

“Bashir is Dividing Us”:
Africa and the International Criminal Court

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Abstract

The African Union has become increasingly hostile towards the International Criminal Court, particularly in the wake of the ICC arrest warrant for Sudanese President Omar al-Bashir, although the public hostility masks deeper divisions among African countries. Indeed, evidence of arguments among African states and between Africa and Western countries over the proper functioning and scope of the ICC is indicative of a number of paradoxes and conflicts which have emerged as Africa reorients its identities and interests to embrace international human rights norms while also asserting itself on the global stage.

I. Introduction

On 16 April 1999, at the first Ministerial Conference on Human Rights in Africa, the Organization of Africa (OAU) passed a resolution urging all African states to consider ratifying the Rome Statute of the International Criminal Court (ICC).¹ Five years later, the Assembly of the African Union (AU), the successor to the OAU, called on member states to universally ratify the Rome Statute.² After another five years, however, in November 2009, the representative of South Africa sat before the Assembly of States Parties of the International Criminal Court (ASP) in The Hague and to amend the Charter, and to provide direction to the Prosecutor on how he or she should choose his or her cases.³ These proposals were made on behalf of the AU and were perceived by many as dangerously undermining core aspects of the ICC. Further, the African Union has called on member states not to cooperate with the ICC.⁴

The ASP is comprised of all state members of the ICC who have committed themselves to upholding the terms of the Rome Statute, which aims to combat impunity for genocide, crimes against humanity, and war crimes. Some African countries—most notably South Africa—were members of the informal group that pushed the Rome Statute through its development and ratification process. Indeed, the first country to ratify the Rome Statute, Senegal, was from Africa.⁵ These countries learned from their conflict-ridden pasts and were committed to ensuring that such situations did not arise again. Indeed, why would a country sign a treaty which opens your citizens—including your head of state—to prosecution if it did not have a significant commitment to the development of human rights and combatting impunity?⁶ Yet these same countries also put out a statement demanding that one of their fellow African heads of state be insulated from prosecution and that, if their demands were not met, they might not cooperate with the ICC—in direct violation of their freely entered into international legal commitments. They then proposed amendments to the Charter which would undermine the ICC’s independence

and, thus, its effectiveness.⁷ Why? How did Africa move from calling on all African countries to become parties to the ICC, to supporting proposals which would undermine the ICC—and also calling for noncooperation with the ICC?

Africa, perhaps more than other parts of the world, is in the midst of a significant period of cognitive dissonance as African states attempt to come to grips with evolving and contradictory pressures on their identities. It has experienced a significant period of democratization and improvement in human rights standards, yet many countries are still highly authoritarian states, some of which are consumed by major violent conflicts. The AU wants to create an African voice on the international scene, yet it is rife with divisions. On paper the AU has some highly developed human rights norms, yet implementation has lagged far behind, and expressions of unity from the AU seem to contradict the diversity of opinion. Indeed, views on human rights and, specifically, the role of the ICC, are complex and in flux, caught between developing national and international human rights norms, the drives for international influence, deep-seated anti-imperialism, and an authoritarian old guard that wants to undermine the stated human rights goals of the AU charter and that, for perhaps good reason, may fear the consequences of these human rights developments.⁸

All of these dynamics collided in the aftermath of the UN Security Council's decision to refer the situation in Darfur to the ICC and the subsequent successful attempt by the Prosecutor to seek an arrest warrant for Omar al-Bashir. This article contends that in order to understand the seemingly contradictory statements and dynamics of the support for the ICC in Africa, it must first be recognized that the international criminal justice regime, of which the ICC is the most recent and forceful representation and institutionalization, is still in a significant period of flux. The particular situation that Africa finds itself in right now provides the background and, indeed, a fertile breeding ground for the contradictions witnessed today. This article focuses on Africa and the Bashir case because Africa is where the ICC's seven ongoing cases are located and the Bashir case has usefully highlighted potential conflicts between norms, interests, and responsibilities (although the reaction to investigations in Kenya is starting to demonstrate some of the same dynamics).⁹ It is also perhaps the first "hard case" for state cooperation with the ICC and it is the first case before the ICC that has forced states to confront their multiple interests and responsibilities in light of global power dynamics.

While the Rome Statute may be clear in what it expects of its States Parties, those legal expectations exist in a much broader international political milieu that necessarily intrudes on the smooth running of the ICC as a judicial body, especially because it relies on states to carry out its wishes. However much a sovereign state may have ceded a bit of sovereignty to the ICC, those states' multiple, overlapping, and competing interests will inevitably lead to conflicts over interpretation and relative weighting of competing interests and norms. This line of thinking follows insights from Thomas Risse¹⁰ and Kurt Mills¹¹ who, from a constructivist perspective, examine how states may "argue" with each other over rival claims and interpretations as they define their identities and interests in unsettled circumstances. This type of arguing may be particularly relevant when norms are in flux or there are conflicts between norms and interests. This is certainly the case today in Africa. There are conflicts between the "old" norm of absolute state sovereignty and "new" norms having to do with human rights, as well as human rights and a newly re-energized pan-Africanism under the somewhat contradictory African Renaissance. As a result of continuing global power imbalances, there are conflicts between African demands for a bigger seat at the global power table (and especially the UN Security Council) and a greater role in managing its own conflicts on the one hand, and a global power elite which has resisted

such demands on the other, creating a perception among many African states that they are being shut out of decisions that affect them. Finally, conflict continues over peace and justice, and the difficulties that an independent judicial process may pose for conflict management. New and evolving global and regional norms and institutions provide plenty of scope for such arguments, particularly in Africa. African states must negotiate these sometimes conflicting demands on their loyalties as they construct their identities and interests in a complex and changing environment.

II. The Creation of the International Criminal Court

The ICC was created in 1998 with the passing of the Rome Statute of the International Criminal Court. This was the culmination of years, indeed decades, of work going back to the Nuremberg and Tokyo war crimes tribunals after World War II. The Rome Statute made evolving norms of accountability for genocide, war crimes, and crimes against humanity concrete. It followed the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and its coming into existence in 2002 coincided with the creation of the Special Court for Sierra Leone—a UN-created international-national hybrid—and the development of another hybrid court in Cambodia. The creation of the ICC also coincided with the expansion of assertions and implementations of universal jurisdiction—the doctrine that any state can try someone accused of the most heinous of international crimes, like genocide, from any other state. The creation of the ICC was, it seemed, a sign of the times—a culmination of post-Cold War democratization, expansion of global governance and global institutions, and widespread recognition and implementation of human rights standards. It was a partial implementation of the “never again” norm which, until Bosnia and Rwanda, had lain dormant since the end of the Holocaust.¹²

The Rome Statute enshrines in international law individual criminal responsibility for genocide, crimes against humanity, and aggression.¹³ The statute also creates responsibilities for states parties. They accept the jurisdiction of the Court,¹⁴ are required to arrest and surrender to the Court individuals for whom an arrest warrant has been issued,¹⁵ and must provide other cooperation the Court may request.¹⁶ It is precisely the issue of cooperation, including arrest and surrender, upon which there has been much conflict in Africa. While the ICC is an independent entity, accountable to the States Parties, it also has a relationship with the UN Security Council.

A case may come before the Court in three ways. First, a State Party may refer a case over which the Court would have jurisdiction to the Prosecutor.¹⁷ Second, the Prosecutor may initiate an investigation.¹⁸ Third, the Security Council may refer a situation acting under Chapter VII of the UN Charter.¹⁹ The Security Council may also defer an investigation or prosecution for up to a renewable twelve month period.²⁰ It is the Security Council’s exercise of the referral power, but not the deferral power, that has led to a conflict between the African Union, the UN, and the ICC.

Of the more than 160 states assembled in Rome, only seven voted against the statute, including only one African country—Libya—while 120 voted in favor and twenty-one abstained.²¹ It entered into force four years later, after the requisite number of states ratified the statute. As one might expect, the largest number of ratifications come from Europe—forty-two, with another six signatories. The second largest, however, came from Africa—thirty-three, with

an additional nineteen signatories.²²

For a continent not known for its liberal or democratic political systems, this would seem to be a significant indicator of political change. The first country to ratify the Rome Statute was African—Senegal—thus highlighting the support for the ICC in Africa.²³ In addition to certain European countries, important members of the so-called “like-minded group,” which advocated for a strong ICC with an independent prosecutor, included African countries like South Africa and Ghana.²⁴ These countries typified a significant portion of the like-minded group. South Africa had recently gone through a democratic transition and wanted to “lock-in” human rights gains. Its constitution is recognized as one of the most human rights friendly and, at times, South Africa has been an outspoken supporter of human rights internationally (although it has had, in fact, more of a mixed record²⁵). Ghana is recognized as a stable, democratic, human rights-supporting state. Botswana, the continent’s longest continuous multiparty democracy, has also been a firm supporter of the ICC.²⁶

To date, all of the active cases the ICC is prosecuting are in Africa.²⁷ In December 2003 Uganda referred the situation in northern Uganda to the ICC. The Prosecutor accepted the case and instituted an investigation, eventually resulting in the issuance of arrest warrants for Lord’s Resistance Army leader Joseph Kony and four of his top lieutenants.²⁸ In 2004 the Democratic Republic of Congo (DRC) asked the ICC to investigate the situation in eastern DRC,²⁹ resulting in a number of arrest warrants and the ongoing trials of three individuals. In 2005 at the request of the government, the ICC launched an investigation in the Central African Republic, leading to the arrest and pre-trial detention of Jean-Pierre Bemba Gombo.³⁰ These actions were relatively uncontroversial—they certainly did not appear to trouble the African state parties. This was to change, however, with the referral to the ICC by the UN Security Council of the situation in Darfur, Sudan. When it became clear that the President of Sudan, Omar Hassan Ahmed al-Bashir was under investigation, there was furious lobbying by many in Africa—and the Middle East³¹—to stay the investigation.³² Once the ICC announced an arrest warrant for Bashir, Africa became much more hostile as many realized that with the first sitting head of state to be indicted, there could be others. The Prosecutor is also actively investigating the situation, including filing charges, in Kenya in the context of an outbreak of violence after the elections in 2007,³³ as well as Libya³⁴ and Côte d’Ivoire.³⁵ Other potential situations for investigation include Afghanistan, Colombia, Georgia Guinea, Honduras, Nigeria, the Republic of Korea and Palestine, although these are only at the preliminary stages.³⁶ Thus, the focus of prosecutions to date has been on Africa and this has affected how many states in Africa perceive the court.

III. General African Dynamics

The development of the ICC occurred alongside, or toward the end of one phase, of a wave of democratization and human rights improvements around the world.³⁷ While it was impacted less than other parts of the world, beginning in the late 1980s, a number of African countries became democratic or engaged in post-war/democratic transitions. Transitions occurred in Benin, Cape Verde, Ghana, Kenya, Liberia, Malawi, Mali, Namibia, Mozambique, and perhaps most profoundly South Africa, which shed its decades-long history of Apartheid.³⁸ These were added to the handful of previously existing democracies, including Botswana and Mauritius.³⁹ Not all of

these countries have become full-fledged, rights protecting, liberal democracies, but they represent some of the bright spots.

While Africa has not been completely overcome with a wave of democratization,⁴⁰ there have been other continent-wide positive human rights developments that form the background for Africa's interaction with the ICC, most significantly the creation of the AU. The AU came into existence in 2002, only eight days after the ICC, as a rebranded version of the Organization of African Unity (OAU).⁴¹ Partially a result of the initiative of former Libyan leader Muammar Qaddafi, the AU is an attempt to bring the countries of Africa closer together, create a more united international persona, and address an array of African problems. It has allowed African states to pursue what has been labeled the "African Renaissance," which entails a commitment to anti-colonialism, African solidarity, African responsibility for its policies—commonly referred to as "African solutions for African problems"—and democracy.⁴² While recognizing international norms such as democracy and human rights, the AU is also a way for Africa to chart its own path, assert itself internationally, and resist outside interference, leading at times to contradictory outcomes.

Most notable for purposes of this discussion, however, is the establishment of the African Peer Review Mechanism and the principle of "non-indifference." The former, championed by former South African President Thabo Mbeki, was intended to provide a way for the human rights records of African countries to be reviewed by the AU. Its implementation to date has been less than robust, but the very creation of such a mechanism indicates the increasing role of human rights norms in Africa.⁴³ It would be difficult to imagine such a thing happening under the old OAU, which put a significant premium on sovereignty and non-interference. Sovereign equality and non-interference by one member state in the domestic affairs of another are still core principles of the AU (as they are in the UN Charter), but Article 4h of the Constitutive Act of the African Union—also championed by Mbeki—heralded a normative shift in thinking about human rights by giving to the AU the right to intervene on human rights grounds in its member states.⁴⁴ As a precursor to the UN recognition of a "responsibility to protect,"⁴⁵ this shift was a significant watershed in the normative development of human rights on the continent. As the Legal Adviser of the AU has argued, the term "non-indifference" is a form of active solidarity that "conform(s) to the idiom in most African cultures that you do not fold your hands and just look on when your neighbor's house is on fire."⁴⁶ Another positive human rights development is the recent adoption of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa,⁴⁷ the first regional (or global) convention focused specifically on internally displaced persons (IDPs). Again, it is too soon to say whether this will actually result in better protection for IDPs; however, it is yet another sign of a normative revolution in Africa—albeit one whose practical effects may at times be hard to discern.

