

Full Length Research

The International Criminal Court-African Union Contestation on President Al Bashir Case

Tegegne Edemealem Mekuriyaw

Debre Markos University, College of Social Sciences, Department of Civics and Ethical Studies, Debre Markos.
Email:edmexlibanon@gmail.com

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The title of the study was the International Criminal Court-African Union contestation on President Al Bashir case. The International Criminal Court and African Union had good relations in most international criminal cases in Africa. However, the International Criminal Court-African Union relations relapsed following the International Criminal Court's arrest warrant on Al Bashir. The focus of the study was to analyze and interpret the International Criminal Court-African Union contestation in Al Bashir case. The International Criminal Court brought various evidences that made Al Bashir as the major responsible person for the Darfur crisis; and it issued arrest warrants against Al Bashir in 2009 and 2010. The African Union opposed the International Criminal Court's arrest warrant by claiming that the arrest warrant may lead to the deterioration of the peace process in Sudan and violates the International Customary Law such as immunity of heads of states. The study argued that the International Criminal Court had become unsuccessful to prosecute Al Bashir because the African Union had strongly opposed the International Criminal Court's arrest warrant on Al Bashir, and the enforcement of the International Criminal Court's decisions were mostly dependent on the cooperation of states and regional organizations like the African Union. As a result, Omar Al Bashir had travelled to many states, including to the states parties to the International Criminal Court and no country was willing to arrest and surrender him to the International Criminal Court. The study employed qualitative approach and it highly used secondary sources of data and some primary data. The data was collected through document analysis and key informant interview. The African Union put various reasons and called its member states not to arrest Al Bashir. Contrarily, the International Criminal Court refused the African Union's reasons and called its states parties to arrest President Al Bashir. Consequently, their relations had been worse.

Keywords: International Criminal Court, African Union, Al Bashir, Arrest Warrant, Contestation

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INTRODUCTION

The International Criminal Court (ICC) is a permanent and independent court to investigate and prosecute individuals who commit war crimes, crimes against humanity, and genocide. The Rome Statute of the ICC entered into force in 2002 (Struett, 2008). The ICC is only

concerned on investigating and prosecuting cases of the most serious crimes perpetrated by individuals rather than organizations and governments. Moreover, it may hold the responsibility of prosecuting criminals only when national judicial systems are unwilling and unable to

handle issues (Oyugi, 2014). The ICC has jurisdiction when genocide, war crimes, and crimes against humanity¹ are committed in the territory of a member state; by nationals of a member state; and when the United Nations Security Council (UNSC) refers a specific situation to the ICC (Simon, 2011). Therefore, Darfur case became the first referred situation to the ICC by the UNSC. The ICC prosecutor opened an investigation into the Darfur situation on 1 June 2005 (Stahn and Sluiter, 2009).

In 2009, the ICC issued an arrest warrant on Omar Al Bashir for his indirect role in war crimes and crimes against humanity in Darfur. The ICC prosecutor argued that Al Bashir did not directly carry out the alleged crimes but committed them indirectly through members of the state apparatus, army and militia (Cryer and Kalpouzou, 2010). Following the ICC's arrest warrant on Omar Al Bashir for war crimes and crimes against humanity, the African Union (AU) declared that "AU member States shall not cooperate with the ICC for the arrest and surrender of President Omar Al Bashir of Sudan" (quoted in Greenberg, 2009, p.1). In 2010, the African Union Commission strongly condemned the ICC's arrest warrant against Omar Al Bashir. It decided that the process for justice must be conducted in a manner not damaging the search for peace (Goldston, 2010).

The AU had no opposition against the ICC's interventions in the Uganda, Democratic Republic of Congo (DRC) and Central Africa Republic (CAR) which the cases have been referred by the states themselves. However, the smooth relationship between the ICC and AU has been disturbed following the imposition of an arrest warrant on Al Bashir in 2009. The ICC has got evidences which show the involvement of Al Bashir in crime against humanity, war crime and genocide during the Darfur crisis. Most African leaders opposed the arrest warrant and the AU as a regional organization has been announcing its opposition against the arrest warrant (Avocats Sans Frontieres, 2012). The ICC has also faced

¹ Crimes against humanity include acts of murder, extermination, enslavement, deportation, torture, rape, and disappearance. When they are committed as part of a widespread and systematic attack directed against any civilian population, it will be known as crimes against humanity. Whereas genocide is the act of perpetrating and destroying certain groups of people such as national, ethnic, racial, or religious groups in whole or in part. And, war crime is the violation of the laws of war such as intentionally directing attacks against the civilian population and their objects, the humanitarian assistance forces and so on. See United States Institute of Peace (2008) "Confronting Crimes against Humanity." *A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors*, Washington, DC: United States Institute of Peace; and the Rome Statute of ICC, Part two (2), Article six (6), seven (7), and eight (8) .

difficulty in Africa after the arrest warrant against Al Bashir. For example, the requests to set up the ICC Liaison Office in Addis Ababa have faced strong resistance from the AU (ibid).

