminated. For example, ***what is the role of AU-UNSC diplomacy and in particular AU-P5 diplomacy in easing existing tensions? Does the newly appointed Chairperson of the AU, Dr. Nkosazana Dhlamini-Zuma of South Africa represent a new set of possibilities in this respect? Relatedly, what is the possible role of diplomacy within the AU and within the UNSC in navigating the developing impasse between the AU and the UNSC on deferrals? Does the recent appointment of an African Prosecutor offer new avenues for engaging the AU?***

***As a normative matter, should the AU have greater influence on UNSC ICC Referrals and Deferrals, and if so, how would this be effected?*** The AU's expressed commitment to finding "African solutions to African problems" has been a source of tension regarding UNSC-authorized ICC interventions in Africa such as those in Libya and Darfur. For those interested in an ICC with a strong African backing it may be necessary to consider possible benefits of informal or formal procedures for ensuring the UNSC explicitly takes into account AU input particularly relating to Article 16 deferrals for situations in Africa.

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<sup>71</sup> For a discussion placing the AU's position as one among many of consequence on the continent see Keppler (2011).