IV. Darfur

A. The Conflict

The conflict in Darfur began in February 2003 when the Sudan Liberation Army attacked

government forces. The attack was in response to years of marginalization of this region in western Sudan by the government in Khartoum. The government responded with significant force and armed local “Arab” militias to fight the “African” rebels.⁴⁸ The so-called *janjaweed* killed thousands, torched villages, and forced hundreds of thousands to flee their homes.⁴⁹ The world was slow to respond. First came humanitarian assistance, although the government impeded the delivery of such assistance at times. A year or so later, newspaper editorial pages started referring to the conflict as genocide. In April 2004 a departing UN humanitarian official compared Darfur to Rwanda on the ten year anniversary of the genocide there.⁵⁰ On 7 April US President George Bush referred to “atrocities” in Darfur and UN Secretary-General Kofi Annan raised the possibility of UN military action.⁵¹ In May 2004 the AU—in coordination with the government and other actors—decided to send in a small peacekeeping force—African Union Mission in Sudan (AMIS). However, it only had a mandate to monitor a humanitarian ceasefire that fell apart almost as soon as it was agreed. It could not use force to protect civilians or stop the fighting.⁵²

In July 2004 the UN Security Council finally passed its first resolution on Darfur,⁵³ which was quickly followed the following month by another resolution⁵⁴ which essentially told the government to stop the killing, which it did not.⁵⁵ Other resolutions had a similar effect.⁵⁶ As many as 200,000 people were killed and 2.3 million⁵⁷ were displaced or otherwise affected by the conflict and genocide became the general descriptor for the situation. While this did little to induce the United Nations to respond, it did launch a Commission of Inquiry, which concluded that war crimes and crimes against humanity—but not genocide—had occurred.⁵⁸ While this set off a pointless debate about why genocide had not been identified and whether this made any difference⁵⁹—tens if not hundreds of thousands of people had already been killed—it had little immediate concrete effect.

B. The Referral

However, as pressure increased for the United Nations to take action to stop the killing, the Security Council decided to take a different tack. Instead of sending in a peacekeeping mission to stop the fighting, it decided to refer the situation in Darfur to the ICC under the prerogatives given to it in the Rome Statute.⁶⁰ This obviously would not stop the fighting, but it was an easy way to avoid sending in troops and funding an expensive peacekeeping force. Indeed, it would be 2 ½ years before the United Nations deployed the UN Force in Darfur (UNAMID), essentially rehatting AMIS under the UN flag, although with a somewhat more robust mandate, including protecting civilians.⁶¹ While UNAMID did increase international presence on the ground, it cannot be considered a resounding success because the force was held hostage to the whims of Khartoum and lacked basic equipment like transport helicopters.⁶²

But at least the United Nations had decided that the perpetrators in Darfur should be held to account, with the hope of making the government and other forces think twice about further bloodshed, and removing some of the worst offenders from the scene, making peace more likely. Most importantly, it demonstrated the world’s commitment to international criminal justice. At least that was the theory. Given that 27 African states—just over half of the continent—had ratified the Rome Statute at that point, and another quarter of African countries had signed the

Rome Statute, one would expect that this would be considered a welcome development by the vast majority of Africa. Yet, beyond a mention in an AU report about Darfur,⁶³ there was little public response from Africa. The previous self-referrals to, and subsequent investigations by, the ICC had appeared to be relatively non-controversial, and thus one more investigation, even at the behest of the UN Security Council, did not seem like a threat. Indeed, after the Prosecutor decided to open an investigation on 6 June 2005,⁶⁴ there was little response. At the AU Assembly the next month, there was no mention of the referral or investigation in any of the declarations.⁶⁵ There was a declaration on the peace talks,⁶⁶ but apparently the new investigation was not perceived as a hindrance to the peace process. Nor did the next session of the Assembly lead to any mention of the investigation. This meeting was held in Khartoum and witnessed an address by Bashir in which he talked about human dignity, justice, and equality.⁶⁷ At the same time, the Assembly decided to set up a commission to investigate possibilities for trying former Chadian President Hissène Habré.⁶⁸ Thus, while fighting impunity in the Habré case, the AU honored another leader who, while not yet indicted as a war criminal, was widely understood to be behind vast crimes against humanity.⁶⁹ The AU did not seem too interested in the investigation by the ICC one way or the other. The government of Sudan, on the other hand, did seem more worried, as it set up a Special Criminal Court on the Events in Darfur, supposedly to investigate and prosecute war crimes in Darfur.⁷⁰ However, given that it was the government that was committing or supporting the atrocities, this did not lead anywhere, as one might imagine.

The investigation seemed to have little effect on the fighting, although 2006 witnessed the Darfur Peace Agreement, which was signed on 5 May between the government and one group of rebels.⁷¹ It was meant to form the basis of a permanent peace in Darfur. However, the rebel groups that did not sign the agreement continued their attacks, the government did not substantially stop its military activities, and the agreement fell apart almost as soon as it was signed.⁷² Six years later, however, although it has not led to peace in the region, it continues to be the basis on which the AU argues for a settlement and with which the Bashir arrest warrant is supposedly interfering.

In May 2007 the ICC unveiled arrest warrants for two individuals. The first was for Ahmad Harun, the former Minister of State for the Interior, who was serving as the Minister of State for Humanitarian Affairs, and who was accused of war crimes and crimes against humanity.⁷³ The second warrant was for Ali Muhammad Al Abd-Al-Rahman (also known as Ali Kushayb). Kushayb, also accused of war crimes and crimes against humanity, was a senior leader of the *janjaweed*.⁷⁴ The government refused to cooperate with the ICC and again said that it would investigate war crimes in Darfur, although not these two.⁷⁵

C. Abusing Universal Jurisdiction?

The relationship between the AU and the ICC, as well as other international justice mechanisms, became more combative in 2008. At the AU Assembly on 30 June and 1 July that year, it passed a resolution calling on non-African states (and in particular European Union states) to stop the practice of arresting and trying Africans for grave offences under the principle of universal jurisdiction.⁷⁶ On the one hand, the resolution stated that the Assembly:

Recogniz[ed] that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the Constitutive Act of the African Union.⁷⁷

At the same time, the resolution stated that “[t]he abuse of the Principle of Universal Jurisdiction is a development that could endanger international law, order and security,” and any attempt to exercise universal jurisdiction against African leaders “is a clear violation of the sovereignty and territorial integrity of these states.”⁷⁸ The arrest warrants were perceived as part of a “legal campaign” against Africa,⁷⁹ a sentiment which was reiterated by the AU Peace and Security Council on 11 July.⁸⁰ Given that this statement was in the context of a briefing by the Deputy Prosecutor of the ICC, however, the lines between universal jurisdiction and the jurisdiction of the ICC, which has a different legal basis,⁸¹ were becoming blurred in AU rhetoric.

The Princeton Principles on Universal Jurisdiction define universal jurisdiction as:

criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.⁸²

According to this principle, one state may arrest or try somebody from another state who committed a crime—in this case genocide, crimes against humanity, and war crimes—even though the crimes were not committed on the territory of the first state, the crimes were not committed by a national of the first state, and there is not necessarily any direct connection to the first state. The argument is that the crimes have transcended nationality and become international crimes, and thus all states have an interest in seeing that individuals who commit these crimes are punished and can claim jurisdiction over such individuals “as a trustee or agent of the international community.”⁸³

Although universal jurisdiction is still a highly contested concept, it gained currency in the 1990s as Western states started to initiate proceedings against numerous individuals. Perhaps the most famous was the case initiated by Spain against former Chilean President Augusto Pinochet.⁸⁴ A number of other countries have also initiated proceedings against or tried individuals for the aforementioned crimes, including eight EU countries. Some of these have been against non-Africans—including US, Israeli, and Chinese leaders (which have foundered on the shoals of global power politics)—but many have been against Africans from at least twelve African countries. Of the twenty-seven universal jurisdiction cases being pursued by EU states in 2009, ten were against Africans.⁸⁵

The AU seems particularly exercised by cases against Rwandans. Certainly Rwanda has had a fraught relationship with international criminal justice mechanisms. While the Tutsi-led post-genocide government of the Rwandan Patriotic Front called for the creation of the International Criminal Tribunal for Rwanda (ICTR), the ICTR and Rwandan government have had difficult dealings.⁸⁶ Belgium, Canada, and France, among other countries, have tried Rwandans for crimes committed during the 1994 genocide.⁸⁷ Yet, cases are now starting to

appear against Rwandan government officials. French and Spanish magistrates indicted nine and forty Rwandan officials, respectively, in 2006 and 2008. Both countries said they had evidence against Rwandan President Paul Kagame, although they could not indict him because he was a sitting head of state, but the French magistrate Jean-Louis Bruguière called for the ICTR to file charges against Kagame.⁸⁸ The Rwandan government has been very touchy about any criticisms of the Rwandan Patriotic Army's (RFP) conduct during and after the genocide and the RPF's human rights record since it came into power in 1994, playing on international guilt for not having stopped the genocide to pre-empt criticism.⁸⁹ Rwanda accused France of judicial bullying, and the Rwandan Justice Minister and Attorney General, Tharcisse Karugarama, described it as recolonization through "neo-colonial judicial coup d'état."⁹⁰ It pursued this at the AU, the outcome being the aforementioned—and subsequent—AU declarations on the alleged abuse of universal jurisdiction. The July 2008 AU decision also requested a meeting with the European Union to discuss these issues. This led to a joint report in April 2009 which surveyed state practice (including the fact that, while a number of African states have specific legislation providing for universal jurisdiction, no African state has effectively exercised universal jurisdiction), noted points of agreement and disagreement, and made recommendations.⁹¹

D. A Deferral?

On 14 July 2008, the ICC Prosecutor requested that the ICC Pre-Trial Chamber issue an arrest warrant against Bashir for war crimes, crimes against humanity, and genocide.⁹² One week later, the AU Peace and Security Council (PSC) called for the UN Security Council to use the power provided for in the Rome Statute to defer the ICC process.⁹³ It did this because, in the view of the PSC, "approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur" and Sudan more broadly, and thus result in greater suffering.⁹⁴ It also reiterated its condemnation of its perceived abuse of universal jurisdiction and insinuated that there were double standards in the application of international justice mechanisms in Africa, which could affect the rule of law, stability, and the development of national institutions in Africa.⁹⁵ There appears to be a muddling of universal jurisdiction and the ICC,⁹⁶ a general feeling of unfair persecution,⁹⁷ and a perception that the ICC and other international justice processes could harm peace efforts and institutional development. In other words, the very development of a united Africa was being put in jeopardy by rogue magistrates and prosecutors. At the same time, it recognized the serious nature of the situation and asked the government of Sudan, "in line with the principle of complementarity as enshrined in the ICC Rome Statute"⁹⁸ to bring perpetrators to justice. It also asked the AU Commission to create a high level panel to look at how to address the situation in Darfur.⁹⁹ So, while recognizing that the situation in Darfur was dire, it wanted the international community to stay out of the way while it tried to address the situation as it had since 2004, when AMIS was put into place, with rather disappointing results.

On 22 September 2008, the PSC, dissatisfied with the mere "taking note" of their request to the UN Security Council to defer the Bashir investigation, again asked the Security Council to defer the arrest warrant request.¹⁰⁰ At the same time, it reiterated the "AU's unflinching

commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act.”¹⁰¹ Later that year, the government of Sudan appointed a special prosecutor to investigate war crimes.¹⁰² This, like earlier efforts, was a sham. Yet it indicates increased pressure, both globally and continentally, to address impunity. However, such efforts could also allow Sudan and, perhaps more importantly, the AU, however disingenuously, to argue that it was capable of investigating war crimes itself. Under the principle of complementarity, there would then be no need for the ICC to continue its investigations. At the same time, efforts were under way for the handover of peacekeeping duties from AMIS to, it was hoped, a more robust hybrid peacekeeping force, UNAMID.

E. The Indictment

If 2008 provided the background for increasing frustration with what African leaders saw as an unfair and biased international criminal justice system, in which they had little or no say, 2009 witnessed the eruption of all out rhetorical war, at least by the AU, on the ICC. In February, the AU Assembly, while condemning human rights violations in Darfur and reiterating its commitment to combating impunity, also reiterated its request that the UN Security Council defer the ICC process against Bashir. In addition, it called for a meeting between the Commission (whose head, Jean Ping, has been vociferously outspoken against the ICC) and the African state parties to the ICC, which included thirty countries—57 percent of African countries.¹⁰³ On 4 March, the developing collision course between the AU and the ICC was firmly set in place by the issuance of an arrest warrant against Bashir.¹⁰⁴ The PSC reacted swiftly. The next day, it expressed “deep concern” over the arrest warrant, reiterating that it could undermine peace efforts. The PSC also expressed its obviously increased irritation that the Security Council had “failed to consider with the required attention” its request to defer proceedings against Bashir and directly indicated that it was a responsibility of the Security Council to do so¹⁰⁵—the clear implication being that the Security Council was acting irresponsibly. At the same time, it continued its high-wire balancing act by mentioning the AU’s commitment to combatting impunity and called on “Sudanese authorities to exercise utmost restraint.”¹⁰⁶

By continuing its actions in Darfur, the Sudanese government was making it more difficult for the AU to protect itself from the insidious forces of global justice (which it also supported). Even as Africa appeared increasingly united in its opposition, the seeds of its contradictory stances were becoming clearer. Africa supports international justice, but its own brand and on its own terms. Significantly, objection was made on the timing of the proceedings against Bashir, which the AU said could hurt the peace process, rather than on the proceedings themselves. Certainly, a number of African leaders had little time for Bashir—as indicated by his failed attempts to gain the Chairmanship of the AU¹⁰⁷—and wanted him to stop causing problems.¹⁰⁸ But the AU position cannot be disentangled from the broader issue of universal jurisdiction proceedings against Africans that, while significantly different in legal standing and process, had been conflated with the ICC’s jurisdiction. The PSC also appealed to the League of Arab States to help it combat the Bashir investigation—a solid ally in this regard, particularly

given the nature of most regimes in the Arab world and the fact that only three members of the Arab League—Comoros, Djibouti, and Jordan—were also a party to the Rome Statute.¹⁰⁹

In June 2009, the African state parties to the ICC met in Addis Ababa. While there was pressure on other countries to withdraw from Libya,¹¹⁰ which is not a party to the Rome Statute, and Senegal, Djibouti, and Comoros, which are state parties, the threat of mass withdrawal did not occur. Djibouti and Comoros has said that they would not arrest Bashir if he came to their countries, while the President of Senegal, Abdoulaye Wade, had previously told Bashir that he would be arrested if he came to Senegal. Most African state parties did, however, support the request for the UN Security Council to suspend the arrest warrant.¹¹¹

F. Noncooperation

July 2009 witnessed what might be seen as the logical conclusion of the increasing tension between the AU and international criminal justice. At the meeting of the AU Assembly in Sirte, Libya from 1 to 3 July, the Assembly reiterated, yet again, its concern about the perceived abuse of the principle of universal jurisdiction, focusing in particular on the immunity of state officials, and called for an international regulatory body to deal with complaints related to the exercise of universal jurisdiction.¹¹² But this was just a well rehearsed precursor to the most important decision, in which the AU Assembly expressed “deep concern” about the Bashir indictment, claimed that it undermined peace efforts, and called for an earlier Assembly decision that the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights investigate empowering the Court to try genocide, crimes against humanity, and war crimes.¹¹³

This latter decision was obviously a defensive move responding to a perception that the West was ganging up on Africa through both universal jurisdiction and the ICC. While the AU has made great rhetorical and conceptual strides since its creation in the area of the protection of human rights, the implementation of these ideas has been much slower. It is unlikely that such prosecutions would have proceeded with the same vigor—or at all—as the ICC and universal jurisdiction activities, which was the point. This stalling tactic, which is unlikely to stop the perceived abusive activities in the short run at any rate, set the stage for two other elements of the decision. The AU wanted a number of issues related to the ICC investigated, including the powers of the UN Security Council to refer cases to the ICC and defer ICC proceedings, “procedures of the ICC,” issues surrounding immunities of officials from countries not party to the ICC—e.g., Bashir’s status—as well as the question of the irrelevance of immunities more generally, and the possibility of having regional input in decisions on whether or not to prosecute.¹¹⁴ These issues developed further over the course of the following months, and will be discussed further below. However, they were all designed as attempts to put the brakes on globally based prosecutions of Africans—or at least African heads of state.

The concluding element of its decision on the ICC is so important that it is worth quoting at length. The Assembly

9. Deeply regrets that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan

in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard reiterates its request to the UN Security Council;

10. Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan;

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

12. Underscores that the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent.¹¹⁵

Momentary pause should be taken to reflect on the momentous nature of this decision. Thirty African states were at the time parties to the Rome Statute.¹¹⁶ By ratifying the Statute, they were publicly demonstrating their commitment to fighting impunity and voluntarily became legally bound by all of the provisions in the Statute, including the requirement to cooperate with the ICC and arrest those who had arrest warrants issued against them if they appeared in their territory. These same states now seemed to be saying that they would not live up to these obligations. They held a majority of seats in the Assembly and could have indicated a majority preference to decline the proposal of noncooperation. Yet as a result of a number of factors, they did not do so. Some of them were bullied by AU Chairman Muammar Qaddafi and AU Commission Chairman Jean Ping, who were highly hostile towards the ICC.¹¹⁷ But the broader context is the feeling of being persecuted by the West and ignored by the Security Council. African leaders felt that the AU's request to the Security Council was not acted upon. Indeed, there was no official discussion of the request in the Security Council, although there were likely unofficial discussions. There was no decision—either affirmative or negative—on the request. Some have suggested that many African leaders just wanted some sort of acknowledgement of their concerns and their standing as global leaders. If there had been evidence that their concerns were being taken seriously, it is possible that there would not have been as widespread support on the part of African ICC state parties as there was for this and ensuing actions.¹¹⁸

All of this activity at the AU would give the impression of a unified, monolithic Africa—indeed, that was the point. The AU came under such pressure after its decision that the AU Commission felt it had to issue a statement to try to shore up the image of unanimity. It denied rumors of pressure on some states and reiterated the AU's support for combating impunity, while there was only one reservation lodged on the Assembly decision.¹¹⁹ However, the situation is much more complex and reflects the contradictory state of flux Africa is in as it sets out to establish its identity, assert its power, and deal with multiple internal and external pressures.

Chad was the only country to express an official reservation on the Assembly decision.¹²⁰ However, Botswana has indicated a number of times, including after the Assembly,¹²¹ that it did not agree and would live up to its obligations under the Rome Statute. Benin was also reportedly unhappy with the decision,¹²² and South Africa has stated that it would arrest Bashir according to its obligations¹²³ as did Uganda.¹²⁴ Others have also expressed discontent with the decision.¹²⁵

G. The High Level Panel

The next major development came in October when the report of the African Union High Level Panel on Darfur (HLPD), also known as the Mbeki Report after its Chair, former South African President Thabo Mbeki, was presented to the AU Commission and PSC.¹²⁶ The report, which was endorsed in its entirety by the PSC,¹²⁷ argued that there were three pillars to resolving the crisis (which it characterized as “Sudan’s crisis in Darfur”¹²⁸ rather than an isolated situation in one part of the country)—peace, reconciliation, and justice¹²⁹—and put forth a number of key recommendations:

- (a) Measures to expand and strengthen the system of Special Courts to deal with crimes committed in the conflict in Darfur;
- (b) The establishment of Hybrid Courts to deal particularly with the most serious crimes, to be constituted by Sudanese and non-Sudanese judges and senior legal support staff, the latter two groups to be nominated by the African Union;
- (c) Measures to strengthen all aspects of the criminal justice system, including investigations, prosecutions, and adjudication, paying attention to its capacity to handle sexual crimes in an effective manner;
- (d) Introduction of legislation to remove all immunities of State actors suspected of committing crimes in Darfur;
- (e) Establishment of a Truth, Justice and Reconciliation Commission (TJRC) to promote truth telling and appropriate acts of reconciliation and to grant pardons as considered suitable.¹³⁰

Several observations can be made at this point about the recommendations. First, while recognizing that the ICC can only deal with a few individuals, and that Sudan is not a member of the ICC, it nonetheless asserted Sudan’s “duty to deal with the crimes that have been committed in Darfur”¹³¹ through the national legal system, perhaps recognizing what is described elsewhere as the “responsibility to prosecute.”¹³² Second, it tried to “Africanize” the international criminal justice process by creating a hybrid court including both Sudanese and non-Sudanese African judges. This was perhaps an attempt to take the initiative from global international criminal justice processes and root them in Africa, thus responding to the Africa solutions to African

problems mantra. Third, and most importantly, while the report is somewhat ambiguous on the issue – it did not take a position on whether or not Bashir should be tried by a hybrid court – there was little question of Bashir being tried by the hybrid court.

Indeed, how could he be tried by a court that is partly constituted by his own government, which is responsible for much of the killing in Darfur? Given the complicity of the government, it is somewhat difficult to see how others might also be transparently tried before hybrid courts.¹³³ However, the implicit recognition by the HLPD that Bashir needed to go before the ICC is a clear recognition of the gravity of the situation as well as the legitimacy of the ICC. Many African leaders will agree that Bashir is a particularly unsavory character who makes their lives harder and who, if they had their preference, would not be president of Sudan,¹³⁴ but it is rather difficult to say this while simultaneously attempting to pursue the ideals of African unity and anti-colonialism. While Article 4h was included in the AU Charter, significantly problematizing previous conceptions of absolute sovereignty on the continent in the context of human rights violations, Afro-centrism still demands at least public fealty to sovereignty—and to fellow African leaders.

H. The Proposal

The final flurry of activity before the ICC Assembly of States Parties (ASP) meeting in November 2009 occurred in the days between the acceptance of the HLPD report and the ASP meeting. On 6 November, the African ICC State parties held a meeting in Addis Ababa to prepare for the Rome Statute Review Conference to be held the following May in Kampala. It was attended by twenty-six state parties and fifteen African non-state parties and discussed, among other things, some of the issues raised in the July Assembly resolution. The assembled Ministers adopted the following decisions:

- 1) The Office of the Prosecutor be requested to review the 2009 Regulations and the 2007 Policy Paper regarding the guidelines and code of conduct of the exercise of Prosecutorial powers to include factors of promoting peace and submit them to the Assembly of States Parties in order to ensure more accountability.
- 2) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC should be retained as it is, in view of the fact that it is the organ responsible for the maintenance of international peace and security and has the power to set up ad hoc tribunals.
- 3) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year should be amended to allow the general Assembly of the United Nations to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly resolution 377(v)/1950 known as “Uniting for Peace Resolution”

- 4) Articles 27 and 98 of the Rome Statute should be discussed by the Assembly of States Parties under the agenda item “stock taking” in order to obtain clarification on the scope and application of these Articles particularly with regard to non States Parties. In this regard, there is need to clarify whether immunities enjoyed by officials of non states parties under international law have been removed by the Rome Statute or not.¹³⁵

These points were discussed in various fora at the ASP meeting ten days later. And, as noted at the beginning of this article, two proposals were officially put forth by the South African representative, on behalf of the AU, for the agenda of the Rome Statute Review Conference scheduled for the following May in Uganda.¹³⁶ These proposals closely resembled items 1 and 3 listed above.

First, the parties requested that the Office of the Prosecutor take into account interests of peace, in addition to interests of justice, in his or her decisions on whether to investigate and prosecute in a particular situation. Second, it was proposed that Article 16 of the Rome Statute be amended to allow the UN General Assembly to defer an investigation or prosecution in cases where the UN Security Council did not act on such a request.¹³⁷ The first proposal was problematic because it was perceived as politicizing justice as well as undermining the independence of the Prosecutor. Peace processes are political negotiations, and thus the rationale was that requiring the Prosecutor to consider interest such as peace would improperly embed him or her within such political processes. As the Office of the Prosecutor points out, such considerations fall under the jurisdiction of the UN Security Council.¹³⁸

The impetus behind the proposal on Article 16 is the lack of power African states feel within the Security Council and the perception that they and other developing states have more power in the General Assembly. The feeling of being ignored by the Security Council on the request to defer the proceedings against Bashir has already been mentioned. An even deeper grievance, however, is embedded within the broader debate over reform of the Security Council. Generally, countries of the developing world have argued that the Security Council is undemocratic and unrepresentative, and have therefore pushed for more seats for developing states. Indeed, a few African states have laid claim to a permanent seat—notably Egypt, Nigeria, and South Africa—and the AU more generally has argued for more seats for Africa.¹³⁹ There is also a general feeling among African states that the Security Council’s current make-up is unjust, does not reflect new global and regional realities, and imposes double standards (e.g., the failure to investigate alleged Israeli human rights abuses).

Given the greater representation of Africa and the developing world more generally in the General Assembly, such an amendment would arguably shift power from the Security Council and, in particular, the five permanent members who could veto any such decisions. Moreover, given the long negotiations and the delicate balancing act involved in including the Security Council in the Rome Statute as the UN organ with primary responsibility for international peace and security, such an action would likely politicize the ICC even more and make its actions that much more uncertain. Of course, this is likely the intention of some, although not all, of the countries proposing this amendment.

The call for discussing Articles 27 and 98 relates to the immunity provisions in the Rome Statute. Article 27 essentially removes all immunity—presidential, diplomatic, etc.—from nationals of state parties¹⁴⁰ while Article 98 appears to recognize the immunity of certain individuals who are nationals of non-state parties.¹⁴¹ Max Du Plessis notes the argument that by

the act of referring Darfur to the ICC, the Security Council stripped all Sudanese nationals, including the President, of their immunity.¹⁴² The issuance of an arrest warrant for Bashir, in particular, rankles some African states because of a perceived double standard on the part of the Security Council, and in particular the United States. In 2002, soon after the Rome Statute came into force, the Security Council passed resolution 1422 which in effect attempted to give blanket immunity to any individual from a non-state party for any action related to a peacekeeping mission for twelve months.¹⁴³ Although it is questionable whether Article 98 allows such blanket immunity, this provision was demanded by the Bush administration as the price for renewing the mandate for the UN Mission in Bosnia-Herzegovina.¹⁴⁴ The indictment of Bashir, President of a non-state party who would normally have a wide range of diplomatic immunities, would be perceived as particularly galling and hypocritical to African leaders in light of the attempt by the United States to exempt individuals of non-state parties (i.e. US citizens) from ICC jurisdiction. There is also, of course, the concern that one of their number might be next.

As noted above, South Africa was responsible for requesting that the proposals on Prosecutor guidelines and Article 16 be added to the agenda of the Rome Statute Review Conference due to take place the following May. Even going into the ASP, however, there was no consensus on the proposals among the African states parties. As a result, South Africa committed to introducing the proposals on behalf of the AU, but noted that it would be up to each individual state to indicate support.¹⁴⁵ South Africa apparently agreed to make the proposals as a means of heading off even more damaging proposals from the AU (including non-cooperation.)¹⁴⁶ As one of the African countries with the highest moral authority, South Africa agreed to give added weight to the proposal, although it probably also damaged its credibility a bit, particularly in light of other criticisms it had endured with respect to an apparent paradoxical stance on a variety of human rights issues.¹⁴⁷

Perhaps, in addition to warding off worse proposals, South Africa also assumed that even if the proposals were sent to the Review Conference, there was little chance that the majority of states parties would accept them (as was assumed by many observers at the ASP).¹⁴⁸ In the end, only two African states parties—Namibia and Senegal—supported the proposal on Article 16, while the discussion of Article 13 indicated a lack of support. Four African states parties—Burkina Faso, Namibia, Senegal, and South Africa—supported the proposal to include the promotion of peace in prosecutorial guidelines. These numbers indicate that, far from the united front that the AU has tried to put forth, there is much disagreement and ambivalence among African states parties on the proper role and functioning of the ICC. And given that these countries constitute a majority of all African countries, the AU position is a façade masking significant arguments and disagreements, as well as significant support for the ICC. Moreover, neither of these issues was referred to the Review Conference at that time, with the first being referred to some future meeting, and the second modified so that consultations on prosecutorial strategy were “noted.”¹⁴⁹

One other issue discussed at the ASP and destined to become a point of contention between Africa and the ICC was that of an ICC Liaison Office in Addis Ababa.¹⁵⁰ Given that all of the active cases to date were in Africa and the ICC requires the active cooperation of states to do its work, such an office was seen as a crucial link between the ICC and the AU. Talks on an office had been mooted a couple of years previously and there were discussions about an agreement in 2007, although they were not concluded.¹⁵¹ In 2008, however, there was a change in leadership in the AU Commission when Jean Ping became Commission chairman.¹⁵² Ping was, and continues to be, a fierce critic of the ICC, and in particular the Prosecutor, and this

development created an impediment to reaching an agreement.¹⁵³ Although the ASP eventually passed a resolution whereby it decided to establish such a Liaison Office,¹⁵⁴ given the controversy in the previous months there was little prospect that this would happen in the near term.¹⁵⁵

I. The Frustration

At the AU Assembly's next meeting from 31 January to 2 February 2010, the Assembly, while yet again "reiterat[ing] its commitment to fight impunity," noted "the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded."¹⁵⁶ Once again the AU expressed the need to have a common position, as well as the assumption that all African countries share the same interests, even as it becomes apparent that there are disputes about what those interests actually are and whether they are, indeed, shared by all African leaders (much less all Africans). At this same meeting, the AU also expressed its apparently increasing frustration that the Security Council had ignored its request to defer the Bashir proceedings. The Assembly also passed another resolution on the abuse of universal jurisdiction.¹⁵⁷ Thus, while recognizing their responsibility to combat impunity,¹⁵⁸ AU member states are obviously extremely frustrated at being marginalized at the highest levels of global power, while also falling back on traditional interpretations of sovereignty.

The day after the AU Assembly ended brought a further affront to AU efforts to stop the Bashir indictment. On 3 February 2010, the ICC Appeals Chamber ruled that the Pre-Trial Chamber, which had originally only issued arrest warrants for Bashir for war crimes and crimes against humanity, should reconsider their decision not to issue an arrest warrant for genocide.¹⁵⁹ As would be expected, the AU described that decision as "detrimental to the search for peace."¹⁶⁰ The ostracization of Bashir continued in March when French President Nicolas Sarkozy invited Sudan—but not Bashir—to attend a Franco-African Summit in France. The Summit was originally to take place in Egypt, but France was worried that Egypt—a non-State Party to the Rome Statute—would invite Bashir.¹⁶¹ Sudan and the AU would not have been pleased a day later when the ICC Prosecutor, Luis Moreno-Ocampo, likened monitoring the upcoming Sudanese elections to monitoring elections under Hitler.¹⁶² Such a statement would confirm fears that the ICC could potentially undermine stability not only in Darfur, but in Sudan as a whole. The statement similarly highlights a broad concern within Africa over Moreno-Ocampo's conduct more generally. He is perceived there as arrogant and political, inattentive to African concerns and perspectives, and is personally hated by many African leaders.¹⁶³

J. The Review

The continuing debate and conflicted nature of the AU's position on the ICC was evident in a statement made at the Rome Statute Review Conference in June 2010.¹⁶⁴ Ben Kioko, Legal Counsel to the AU Commission, speaking on behalf of the Commission, laid out the AU's

commitment to fighting impunity, including the call for all AU member states to ratify the Rome Statute in the AU's Strategic Plan 2004-2007. He noted that 30 of the 111 State Parties at the time were from Africa, and that all the situations currently referred to the ICC by States Parties were in Africa. He also noted that some decisions taken by the AU would be political when geopolitical issues are involved. He then went on to clarify the AU position on Darfur, noting that rebel groups put additional conditions on peace talks after the Bashir indictment.¹⁶⁵ He reiterated that the deferral request did not undermine a commitment to stopping impunity, but said that stopping impunity should be pursued in a way that does not impede the peace process.¹⁶⁶ There was nothing new in Kioko's statement. Although it perhaps made the link between the indictment and the effect on the peace process more direct, it was certainly not as strident as some other AU statements. Such stridency would, however, reappear with a vengeance the following month.

K. Genocide and a Balancing Act

On 8 and 9 July 2010, the President of the ICC, Judge Sang-Hyun Song, met with AU officials to discuss, among other things, the opening of a liaison office.¹⁶⁷ On 16 July the AU issued a statement indicating the readiness of the AU Commission Chairperson, Jean Ping, to discuss the creation of such an office.¹⁶⁸ This contradicted other signs,¹⁶⁹ but appeared to be a hopeful public stance nonetheless. Any hopes of establishing a liaison office were doomed to failure, however, given the issuance, four days previously, of a second arrest warrant for Bashir—this time for genocide.¹⁷⁰ The AU's exasperation was evident in a press release issued the same day as the previous press release.¹⁷¹ If the previous arrest warrant for Bashir inflamed passions at the AU, this newest warrant, for what many consider to be the über crime of genocide, would certainly be a giant red flag.

On 21 July, the AU Peace and Security Council "expresse[d] concern at the counter-productive consequences of the decision."¹⁷² The following week the AU Assembly rejected "for now" the request to open an ICC liaison office in Addis Ababa. In a public statement, AU Commission Chairperson Jean Ping seemed to indicate that the proposal to open a liaison office was part of a plot to target Africa: "'The ICC has no office outside of its headquarters. The issue is why are they only interested in opening an office in Africa, why not in Europe or Asia?'"¹⁷³ In addition, the AU Peace and Security Council reiterated its decision that AU member states would not cooperate with the ICC in arresting Bashir. The council also asked "Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC."¹⁷⁴ In other words, while member states may have signed the Rome Statute, their primary concern should be Africa and presenting a united African front to the rest of the world, thus highlighting the tension between universal human rights norms and institutions, and a supposedly different and monolithic set of interests for all African states. This assertion of African interests can be seen in another resolution from the Assembly—the Decision on the Promotion of Cooperation, Dialogue and Respect for Diversity in the Field of Human Rights—which "stresse[d] the need to maintain joint ownership of the international human rights agenda," to respect differing value systems, and not to include issues of private individual conduct in universalistic ideas about human rights.¹⁷⁵

African countries obviously feel a need not let the human rights agenda get away from them, and nowhere is this more evident than the conflict over gay rights on the continent. Homosexuality is seen as anathema in many parts of Africa, and many countries have been subject to significant pressure and condemnation over their policies toward gay men and women. Recently Uganda, which hosted the ICC Review Conference, came under intense international pressure for a proposed law that imposed life imprisonment for homosexual acts, and even the death penalty in some cases.¹⁷⁶ Although significant rhetorical—and actual—progress in the wide field of human rights has been made on the continent, many African states still feel pressure from universalist—read “Western”—human rights notions and institutions and, as in the case of the ICC, may see them as part of a conspiracy against Africa—hence the sometimes rather defensive stances taken by the AU.

Turning back to the issues surrounding Bashir, even though the AU appeared to take a unanimous stance on the issuing of an arrest warrant, the summit further revealed deep fissures between African countries, led on the one side by South Africa, Ghana, and Botswana, and by Libya, Eritrea, Egypt and other non-party countries on the other. As one African diplomat observed, the debate over the response to the Bashir arrest warrant and the ICC liaison office “caused a big fight between the delegates . . . Bashir is dividing us.”¹⁷⁷ While some African states parties—in particular Botswana and South Africa¹⁷⁸—have vowed to defy the call for non-cooperation, others have spoken in support. The President of Malawi—which is a party to the Rome Statute—Bingu wa Mutharika, who was also Chair of the AU at the time, stated, “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.”¹⁷⁹ Although the Rome Statute explicitly says that heads of state or government are not immune from prosecution, the first case involving a sitting leader appears to have shaken many African leaders. Mutharika, for example, said that “Bashir could not and would not be tried outside the African soil.”¹⁸⁰ Thus, even the President of a country that is a party to the Rome Statute does not want an African head of state tried outside the continent, although apparently it is OK for non-leaders to be tried. This, once again, illustrates the core of the purported change in the status of human rights over the last few decades, and in particular those related to the creation of the ICC.

Do state sovereignty and the prerogatives of power continue to outweigh the human rights imperative? The African Union position would seem to answer affirmatively, although it is more complicated. We know that the AU position is not unified. Further, the AU has not asked for a permanent suspension of the Bashir arrest warrant, which many African leaders have tied directly to the peace process—although there are obvious undercurrents of perceived bullying and chafing at the undemocratic nature of the Security Council. In addition, at the same summit, discussions arose as to whether Bashir could be tried in Africa—perhaps by the African Court of Justice—although it was decided that there was not a proper mechanism in place to do so. Another factor, moreover, was likely the realization by some leaders that they, too, might face the same fate.¹⁸¹

L. Victory?

Although Bashir did not attend the July summit in Kampala,¹⁸² he did have one small

“victory,”¹⁸³ which represented the first significant chip in the wall of the commitment of African state parties to the ICC. A few days before the summit, Bashir made his first trip to a states party to the Rome Statute since the first arrest warrant was issued when he traveled to Chad a few months after Sudan and Chad normalized relations. Chad’s interior and security minister, Ahmat Mahamat Bachir, stated, “We are not obliged to arrest Omar Hassan al-Bashir . . . Bashir is a sitting president. I have never seen a sitting president arrested on his travels by the host country.”¹⁸⁴ Chad’s conduct clearly flouted its obligations under the Rome Statute, but it appeared to do so because of the underlying issue of Bashir’s status as a national leader, the targeting of which by the ICC seems to be anathema to African leaders. This would also seem to indicate the triumph of national interest over international commitments, because Chad expressly disagreed with the noncooperation in July 2009 before its rapprochement with Sudan. AU Commission Chairperson Ping again made accusations of “double standards” and “bullying.”¹⁸⁵

Bashir scored another minor victory when he traveled to Kenya in late August 2010. Besides being a violation of Kenya’s obligations under the Rome Statute, the visit is also somewhat ironic because Kenya had consented to the ICC’s opening of an investigation on the 2007 post-election violence.¹⁸⁶ The visit, however, exposed certain divisions in Kenya. While Kenyan President Kibaki invited Bashir to attend the ceremony celebrating the country’s new constitution, the Prime Minister, Raila Odinga, indicated that this decision was a mistake. Odinga called for Kenya to apologize to the international community, and especially the ICC. In doing so, Odinga referenced negative perceptions of Kenya that could be formed as a result of the visit and suggested that the AU was in effect reverting to the policy of noninterference and impunity held during the period of the OAU, noting that, “when [Africa] formed the AU, we said goodbye to sovereignty.”¹⁸⁷

Kenya’s perspective, however, apparently took another turn a couple of months later when Bashir was due to travel to Kenya at the end of October to attend a meeting organized by the Inter-governmental Authority for Development (IGAD). On 25 October, in advance of the meeting, the ICC publicly reminded Kenya of its responsibility to arrest Bashir and asked to be informed of any impediments to such an action should Bashir travel to Kenya again.¹⁸⁸ The meeting was then moved to Ethiopia, which is not a party to the Rome Statute.¹⁸⁹

Kenya entered further into the debate at the AU Assembly Meeting in January 2011. The AU not only supported Kenya (and Chad) in allowing Bashir to visit, noting that they “were implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir as well as acting in pursuit of peace and stability in their respective regions,” but also supported calls for the Security Council to defer the ICC proceedings in Kenya “in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence.”¹⁹⁰ The AU also continued to support changes to Article 16, and called on “African States Parties to the Rome Statute of the ICC to speak with one voice.” And it essentially demanded that the next Prosecutor be African.¹⁹¹ While recognizing, yet again, its commitment to fight impunity under Article 4h, the AU also raised the issue of universal jurisdiction, and called on “Member States to apply the principle of reciprocity to countries that have instituted proceedings against African State Officials.”¹⁹² These actions and statements not only portrayed Africa as a victim, but also, apparently, further indicated that Africa would fight back with the same supposed unfair proceedings that have been instituted against Africans.¹⁹³ On 8 May and 14 October 2011, respectively, Bashir also visited Djibouti and Malawi, both ICC state parties.¹⁹⁴

V. Decoding the African Paradox

Africa's experience with the ICC over the last few years creates the impression that Africa is in an extended argument—both within Africa itself and between a number of African countries and the West. It exposes continuing and unresolved paradoxes and conflicts, highlights geo-political inequalities, and points to real concerns about the functioning of the international criminal justice regime.

A. Conflict 1: Human Rights v. Sovereignty

As newly decolonized states sought to protect themselves from their former colonial masters and (far too many) African leaders sought to protect their corrupt and authoritarian privileges, the OAU was characterized by its slavish adherence to state sovereignty. Rhetorically, this changed dramatically with the creation of the AU. In an even more far-reaching precursor to the responsibility to protect, with Article 4h the AU sought to put the protection of human rights at the core of its mandate and thus inserted a significant wedge into the previous absolute conceptions of sovereignty.¹⁹⁵ However, the impulse to protect the sovereign—i.e. Presidents and Prime Ministers—remained. The exercise of universal jurisdiction threatened Rwanda, in particular, as it sought to control the prosecution of those involved in the genocide and undertook to protect the post-genocide government from allegations of human rights abuses.

Although the AU has supported the prosecution of an ex-leader—Hissène Habré—the issuance of an arrest warrant for a sitting President was ultimately too much for some African leaders to accept. These leaders included not only those who have little time for international human rights mechanisms, and who indeed might be subject to them themselves, but also those leaders whose states were parties to the Rome Statute and had made an affirmative public declaration of their support for international human rights processes. This entails an argument, then, between the old guard of Qaddafi and others of his ilk on the one hand, and transitioning or post-transition African states that are putting forth a different view of sovereignty and the international community. Yet, as norms are introduced and embraced one would expect uneven response and implementation. Still, while the AU Charter embraces human rights norms, and while there is a recognition that human rights abuses are at the root of many threats to international peace and security on the continent, questions of sovereignty will not easily be resolved.

This appears to be the case even with some early supporters of the ICC who, at least partially, seem to be arguing amongst themselves over the proper application of the Rome Statute vis-a-vis sovereign immunity. Yet, the extent of the argument can be overblown. While the African Union tries to put forth a united front, there is disagreement amongst its members, and indeed even support for the Rome Statute in some quarters, as indicated, for example, by the overwhelming opposition to amending Article 16 at the ASP in 2009. Given that even supposed post-sovereign Western countries who demonstrate a significant—although certainly not total—support for human rights also attempt to retain many trappings of sovereignty when it suits them, we should not be surprised that the post-sovereign transition in Africa would be rather rocky.

Furthermore, some of this apparent argument has little to do with sovereignty per se, but rather with the conflict over allegiances and who makes the rules.

B. Conflict 2: Human Rights v. Pan-Africanism

A significant element of the African Renaissance is pan-Africanism, which might include the “African solutions for African problems” mantra, but also includes a general inclination for supporting one’s fellow African states. Tension between this idea and the international human rights duties imposed on African states is evident in the debate over how to deal with Zimbabwe President Robert Mugabe, a hero of the anti-colonial struggle turned petty despot. Still, the AU and other African governments, such as South Africa—which might be expected to be more critical—have applied little pressure in this area. They have done so while simultaneously condemning violent changes in government in Guinea and Niger—a change from behavior under the OAU—and supporting the opposition leader deemed to have won the 2010 presidential election in Côte d’Ivoire rather than the incumbent president who tried to hold onto power.¹⁹⁶ Such behavior is also evident with Bashir, although perhaps with less conviction.

Although the AU has asked for the proceedings against Bashir to be suspended, declared that African states will not cooperate with the ICC in arresting Bashir, and denounced what it perceives to be anti-Africanism, internal and external arguments belie the united front put forth by the AU. First, while the AU has unanimously and consistently asked for the proceedings against Bashir to be deferred, there is little suggestion (at least among most ICC states parties) that the case should be scrapped altogether. The only states that might make such a suggestion would be the authoritarian, old guard states that have little use for the new human rights face of Africa. Thus, while some may want to protect Bashir indefinitely, many others have little time for him and see him, instead, as a nuisance, although these individuals at the same time still vaguely fall back on the idea of pan-Africanism.

It is these same individuals and states that have been bullied by Qaddafi and others who use money and other tactics to ram through hard-nosed resolutions in the AU. Thus the issue of non-cooperation, like proposals to reform the Rome Statute, is not evidence of an absolute turning away from the ICC on the part of Africa, as some suggest. Rather, there is a diversity of opinion. Some countries are also, no doubt, coming face to face with what the Rome Statute actually means and wrestling internally and externally with the profound implications that may not have been evident to some leaders when they signed. Furthermore, some of the perceived opposition stems, as we will see, from concerns over the proper role of regional and global mechanisms, and the timing for international criminal justice mechanisms, rather than opposition to international criminal justice itself. Would the OAU have held a debate on whether to try an African leader for crimes against humanity?

Some of the opposition also comes from an intense personal dislike of the Prosecutor. His term is up in 2012, however, and a new Prosecutor has been elected.¹⁹⁷ The AU demanded that the next Prosecutor be African. The AU got its way – the Deputy Prosecutor, Fatou Bensouda, will take over as Prosecutor. The fact that an African – and the AU’s candidate – was chosen, could help overcome some of the neo-imperial fears and heal part of the rift between Africa and the ICC. It might also help if the next Prosecutor is perhaps more circumspect regarding

pronouncements and not perceived as arrogant and political.¹⁹⁸ In addition, the AU will also choose a new AU Commission Chair. If Jean Ping, who failed to receive enough votes in the first round of voting in January 2012 and is thus not eligible to stand again to be re-elected,¹⁹⁹ is replaced by an individual with less personal animosity toward the ICC (or at least the prosecutor), this, combined with an African Prosecutor, could herald a new, more moderated tone in the AU-ICC relationship, even if the existing conflicts and tensions remain.

C. Conflict 3: Global vs. Regional Geopolitics

The pan-Africanism referred to above is related to broader debates about the role of regional and global institutions, and Africa has made a move to be much more proactive in the area of peace and security, amongst other issues.²⁰⁰ AMIS, for example, was an attempt, however weak, to address an African problem with an African solution in the absence of global solutions or interest. Africa has also attempted to be more assertive globally, in particular in the context of the United Nations. The attempt to give the UN General Assembly authority to defer ICC proceedings was an attempt to move power away from the Security Council, where Africa sees itself at a distinct disadvantage, to an arena where it and other developing regions could have more of a say in global affairs. Furthermore, it has steadfastly asserted the need for a greater African presence on the Security Council itself. The so-called Ezulwini Consensus of 2005 asserted the right of the AU, under Article 4h, to intervene in cases of genocide without prior Security Council approval.²⁰¹ It also demanded two permanent seats with veto on the Security Council for Africa and an additional five nonpermanent African seats.²⁰² The chances of this demand being met are extremely slim, given that the current veto powers are not going to dilute their power by giving more states the veto. This continuing demand, however, underscores the perception (and reality) of the undemocratic nature of the Security Council and the feeling amongst African states that they lack a fully representative voice on the UN body—which means that decisions are made that do not reflect the wishes of Africans. Thus, the ICC and the Bashir arrest warrant are tied into much broader discussions about the proper role of global and regional institutions, and the undemocratic nature of the Security Council.

Africa feels sidelined, and the frustration evident in AU declarations over the refusal of the Security Council to make any sort of public decision about the deferral request heightens this perceived disjuncture between an assertive Africa and its inability to adequately pursue its agenda at the United Nations. The AU's directive to member states that they must balance their global obligations with their regional obligations puts this in high relief. As a result, real concerns about the role and sequencing of human rights mechanisms in conflict management fall prey to ideology and geopolitics. If the Security Council and the ICC were more amenable to considering the AU positions, even if not ultimately agreeing with them (e.g. officially considering, if then rejecting, the Darfur deferral request), this could possibly defuse some of the tension between the AU and ICC.

D. Conflict 4: Peace v. Justice?

The final argument is perhaps the most real, at least superficially. The broad peace vs. justice debate is ongoing and likely irresolvable. Although the ICC may have pushed Joseph Kony to the negotiating table, Uganda found to its dismay that once ICC mechanisms are put into motion, it is difficult, if not impossible, to stop them—even when they may undermine peace negotiations. It is an open question, however, whether withdrawing the ICC arrest warrant would actually lead to an accommodation with Kony.²⁰³ Many arguments also exist as to whether it is truly possible to achieve lasting peace without some sort of legal justice or accountability. In Darfur, for example, there may be real concerns over the effect of the arrest warrant on the peace process and other aspects of the situation. Indeed, Philipp Kastner argues the arrest warrants “are likely to represent an obstacle to a peace deal.”²⁰⁴

The ejection of international humanitarian organizations after the Bashir arrest warrant was issued further illustrates the potential problems.²⁰⁵ To understand the true impact of the deferral decision, however, the exact goal of the deferral request must be further analyzed. If the deferral is granted, what then? Bashir has not, in fact, been a positive force for regional stability, and it is his government that has undertaken or supported most of the killing in Darfur. African leaders know this. Certainly, many see Bashir as an irritant, not as a positive force for stability. The AU has not suggested that the arrest warrant be permanently deferred; neither has it suggested that Bashir not face justice. Indeed, it debated (inconclusively, it must be said) whether the AU could try him. This is not the sign of a continent rejecting international criminal justice norms. Rather, it may be interpreted as a reflexive overreaction²⁰⁶—overreaction to a sitting leader, one of their own, facing the possibility of being dragged to The Hague, the first time this would have happened in Africa, and the loss of control over conflict management processes.

An independent ICC does pose significant challenges to conflict management. Still, one might ask whether the argument is really over peace versus justice, or whether it is, again, the case of an assertive Africa coming face to face with larger realities. Today’s Africa played a minor role in creating the existing structure of the Security Council. It did, however, play a significant role in creating the ICC of today, and is now faced with the unpredictable consequences of an independent ICC inserting itself—or being inserted—into the continent’s future conflicts. There are many claims about “traditional” justice and alternative “African” ways of resolving conflict, which may indeed have significant grains of truth in them. But it is also important not to essentialize or romanticize these processes, just as it is important to be open to these perspectives. Different approaches may have different application in different situations. And, indeed, the peace and justice debate is not confined to Africa. Yet, it is discomfiting to have to deal with yet another unpredictable global institution.

VI. Conclusion

The past three years have not witnessed the commitment to fighting impunity on the part of African states that one might expect, given the number of African signatories to the Rome Statute. However, neither have the events since 2008 demonstrated a complete lack of support on the part of African states for the ICC. The AU has tried to put forth a united public face, but this masks very significant disagreements between and among the African ICC states parties and

non-states parties.

African states were crucial in creating the ICC. Four African states have referred cases within their territory to the ICC, and another has allowed a case to go forward.²⁰⁷ A few states, most notably Botswana, and somewhat more ambiguously South Africa, have been staunch defenders of the ICC and have resisted efforts to defer the Bashir prosecution. Others have expressed concern over the timing of the actions against Bashir, worrying that it might interfere with peace efforts. While the AU has requested that the arrest warrant be suspended, it has not suggested that Bashir not face justice. Indeed, it even debated whether the AU could try him. This is not the sign of an Africa that is turning its back on justice. Rather, it indicates an Africa that is arguing with itself and the international community over how best to proceed. Still, it does reflect a certain level of discomfort for African states as they face the reality of what more than 60 percent of them have signed on for.

As much as anything, however, it is probably indicative of the difficult process any revolution in international norms and institutions goes through as the norms and institutions fight to claim their place in the international arena. Not all states will come on board at once, and even many of those that do will go through a significant period of soul-searching and realignment of their understanding of their interests. Article 4h of the AU Constitutive Act was revolutionary, not only for Africa, but for the entire world, although nobody expected it to be implemented in full bloom immediately, if ever. African support for the ICC is one significant element of this revolution in sovereignty. Nevertheless, it would be naïve to expect fully formed implementation of the ideals of the Rome Statute to appear overnight, even amongst its legal adherents. The implementation of an international criminal justice regime is hardly an unproblematic exercise. States will come to different understandings of the regime's meaning and proper role.

While it is a legal regime, the Rome Statute is also the result of a political process, and its implementation is embedded within global political processes where not only the quest to end impunity is up for grabs, but also other major concerns like access to the pinnacle of global power or states' evolving identities. These all involve elements of argument—within states, between states, between institutions. The African argument over the multiple understandings of the ICC is just one of these arguments, although the fact that the argument is happening at all, and states take it so seriously, is evidence that the terms of international argument have changed—from how to maintain absolute sovereignty, and in the process protect major human rights abusers, to how to support human rights commitments while engaging with other elements of state identity. While Bashir may be dividing Africa, it is a division which would have been unthinkable fifteen years ago. This argument is indicative of the multiple identities African states are dealing with as they argue amongst themselves and with the rest of the world over the proper interpretation and application of global and regional norms.

VII. Postscript: Libya

On 26 February 2011, the UN Security Council referred the situation in Libya to the International Criminal Court.²⁰⁸ Given the hostility demonstrated toward the ICC on the part of the African Union, it might be expected that this would further exacerbate the relationship and lead to further condemnation of the ICC, as would the subsequent resolution calling on UN

member states “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.”²⁰⁹ Yet, there was no outcry from the African Union, and this situation may, paradoxically, help to repair the relationship, or least create the conditions for doing so. The three African members on the Security Council (Gabon,²¹⁰ Nigeria, and South Africa) voted for the referral.²¹¹ The AU Peace and Security Council had called for the crisis in Libya to be resolved within the framework of the two resolutions (1970 and 1973).²¹² And while the PSC had previously rejected any military intervention,²¹³ and complained about the Security Council not allowing a mission of its own to go ahead,²¹⁴ these are not the actions of a continent implacably hostile to the ICC and the UN Security Council.

Although Qaddafi had been a very big supporter and driving force within the AU project, he was also one of the most isolated leaders in the world (both internationally and domestically), and it was that much more difficult for African leaders to give him the same support afforded Bashir. Indeed, the support of the three African members of the Security Council, the lack of African outcry against the referral, and the seeming support for the referral by the PSC, perhaps indicate a move away from the imperialist ICC discourse and a move towards supporting the human rights provisions of the AU Constitutive Act. Furthermore, the death of Qaddafi on 20 October 2011 eliminated one extremely important source poisoning the relationship between Africa and the ICC.²¹⁵ Joined with changes in the leadership of the AU Commission and a new African ICC Prosecutor, this could breathe new life into the relationship. While the core arguments, conflicts, and paradoxes will still exist, the background conditions under which the arguments take place could change, possibly altering the terms, and outcomes, of the arguments themselves.

Endnotes

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¹ Grand Bay (Mauritius) Declaration and Plan of Action, *adopted* 16 Apr. 1999, O.A.U., Ministerial Conf. Hum. Rts., *available at* http://www.achpr.org/english/declarations/declaration_grand_bay_en.html.

² Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on Behalf of the AU Commission, at the Review Conference of the Rome Statute of the International Criminal Court (ICC), Kampala, Uganda, 31 May-11 June 2010.

³ *Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC Held at The Hague, Netherlands from 16 to 26 November 2009*, 26 Nov. 2009, A.U. Exec. Council, 16th Ord. Sess., 29 Jan. 2010, Annex 2, A.U. Doc. EX.CL/568(XVI).

⁴ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), *adopted* 3 July 2009, A.U. Assembly, 13th Ord. Sess., ¶ 5, A.U. Doc. Assembly/AU/13(XIII).

⁵ Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 225 (2010).

⁶ A state might sign and ratify a treaty for other reasons than to demonstrate normative support, in particular because of outside pressure or to gain material resources, but neither of these are particularly relevant in the case of the ICC. Little pressure could be put on states to ratify the Rome Statute (indeed, states were under pressure by the US not to sign, or at least not enforce ICC requests against US citizens), and there are few direct material gains to be made by becoming a party to the ICC. It has been suggested that some leaders may not have understood the full extent of what they were agreeing to, and signed because it seemed to be expected of them. Author interviews. Simmons and Danner argue that states ratify the Rome Statute as an act of self-binding. Ratification creates a credible commitment to domestic actors that the government will not engage in atrocities and make real attempts to resolve conflict. Simmons & Danner, *supra* note 5. Another reason governments might sign is to use it against their enemies. Simmons and Danner find little support for this possibility, arguing that the ICC can investigate both non-governmental and governmental actors, and this leaders would not want to open themselves up to this possibility. While this is true, the governments in both Uganda and the Democratic Republic of Congo have attempted to use the ICC against their opponents, and certainly the Ugandan government did not seem to understand that it could not refer only its enemies to the Court. Further, in the case of Uganda, the actual practice of the ICC Prosecutor has been to focus on nongovernmental actors.

⁷ See *Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC Held at The Hague*, *supra* note 3.

⁸ As events in Tunisia, Egypt, and Libya have put in high relief.

⁹ *African Leaders Behind Kenya to Defer ICC Trials*, RADIO NETHERLANDS WORLDWIDE, 1 Feb. 2011, available at <http://www.rnw.nl/international-justice/article/african-leaders-behind-kenya-defer-icc-trials>.

¹⁰ Thomas Risse, “Let’s Argue!”: *Communicative Action in World Politics*, 54 INT’L ORG. 1 (2000).

¹¹ Kurt Mills, *Vacillating on Darfur: Responsibility to Protect, to Prosecute, or to Feed?*, 1 GLOBAL RESPONSIBILITY TO PROTECT 532 (2009).

¹² For more on the creation of the ICC, see BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* (2008); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (3d ed. 2007); ERIC K. LEONARD, *THE ONSET OF GLOBAL GOVERNANCE: INTERNATIONAL RELATIONS THEORY AND THE INTERNATIONAL CRIMINAL COURT* (2005); GOVERNANCE, ORDER, AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN REALPOLITIK AND A COSMOPOLITAN COURT (Steven C. Roach ed., 2009).

¹³ While the crime of aggression was included in the Rome Statute, the Court’s jurisdiction was suspended until the States Parties agreed to a definition and the scope of application of the crime. The States Parties agreed to a definition at the Review Conference of the Rome Statute in June 2010, but its actual application has been suspended until at least 2017. Press Release, ICC,

Review Conference of the Rome Statute Concludes in Kampala, (12 June 2010), *available at* <http://www.reliefweb.int/rw/rwb.nsf/db900SID/ASAZ-86CGWF?OpenDocument>.

¹⁴ Rome Statute of the International Criminal Court, *adopted* 17 July 1998, art. 12, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002).

¹⁵ *Id.* art. 89.

¹⁶ *Id.* art. 93.

¹⁷ *Id.* art. 14.

¹⁸ *Id.* art. 15.

¹⁹ *Id.* art. 13.

²⁰ *Id.* art. 16.

²¹ SCHABAS, *supra* note 12 at 18, 20-21.

²² *See* Coalition for the International Criminal Court [CICC], States Parties to the Rome Statute of the ICC: 120 Ratifications as of 4 December 2011, *available at* http://www.iccnw.org/documents/RATIFICATIONSbyRegion_December2011_eng.pdf; CICC, <http://www.iccnw.org/>.

²³ Simmons & Danner, *supra* note 5.

²⁴ Other African countries included Burkina Faso, Burundi, Congo (Brazzaville), Egypt, Gabon, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, Swaziland, and Zambia. SCHABAS, *supra* note 12, at 18. *See also* Kurt Mills & Anthony Lott, *From Rome to Darfur: Norms and Interests in US Policy Toward the International Criminal Court*, 6 J. HUM. RTS. 497, 505 (2007).

²⁵ Tristan Anne Borer & Kurt Mills, *Explaining Postapartheid South African Human Rights Foreign Policy: Unsettled Identity and Conflicting Interests*, 10 J.HUM. RTS. 76 (2011).

²⁶ *See* Democracy Web, Accountability and Transparency: Country Studies—Botswana, *available at* <http://www.democracyweb.org/accountability/botswana.php>.

²⁷ ICC, Situations and Cases, *available at* <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>

²⁸ Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (29 Jan. 2004).

²⁹ The ICC prosecutor had previously indicated that he would seek to begin an investigation under his *proprio motu* given to him in the Rome Statute, although he said that he would prefer a referral from the government. Press Release, ICC, Prosecutor Receives Referral of the Situation

in the Democratic Republic of Congo (19 July 2004).

³⁰ Press Release, ICC, ICC Arrest Jean-Pierre Bemba—Massive Sexual Crimes in Central African Republic Will Not Go Unpunished (24 May 2008).

³¹ *Arab League Says Sudan Agrees to Investigate Darfur War Crimes*, SUDAN TRIBUNE, 23 July 2008, available at <http://www.sudantribune.com/Arab-League-says-Sudan-agrees-to,27983>.

³² Author interviews.

³³ Situation in Kenya, No. ICC-01/09, Decision on the Authorization of an Investigation (31 Mar. 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

³⁴ Press Release, ICC, Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya (3 Mar. 2011), available at http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf.

³⁵ Situation in Côte d’Ivoire, No. ICC-02/11, Decision on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, (3 Oct. 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>.

³⁶ Report of the International Criminal Court to the United Nations for 2010/11, United Nations General Assembly, A/66/309 (19 August 2011), p. 3, available at <http://www.icc-cpi.int/menus/icc/reports%20on%20activities/court%20reports%20and%20statements/seventhreport>

³⁷ THE GLOBAL RESURGENCE OF DEMOCRACY (Larry Diamond & Marc F. Plattner eds., 2d ed. 1996).

³⁸ Claude Ake, *Rethinking African Democracy*, in THE GLOBAL RESURGENCE OF DEMOCRACY 63, 64 (2d ed. Larry Diamond & Marc F. Plattner eds., 1996).

³⁹ *Id.*

⁴⁰ Larry Diamond notes “both democracy on the march and democracy in retreat” in Africa. Larry Diamond, *Introduction*, in DEMOCRATIZATION IN AFRICA: PROGRESS AND RETREAT, at ix, x (Larry Diamond & Marc F. Plattner, eds., 2010). In 1989, according to Freedom House, just 6 percent of African countries could be described as “free,” 24 percent as “partly free,” and 70 percent as “not free.” By the end of 2009, things had improved appreciably, although Africa still lagged significantly behind the rest of the world. In 2009, 19 percent of states were label “free” (down from 23 percent immediately after the creation of the AU), 48 percent as “partly free,” and 33 percent as “not free.” The Arab Spring revolutions that saw the overthrow of authoritarian leaders in Tunisia, Egypt, and Libya in 2011 may contribute to this improvement. Globally, states moved from 37 percent to 46 percent “free,” 26 percent to 30 percent “partly free,” and 37 percent to 24 percent “not free.” Statistics were taken from FREEDOM HOUSE, FREEDOM IN THE WORLD 2012: THE ARAB UPRISINGS AND THEIR GLOBAL REPERCUSSIONS, REGIONAL DATA,

available at <http://freedomhouse.org/report/freedom-world/freedom-world-2012>. However, the actual electoral practices and media advantages of governments that create an uneven playing field in some countries may call into question the democracy designation of some African countries. See Diamond, *supra*, at xi; Steven Levitsky & Lucan A. Way, *Why Democracy Needs a Level Playing Field*, J. DEMOCRACY, Jan. 2010, at 57.

⁴¹ Rachel Swarns, *African Leaders Drop Old Guard for One That Has Power*, The New York Times (9 July 2002).

⁴² Borer & Mills, *supra* note 25. In January 2011, the Assembly of the African Union further recognized these various elements of the African Renaissance in a discussion on “shared values.” *Declaration on the Theme of the Summit: “Towards Greater Unity and Integration Through Shared Values,”* 31 Jan. 2011, A.U. Assembly, 16th Ord. Sess., A.U. Doc. Assembly/AU/Decl.1(XVI).

⁴³ Magnus Killander, *The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward*, 30 HUM. RTS. Q. 41 (2008).

⁴⁴ Constitutive Act of the African Union, art. 4h, adopted 11 July 2000 (*entered into force* 26 May 2001).

⁴⁵ At the 2005 World Summit, the gathered states declared that the United Nations had a responsibility to act in situations of widespread gross violations of human rights, including using force against the wishes of a state where such abuses were occurring. *2005 World Summit Outcome, adopted* 16 Sept. 2005, G.A. Res. 60/1, U.N.GAOR, 60th Sess, 8th plen. mtg., Agenda Items 46 and 120, ¶¶ 138-40, U.N. Doc. A/Res/60/1 (2005).

⁴⁶ Ben Kioko, *The Right of Intervention Under the African Union’s Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT’L REV. RED CROSS 807, 819-20 (2003).

⁴⁷ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), *adopted* 23 Oct. 2009.

⁴⁸ The terms “Arab” and “African” are highly problematic in the Sudanese context and do not adequately correspond to the complex construction of identities, although these terms have become shorthand for various groups involved in the conflict in Darfur. See GÉRARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE* (rev. & updated ed. 2007); MAHMOOD MAMDANI, *SAVIORS AND SURVIVORS: DARFUR, POLITICS, AND THE WAR ON TERROR* (2009).

⁴⁹ PRUNIER, *supra* note 48, at 100-2.

⁵⁰ *Id.*, at 114.

⁵¹ Mills, *supra* note 11, at 544-46.

⁵² International Crisis Group, *To Save Darfur*, 14-15 (Africa Report No. 105, Mar. 2006),

available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/To%20Save%20Darfur.pdf>.

⁵³ Resolution 1547 (2004), *adopted* 11 June 2004, S.C. Res. 1547, U.N. SCOR, 4988th mtg., U.N. Doc. S/RES/1547 (2004).

⁵⁴ Resolution 1556 (2004), *adopted* 30 July 2004, S.C. Res. 1556, U.N. SCOR, 5015th mtg., ¶ 6, U.N. Doc. S/RES/1556 (2004).

⁵⁵ Warren Hoge, *Annan Says Sudan Hasn't Curbed Militias; Urges More Monitors*, N.Y. TIMES, 2 Sept. 2004, available at <http://www.nytimes.com/2004/09/02/international/africa/02nations.htm>.

⁵⁶ Including Resolution 1564 of 18 September 2004 and Resolution 1574 of 19 November 2004. Resolution 1564 (2004), *adopted* 18 September 2004, S.C. Res. 1564, U.N. SCOR, 5040th mtg., U.N. Doc. S/RES/1564 (2004); Resolution 1574 (2004), *adopted* 19 November 2004, S.C. Res. 1574, U.N. SCOR, 5082nd mtg., U.N. Doc. S/RES/1574 (2004).

⁵⁷ PRUNIER, *supra* note 48, at 150-51.

⁵⁸ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 Jan. 2005, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

⁵⁹ PRUNIER, *supra* note 48, at 152-58; Samantha Power, *Dying in Darfur*, NEW YORKER (30 Aug. 2004), available at www.newyorker.com/archive/2004/08/30/040830fa_fact1.

⁶⁰ Resolution 1593, *adopted* 31 Mar. 2005, S.C. Res. 1593, U.N. SCOR, 5158th mtg., ¶ 4, U.N. Doc. S/RES/1593 (2005).

⁶¹ Resolution 1769, *adopted* 31 July 2007, S.C. Res. 1769, U.N. SCOR, 5727th mtg., U.N. Doc. S/RES/1769 (2007).

⁶² Mills, *supra* note 11, at 551-52.

⁶³ *Report of the Chairperson of the Commission on the Situation in the Darfur Region of the Sudan*, 28 Apr. 2005, A.U. Peace & Sec. Council, 28th Meeting, A.U. Doc. PSC/PR/2(XXVIII). Interestingly, the communiqué from the meeting, which is completely focused on Darfur, did not mention the ICC referral. Obviously, at this point, this was not considered something to get too exercised about. See Communiqué of the 28th Meeting of the Peace and Security Council, 28 Apr. 2005, A.U. Peace & Sec. Council, 28th mtg., A.U. Doc. PSC/PR/Comm.(XXVIII).

⁶⁴ Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (6 June 2005).

⁶⁵ The AU, under the leadership of AU Chairman Nigerian President Olusegun Obasanjo and AU Commission Chairman Alpha Oumar Konare, considered how to help Sudan respond to the referral, eventually recommending that Sudan should amend its laws to encompass the kinds of

crimes occurring in Darfur as well as set up special courts, a special prosecutor, and an appeals tribunal that would include judges from other African countries. Sudan did eventually amend its laws, but only low-level crimes were followed up and the investigation teams were very weak. This made it very difficult to invoke the complementarity clause in the Rome Statute to head off further investigation. Author interviews.

⁶⁶ *Declaration on the Inter-Sudanese Peace Talks in Darfur*, 5 July 2005, A.U. Assembly, 5th Ord. Sess., A.U. Doc. Assembly/AU/Decl.3(V).

⁶⁷ President Omer El-Bashir, Welcome Address in the African Peer Review Forum (20 Jan. 2006), *available at* <http://www.africa-union.org/summit/jan%202006/Bashir%20APRM-opening%20en.pdf>.

⁶⁸ Decision on the Hissene Habre Case and the African Union, 24 Jan. 2006, A.U. Assembly, 6th Ord. Sess., A.U. Doc. Assembly/AU/8(VI)Add.9. The AU subsequently decided that the case fell within the competence of the AU and that Senegal should try him “*on behalf of Africa.*” Assembly of the African Union, Decision on the Hissene Habre Case and the African Union, 2 July 2006, A.U. Assembly, 7th Ord. Sess., ¶ 5(ii), A.U. Doc. Assembly/AU/3(VIII).

⁶⁹ An AU Committee also recommended that Bashir be named Chair of the African Union, although he ultimately withdrew his candidacy with a promise he would get it the following year. In the end, the AU did not name him as chair. *Africa Snub to Sudan over Darfur*, BBC News (29 January 2007), *available at* <http://news.bbc.co.uk/1/hi/6310025.stm>; Ciugu Mwangiru, *Africa Union picks next leader*, Africa Review (25 January 2012), *available at* <http://www.africareview.com/Special+Reports/Africa+Union+votes/-/979182/1313660/-/2x55wuz/-/index.html>.

⁷⁰ Report of the African Union High-Level Panel on Darfur, Darfur: The Quest for Peace, Justice, and Reconciliation, 29 Oct. 2009, A.U. Peace & Sec. Council, 207th mtg., ¶ 215, A.U. Doc. PSC/AHG/2(CCVII) [hereinafter HLPD], *available at* <http://www.darfurpanel.org/2.html>.

⁷¹ Darfur Peace Agreement, *adopted* 5 May 2006, *available at* http://www.sudantribune.com/IMG/pdf/Darfur_Peac_Agreement-2.pdf.

⁷² PRUNIER, *supra* note 48, at 176-84.

⁷³ Situation in Darfur, Sudan, in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir, Warrant of Arrest for Ahmad Harun, Case No. ICC-02/05-01/07 (27 Apr. 2007), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>.

⁷⁴ *Id.*

⁷⁵ Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), at 4, (22 Apr. 2008), *available at* <http://www.iccnw.org/documents/7thUNSCversionsenttoUN29may.pdf>. The government said that Harun had nothing to do with military operations. It had previously said that it would try

Kushayb, although that did not happen. Alaa Shahine, *Sudan Says No Evidence Against ICC Darfur Suspect*, REUTERS, 3 May 2007, available at <http://uk.reuters.com/article/2007/05/03/uk-sudan-darfur-icc-idUKL0367266220070503>.

⁷⁶ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 1 July 2008, A.U. Assembly, 11th Ord. Sess., A.U. Doc. Assembly/AU/14(XI).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Julia Geneuss, *Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 945, 946 (2009).

⁸⁰ Press Statement, 11 July 2008, A.U. Peace & Sec. Council, 141st Meeting, A.U. Doc. PSC/PR/BR(CXLI).

⁸¹ The Rome Statute is not based on universal jurisdiction. Rather, jurisdiction is established by the connection of a person to a State Party—either by being national of that state or having allegedly committed a crime on the territory of that state—or by having the Security Council refer a situation. See SCHABAS, *supra* note 12, at 60-65.

⁸² PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

⁸³ Geneuss, *supra* note 79, at 952.

⁸⁴ See Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

⁸⁵ Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L. FORUM 1, 15-16 (2010). See also AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction: Report (15 Apr. 2009) [hereinafter *AU-EU Report*], available at http://www.africa-union.org/root/AR/index/Report%20UJ%20_FINAL_English.pdf.

⁸⁶ Jalloh, *supra* note 85, at 20-22

⁸⁷ *Id.* at 14.

⁸⁸ Jalloh, *supra* note 85, at 20-21, 29; Geneuss, *supra* note 79, at 946.

⁸⁹ Filip Reyntjens calls this the “genocide credit.” Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 African Affairs, 177, 199 (2004).

⁹⁰ Geneuss, *supra* note 79, at 946.

⁹¹ *AU-EU Report*, *supra* note 85.

⁹² Press Release, ICC, ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war (14 July 2008), ICC-OTP-20080714-PR341, *available at* <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/a?lan=en-GB>.

⁹³ *See Rome Statute*, *supra* note 14, art. 16:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

⁹⁴ Communique of the 142nd Meeting of the Peace and Security Council, 21 July 2008, A.U. Peace & Sec. Council, 142d mtg., ¶ 9, A.U. Doc. PSC/MIN/Comm(CXLII)Rev.1 [hereinafter 142d Meeting Communique].

⁹⁵ *See id.*

⁹⁶ Although the AU-EU report made a clear distinction between the two jurisdictional claims. *See AU-EU Report*, *supra* note 85.

⁹⁷ Indeed, this is part of a broader discourse that sees the ICC as a tool of Western imperialism, targeting Africans but not others. George Bush is frequently put forward as an appropriate target for the ICC, as is the situation in Palestine, even though the ICC does not have jurisdiction in either case. Many Africans also question why the Prosecutor is not an African. Author interviews.

⁹⁸ 142d Meeting Communique *supra* note 94, ¶ 11(iii). Rome Statute, *supra* note 14, art. 1 states that the ICC “shall be complementary to national criminal jurisdictions.” That is, it cannot open an investigation in a particular case if the target state has already begun or carried out its own investigation or prosecution. This requires a degree of interpretation as to whether or not the state investigation is serious.

⁹⁹ 142d Meeting Communique *supra* note 94, ¶ 11(ii).

¹⁰⁰ Resolution 1828, *adopted* 31 July 2008, S.C. Res. 1828, U.N. SCOR, 5947th mtg., U.N. Doc. S/RES/1828 (2008).

¹⁰¹ Communique of the 151st Meeting of the Peace and Security Council, 22 Sept. 2008, A.U. Peace & Sec. Council, 151st mtg., ¶ 4, A.U. Doc. PSC/MIN/Comm.1(CLI).

¹⁰² Tenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) (4 Dec. 2009); HLPD, p. 56.

¹⁰³ *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan*, adopted 3 Feb. 2009, A.U. Assemb., 12th Ord. Sess., A.U. Doc. Assembly/AU/Dec.221(XII).

¹⁰⁴ Situation in Darfur, Sudan, in the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir: Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (4 Mar. 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

¹⁰⁵ Communique of the 175th Meeting of the Peace and Security Council, 5 Mar. 2009, A.U. Peace & Sec. Council, 175th mtg., ¶ 4, A.U. Doc. PSC/PR/Comm(CLXXV).

¹⁰⁶ *Id.* ¶ 3.

¹⁰⁷ In 2006 and 2007.

¹⁰⁸ Author interviews.

¹⁰⁹ See CICC, States Parties to the Rome Statute of the ICC, *supra* note 22. A number of other Arab League members had duly signed the Statute in December 2000 as the deadline neared for states to sign without automatically becoming parties and legally bound by its provisions.

¹¹⁰ Press Release, CICC, Global Coalition Says AU States Parties to International Criminal Court Have Legal Obligation to Cooperate with ICC (7 July 2009), available at http://www.iccnw.org/documents/AU_Summit_PR_CICC_7July_09_Eng.pdf.

¹¹¹ *African Countries Back Away from ICC Withdrawal Demand*, SUDAN TRIBUNE, 8 June 2009, available at <http://www.sudantribune.com/spip.php?article31443>.

¹¹² Decision on the Abuse of the Principle of Universal Jurisdiction, adopted 3 July 2009, A.U. Assembly, 13th Ord. Sess., A.U. Doc. Assembly/AU/11(XIII).

¹¹³ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), adopted 3 July 2009, A.U. Assembly, 13th Ord. Sess., ¶ 5, A.U. Doc. Assembly/AU/13(XIII).

¹¹⁴ *Id.* ¶ 8.

¹¹⁵ *Id.* ¶¶ 9-12.

¹¹⁶ See CICC, States Parties to the Rome Statute of the ICC, *supra* note 22.

¹¹⁷ Colum Lynch, *International Court Under Unusual Fire*, WASH. POST, 30 June 2009, available at <http://www.washingtonpost.com/wp->

dyn/content/article/2009/06/29/AR2009062904322.html; CICC, Global Coalition Says AU States Parties to International Criminal Court Have Legal Obligation to Cooperate with ICC , *supra* note 110; Author interviews.

¹¹⁸ Author interviews.

¹¹⁹ Press Release, A.U., Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (14 July 2009). It is interesting to note that this statement focused much more on the Assembly decision, instead of the African ICC states parties meeting, which is suggested in the title, and glossed over the fact that the decisions at that meeting varied from the Assembly decision.

¹²⁰ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), *supra* note 113.

¹²¹ *Botswana Rebels Against AU over Bashir*, ABC NEWS, 5 July 2009, available at <http://www.abc.net.au/news/2009-07-05/botswana-rebels-against-au-over-bashir/1342312>.

¹²² *African Union Defies ICC over Bashir Extradition*, ABC NEWS, 5 July 2009, available at <http://www.abc.net.au/news/2009-07-05/african-union-defies-icc-over-bashir-extradition/1341682>.

¹²³ *Sudan Reverses Course on ICC Arrest Warrant for Bashir*, SUDAN TRIB., 30 July 2009, available at <http://www.sudantribune.com/South-Africa-reverses-course-on>,31986.

¹²⁴ *Uganda Pledges to Arrest Sudanese President*, STAR (Toronto), 13 July 2009, available at <http://www.thestar.com/news/world/article/665173>.

¹²⁵ Further, a change in voting procedures instituted by Qaddafi, under the guise of “silence as approval” requires two-thirds of AU member states to publicly vote against his proposals that, in conjunction with the aforementioned bullying by Qaddafi, can have the effect of significantly masking disagreements within the African Union. David Greenberg, *African Union Declaration Against the ICC Not What it Seems*, FOREIGN POL’Y IN FOCUS (6 Aug. 2009), available at http://www.fpif.org/articles/african_union_declaration_against_the_icc_not_what_it_seems.

¹²⁶ HLPD, *supra* note 70.

¹²⁷ Communique of the 207th Meeting of the Peace and Security Council, 29 Oct. 2009, A.U. Peace & Sec. Council, 207th mtg., ¶ 1 A.U. Doc. PSC/AHG/COMM.1(CCVII).

¹²⁸ HLPD, *supra* note 70, at 9.

¹²⁹ *Id* at 3.

¹³⁰ *Id* at xix.

¹³¹ *Id* at xvi.

¹³² Mills, *supra* note 11. And, without using the formal terminology, it maintained that Sudan had a responsibility to protect its people, as recognized by the World Summit in 2005. *See 2005 World Summit Outcome, supra* note 45.

¹³³ The HLPD reiterated this perception. HLPD, *supra* note 70, at 65.

¹³⁴ Indeed, some in the AU will point out that the AU decisions requesting that the UN Security Council defer the Bashir proceedings do not call into question Bashir's guilt, and further maintain that Bashir would need to be indicted at some point. Author interviews.

¹³⁵ Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), 6 Nov. 2009, A.U. Doc. Min/ICC/legal/Rpt.(II).

¹³⁶ *Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC Held at The Hague, Netherlands from 16 to 26 November 2009*, 26 Nov. 2009, A.U. Exec. Council, 16th Ord. Sess., 29 Jan. 2010, Annex 2, A.U. Doc. EX.CL/568(XVI) -ALSO IN FOOTNOTE 3 I was at the meeting where this happened and so observed the presentation – not sure how to cite this.

¹³⁷ *Id.*

¹³⁸ For more information on the concept of the interests of justice, and the inapplicability of the interests of peace to the ICC Prosecutor's mandate, see ICC, Office of the Prosecutor, Policy Paper on the Interests of Justice (Sept. 2007), *available at* <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>.

¹³⁹ Wafula Okumu, *Africa and the UN Security Council Permanent Seats*, PAMBAZUKA NEWS, 28 April 2005, *available at* http://www.newsfromafrica.org/newsfromafrica/articles/art_10251.html.

¹⁴⁰ Rome Statute of the International Criminal Court, *adopted* 17 July 1998, art. 27, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002).

¹⁴¹ *Id.* art. 98.

¹⁴² MAX DU PLESSIS, THE INTERNATIONAL CRIMINAL COURT THAT AFRICA WANTS 78-79 (Aug. 2010), *available at* <http://www.issafrica.org/uploads/Mono172.pdf>.

¹⁴³ Resolution 1442, *adopted* 12 July 2002, S.C. Res. 1442, U.N. SCOR, 4572d mtg., ¶ 1 -2, U.N. Doc. S/RES/1422 (2002).

¹⁴⁴ DU PLESSIS, *supra* note 140, at 68-69.

¹⁴⁵ *Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC Held at The Hague, Netherlands from 16 to 26 November 2009*, 26 Nov. 2009, A.U. Exec. Council, 16th Ord. Sess., 29 Jan. 2010, Annex 2, ¶ 5, A.U. Doc. EX.CL/568(XVI) [hereinafter *Report of the Commission on the Outcome and Deliberations of the 8th Session*].

¹⁴⁶ Although there may have been more procedural reasons for this, with South Africa chairing relevant committees. Author interviews.

¹⁴⁷ Borer & Mills, *supra* note 25.

¹⁴⁸ Author interviews.

¹⁴⁹ *Report of the Commission on the Outcome and Deliberations of the 8th Session*, *supra* note 145, ¶ 17. See also *Report of the 2nd Ministerial Meeting on the Rome Statute*, *supra* note 135, ¶ 7.

¹⁵⁰ *Report of the Court on the Establishment of an Office for the International Criminal Court at the African Union Headquarters in Addis Ababa*, 26 Nov. 2009, I.C.C. ASPOR, Assemb. States Parties, 8th Sess., ¶ 1, I.C.C. Doc. ICC-ASP/8/35 (2009).

¹⁵¹ Author interviews.

¹⁵² *Gabon's Ping Becomes AU's Top Diplomat*, MAIL & GUARDIAN ONLINE, 1 Feb. 2008, available at <http://mg.co.za/article/2008-02-01-gabons-ping-becomes-aus-top-diplomat>.

¹⁵³ Author interviews.

¹⁵⁴ *Strengthening the International Criminal Court and the Assembly of States Parties*, adopted 26 Nov. 2009, I.C.C. Res. ICC-ASP/8/Res.3, I.C.C. ASPOR, Assemb. States Parties, 8th plen. mtg., ¶ 28, I.C.C. Doc. ICC-ASP/8/Res.3 (2009).

¹⁵⁵ Author interviews.

¹⁵⁶ *Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC)*, *supra* note 3, ¶ 3, 6.

¹⁵⁷ *Decision on the Abuse of the Principle of Universal Jurisdiction*, adopted 2 Feb. 2010, A.U. Assemb., 14th Ord. Sess., A.U. Doc. Assembly/AU/Dec.271(XIV).

¹⁵⁸ And, indeed, asking for states to support the trial of Hissène Habré—a former African head of state. *Decision on the Hissene Habre Case*, adopted 2 Feb. 2010, A.U. Assemb., 14th Ord. Sess., A.U. Doc. Assembly/AU/Dec.272(XIV).

¹⁵⁹ *Darfur: Bashir Genocide Charges to be Reconsidered*, BBC NEWS, 3 Feb. 2010, available at

<http://news.bbc.co.uk/1/hi/world/africa/8494759.stm>.

¹⁶⁰ Press Release, A.U., Communiqué on the 3 February 2010 Judgment of the International Criminal Court Appeals Chamber on Darfur (4 Feb. 2010), *available at* <http://www.africa-union.org/root/ar/index/Communique%20Feb%204%202010%20eng.pdf>.

¹⁶¹ *France Invites Sudan, Not Bashir, to Summit*, REUTERS, 22 Mar. 2010, *available at* <http://www.reuters.com/article/idUSTRE62L2B720100322>. This was just one of a number of occasions when Bashir was snubbed. *See* Marlise Simons, *Wanted, Sudan's Resident Can't Escape Isolation*, N.Y. TIMES, 1 May 2010, *available at* <http://www.nytimes.com/2010/05/02/world/africa/02sudan.html>.

¹⁶² *ICC prosecutor: Sudan Poll Like Vote Under Hitler*, REUTERS, 23 Mar. 2010, *available at* <http://www.reuters.com/article/idUSTRE62M4HO20100323>.

¹⁶³ Author interviews.

¹⁶⁴ *See* Statement by Mr. Ben Kioko, *supra* note 2.

¹⁶⁵ Indeed, the Justice and Equality Movement said that it would “not negotiate with a war criminal.” Marlise Simons, Lydia Polgreen & Jeffrey Gettleman, *Arrest Is Sought of Sudan Leader in Genocide Case*, N.Y. TIMES, 15 July 2008, *available at* <http://www.nytimes.com/2008/07/15/world/africa/15sudan.html>. Roberto Belloni offers similar cautions about the possible moral hazard of indirectly encouraging rebel groups to become more intransigent. Roberto Belloni, *The Tragedy of Darfur and the Limits of the “Responsibility to Protect,”* 5 ETHNOPOLITICS 327 (2006).

¹⁶⁶ Statement By Mr. Ben Kioko, *supra* note 2.

¹⁶⁷ *President Song Ends a Two Days Visit to Addis Ababa, Ethiopia*, ICC WEEKLY UPDATE, 12 July 2010, at 3, *available at* <http://www.icc-cpi.int/NR/rdonlyres/8C3FDE53-4266-4FFD-AB72-6058B4E30902/282352/ED41ENG.pdf>.

¹⁶⁸ Press Release, A.U., Communiqué: The Chairperson of the Commission Discussed with the President of the International Criminal Court (ICC) Bilateral Cooperation, 16 July 2010, *available at* <http://www.africa-union.org/root/ua/Conferences/2010/juillet/PSC/16juillet/Presse%20CommuniqueICC%20Bilateral%2016-07-10.pdf>.

¹⁶⁹ Author interviews.

¹⁷⁰ Situation in Darfur, Sudan, in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (12 July 2010), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

¹⁷¹ African Union, Communiqué: The Chairperson of the Commission Expresses Deep Concern

About the New Decision of the ICC Pre-Trial Chamber 1 on Sudan and Its Impact on the Ongoing Peace Processes in Sudan, 16 July 2010, *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/2E3A31D7D68FA9154925776C000322ED-Full_Report.pdf.

¹⁷² Communique of the 237th Meeting of the Peace and Security Council, 21 July 2010, A.U. Peace & Sec. Council, 237th mtg., A.U. Doc. PSC/PR/COMM-1(CXCVIII).

¹⁷³ *African Union Moves Aggressively to Shield Bashir from Prosecution*, SUDAN TRIBUNE, 29 July 2010, *available at* <http://www.sudantribune.com/spip.php?article35786>.

¹⁷⁴ *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, adopted 27 July 2010, A.U. Assemb., 15th Ord. Sess., ¶ 6, A.U. Doc. Assembly/AU/Dec.296(XV).

¹⁷⁵ *Decision on the Promotion of Cooperation, Dialogue and Respect for Diversity in the Field of Human Rights*, adopted 27 July 2010, A.U. Assemb., 15th Ord. Sess., ¶ 3, A.U. Doc. Assembly/AU/Dec.328(XV).

¹⁷⁶ *See Uganda Fear Over Gay Death-Penalty Plans*, BBC NEWS, 22 Dec. 2009, *available at* <http://news.bbc.co.uk/1/hi/8412962.stm>.

¹⁷⁷ *See African Union Drops Resolution Barring Arrest of Sudanese President in Continent*, SUDAN TRIBUNE, 26 July 2010, *available at* http://www.sudantribune.com/spip.php?page=imprimable&id_article=35765. The title of this article, which incorrectly asserts that the AU would not call on member states not to cooperate with the ICC in arresting Bashir and that a clause taking the ICC Prosecutor to task for “unacceptable statements” on Bashir would be removed, indicates the fluid nature of the debate within the AU and the very significant disagreements between African countries. On this change, see *African Union Moves Aggressively to Shield Bashir from Prosecution*, *supra* note 173.

¹⁷⁸ On 27 July, Thandi Modise, the ANC’s deputy general secretary, stated:

If Bashir were to come to South Africa today, we will definitely implement what we are supposed to in order to bring the culprit to Hague. . . . We can't allow a situation whereby an individual tramples on people's rights and gets away with it. . . . The perpetrators of war crimes should be tried at all costs.

The last statement would seem to put South Africa’s position at odds not only with the AU decision not to arrest Bashir, but also the decision to defer the proceedings against Bashir, which South Africa has supported. Savious Kwinika, *Sudan President Bashir, Accused of War Crimes, Would Be Arrested in South Africa, Says ANC*, CHRISTIAN SCIENCE MONITOR, 28 July 2010, *available at* <http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/0728/Sudan-President-Bashir-accused-of-war-crimes-would-be-arrested-in-South-Africa-says-ANC>.

¹⁷⁹ See *African Union Drops Resolution*, *supra* note 177.

¹⁸⁰ He also said that he “would not sweep the issue of El Bashir under the table.” *African Union Moves Aggressively to Shield Bashir from Prosecution*, *supra* note 173.

¹⁸¹ *Id.*

¹⁸² Purportedly in retaliation for Ugandan President Museveni not attending his inauguration after being re-elected, although one might speculate that he was afraid of being arrested. *Id.*

¹⁸³ See Guillaume Lavallee, *Sudan Hails Bashir Trip to Chad as “Victory” Against ICC*, AFP, 23 July 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5gAaSKQU4ZKQDUx0VoUa4a7EGLW Mw>.

¹⁸⁴ *Bashir Defies Warrant on Chad Trip*, AL JAZEERA, 22 July 2010, available at <http://www.aljazeera.com/news/africa/2010/07/201072183438656172.html>.

¹⁸⁵ *AU Chief Challenges ICC to Arrest Sudanese President*, SUDAN TRIBUNE, 23 July 2010, available at <http://www.sudantribune.com/spip.php?article35748>.

¹⁸⁶ Alan Cowell, *Sudan Leader Travels Despite Warrant*, N.Y. TIMES, 27 Aug. 2010, available at <http://www.nytimes.com/2010/08/28/world/africa/28sudan.html>.

¹⁸⁷ *Kenyan PM Says Bashir Must Stand Before ICC, Wants Apology Made to Int’l Community*, SUDAN TRIBUNE, 30 Aug. 2010, available at <http://www.sudantribune.com/spip.php?article36117>.

¹⁸⁸ Situation in Darfur, Sudan, in the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir: Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, at 4 (27 Oct. 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc957774.pdf>.

¹⁸⁹ *East Africa Meeting Change Helps Sudan’s Bashir*, AP, 27 Oct. 2010, available at <http://news.yahoo.com/east-africa-meeting-change-helps-sudans-al-bashir.html>. While on the surface this change could be interpreted as a way to help Kenya not come under further criticism, another interpretation has been suggested. Ethiopian prime minister Meles Zenawi is a key actor in the discussions on Sudan and is one of the few African leaders who has any influence over Bashir. It may be that moving the meeting to Addis Ababa was an attempt to get the two leaders in a room together to talk. Author interviews.

¹⁹⁰ *Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII)*, adopted 31 Jan. 2011, A.U. Assemb., 16th Ord. Sess., ¶ 5-6, A.U. Doc. Assembly/AU/Dec.334(XVI) [hereinafter *Decision on the Implementation of the ICC*] Various domestic actors, including the Kenyan parliament, have reacted negatively to the investigation. Human Rights Watch, *Civil Society Statement on Kenya and the International Criminal Court*,

(25 Jan. 2011), available at <http://www.hrw.org/en/news/2011/01/25/kenya-civil-society-organizations-call-support-international-criminal-court>.

¹⁹¹ *Decision on the Implementation of the ICC*, *supra* note 190, ¶ 9. That the Prosecutor is not African has been a key criticism of the ICC by some African states. Author interviews. However, it should be noted that five of the eighteen ICC judges are African, including the first vice-president, and two of these are from states where the ICC has active cases (Kenya and Uganda). Further, the new head of the ICC's Jurisdiction, Complementarity and Cooperation Division in the Office of the Prosecutor is African. Otilia Anna Maunganidze & Antoinette Louw, *An African Advantage: ICC's New Head of Jurisdiction, Complementarity and Cooperation*, INST. FOR SEC. STUD., 9 Feb. 2011, available at http://www.iss.co.za/iss_today.php?ID=1228.

¹⁹² *Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/640(XVIII)*, adopted 31 Jan. 2011, A.U. Assemb., 16th Ord. Sess., ¶ 9, A.U. Doc. Assembly/AU/Dec.335(XVI).

¹⁹³ *Id.*

¹⁹⁴ Press Release, ICC, Pre-Trial Chamber I informs the Security Council and the Assembly of States Parties about Omar Al Bashir's visit to Djibouti, ICC-CPI-20110512-PR665 (12 May 2011), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pr665>; Press Release, ICC, Pre-Trial Chamber I informs the United Nations Security Council and the Assembly of States Parties about Malawi's non-cooperation in the arrest and surrender of Omar Al Bashir, ICC-CPI-20111212-PR755 (12 December 2011), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr755?lan=en-GB>.

¹⁹⁵ Constitutive Act of the African Union, *supra* note 44, art. 4h.

¹⁹⁶ *See Niger's Military Coup Is Condemned by France and Africa*, BBC NEWS, 19 Feb. 2010, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/8523573.stm>; *AU: Guinea Coup a Disgrace*, AFRICAN EXECUTIVE, 7 Jan. 2009, available at <http://www.africanexecutive.com/modules/magazine/articles.php?article=3953>; Scott Baldauf, *African Union Backs Ouattara as President in Ivory Coast*, 11 Mar. 2011, CHRISTIAN SCI. MONTIOR, available at <http://www.csmonitor.com/World/Africa/2011/0311/African-Union-backs-Ouattara-as-president-in-Ivory-Coast>.

¹⁹⁷ Marlise Simons, *Gambian Will Lead Prosecution in Hague*, The New York Times (12 December 2011).

¹⁹⁸ Although one might question how circumspect the Prosecutor *should* be, given their role in going after the worst criminals in the world.

¹⁹⁹ Mark Tran, *African Union left in limbo following leadership vote impasse*, The Guardian, (30 January 2012), available at <http://www.guardian.co.uk/global-development/2012/jan/30/african-union-limbo-leadership-impasse>.

²⁰⁰ Indeed, the AU has deployed missions in Burundi and Somalia, and the Economic Community of West African States has played a significant role in West African conflicts, particularly Liberia and Sierra Leone. In fact, the AU Commissioner for Peace and Security, Ramtane Lamamra, argues that Africa was “practising an advanced form of the Responsibility to Protect (R2P) before even the notion had gained currency.” ECOWAS INTERNATIONAL CONFERENCE: TWO DECADES OF PEACE PROCESSES IN WEST AFRICA: ACHIEVEMENTS–FAILURES–LESSONS 10 (May 2010), *available at* http://www.comm.ecowas.int/dept/h/h1/en/rapport/Final_Report_Two_Decades_English.pdf.

²⁰¹ The Common African Position on the Proposed Reform of the United Nations: “*The Ezulwini Consensus*,” 8 Mar. 2005, A.U. Exec. Council, 7th Extraord. Sess., A.U. Doc. Ext/EX.CL/2(VII).

²⁰² *Id.*

²⁰³ On the Uganda case, see TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY 176-77 (2006); Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT’L AFF. 179, 183-84 (2007).

²⁰⁴ Philipp Kastner, *The ICC in Darfur—Savior or Spoiler?*, 14 ILSA J. INT’L. & COMP. L. 145, 179 (2007).

²⁰⁵ Neil MacFarquhar & Sharon Otterman, *U.N. Panel Deadlocks Over Taking Any Action on Sudan*, N.Y. TIMES, 6 Mar. 2009, *available at* <http://www.nytimes.com/2009/03/07/world/africa/07sudan.html>.

²⁰⁶ Indeed, the reaction by a number of African leaders has been described as “emotional,” rather than being based on a rational analysis of the situation. Author interviews.

²⁰⁷ Although, as noted, there is now a domestic backlash in Kenya against the ICC proceedings.

²⁰⁸ *See Resolution 1970*, adopted 26 Feb. 2011, S.C. Res. 1970, U.N. SCOR, 6491st mtg., U.N. Doc. S/RES/1970 (2011).

²⁰⁹ *Resolution 1973*, adopted 17 Mar. 2011, S.C. Res. 1973, U.N. SCOR, 6498th mtg., ¶ 4, U.N. Doc. S/RES/1973 (2011).

²¹⁰ Jean Ping’s country of nationality.

²¹¹ Max du Plessis & Christopher Gevers, *The UN Security Council Refers Libya to the International Criminal Court*, WAR AND LAW (1 Mar. 2011), *available at* <http://warandlaw.blogspot.com/2011/03/un-security-council-refers-libya-to.html>.

²¹² Press Release, A.U., *Communique: Consultative Meeting on the Situation in Libya* (25 Mar. 2011), *available at* [http://au.int/en/dp/ps/sites/default/files/communique_-_Libya__eng_\[1\].pdf](http://au.int/en/dp/ps/sites/default/files/communique_-_Libya__eng_[1].pdf).

²¹³ Communique of the 265th Meeting of the Peace and Security Council, 10 Mar. 2011, A.U. Peace & Sec. Council, 265th mtg., ¶ 6, A.U. Doc. PSC/AHG/COMM.1(CCLXV).

²¹⁴ Press Statement of the 268th Meeting of the Peace and Security Council, 23 Mar. 2011, A.U. Peace & Sec. Council, 268th mtg., A.U. Doc. PSC/PR/BR.1(CCLXVIII). See *Jean Ping: AU Feels “Totally” Ignored by UN on Libya*, ATAC MAG., 26 Mar. 2011, available at <http://www.atacmag.com/content/jean-ping-au-feels-totally-ignored-un-libya>

²¹⁵ Kareem Fahim, Anthony Shadid & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES, 20 Oct. 2011, available at <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html>.