The ICC-AU relations turn into a fragile one. The AU continues to threaten a complete breakaway from the court whereas the ICC continues to reassure that it is an impartial instrument of justice. It has also decided that African states should not comply with the ICC regarding the Al Bashir case. At the several AU Summits, the AU Assembly has repeatedly recalled the member states not to cooperate concerning on the Al Bashir case. So, the ICC-AU tension has been going high (Admin, 2011). However, following the AU Assembly Extraordinary Session in October 2013 regarding the Africa-ICC relations, Archbishop Desmond Tutu articulated that "African leaders behind the move to extract the continent from jurisdiction of the ICC are effectively seeking a license to kill, maim and oppress their people without consequences" (quoted in Justice Africa, 2013). Therefore, regardless of the efforts of the ICC, the AU is defending Al Bashir. The AU used some mechanisms such as convincing its member states, arranging meetings in favor of Al Bashir, manipulating different powers like China, Russia, the Arab League and so on (Heinrich Boll Foundation of Africa, 2012).

Some scholars argue that the ICC could not arrest and prosecute Al Bashir because United States of America (USA) has not ratified the Rome Statute of ICC. According to them, as one of world's great powers², USA has a big influence on many dictatorial governments such as in the overthrow of Iraq's president Saddam Hussein. Similarly, if USA were party for the ICC, the ICC would arrest Al Bashir easily. In addition, USA more focuses on the issue of counter-terrorism than the protection of democratic and human rights. Whatever the case, the non-party and non-cooperative position of USA has been diminishing the implementation power of the ICC (Arieff et al., 2010). Differently, other scholars believe that the issue of sovereignty and immunity hinders the ICC from arresting Al Bashir. According to them, states are sovereign. As a result, other external institutions like the ICC and states cannot interfere in the affairs of Sudan without state's consent (Cryer and Kalpouzou, 2010). In addition, the heads of states or higher officials have immunity which can protect them from arrest and prosecution. Immunities are valuable in preventing

² Great powers are states which have a dominant position in the international political, economic, social, and cultural system. They are the most powerful states in the world that exert high influence on international events. They are handful of states which possess the majority of the world's power resources and have real influence beyond their immediate locality. See Goldstein, J. (2004). *International Relations*, (5thed.). New York: Longman.

interference with representatives of people or higher officials in conducting their duties. Thus, as a heads of state, Al Bashir has been enjoying the immunity that hampers the ICC efforts (ibid).

Generally, the AU has adopted a hostile stance toward the ICC regarding Al Bashir case and has called its member states to implement a policy of non cooperation with the ICC. Most views have been concerning on the role of great powers such as USA and the principle of sovereignty as well as immunity as big obstacles for the trial of Al Bashir by the ICC. They give less emphasis for the role of African Union in defending Al Bashir. Thus, unlike the above views, this study has asserted that the ICC is unable to try Al Bashir because the African Union has strongly been opposing the arrest warrant. The AU is making everything favorable for Al Bashir by influencing and convincing its member states and other actors not to give Al Bashir up to the ICC. Thus, the study examines the contestation of the AU with the ICC by assessing the acts of the ICC and the position of the AU regarding Al Bashir case. In doing so, the study may contribute to knowledge on the subject thereby filling gaps in the existing literature.

The ICC Grounds to Issue Arrest Warrants on President Al Bashir

Obtaining Jurisdiction on Darfur Case

The ICC has jurisdictions over the crimes on the following situations. First, when a situation is referred to the ICC Prosecutor by a state party; second, when a situation is referred to the prosecutor by the United Nations Security Council (UNSC) acting under Chapter VII of the UN Charter; and finally, when the ICC Prosecutor has initiated an investigation (ICC Statute Article 13). Among situations, the Darfur case was referred to the ICC through the UNSC. The Rome Statute, Article Thirteen (13) states that the UNSC may determine under Chapter VII of the UN Charter on the existence of a threat to the peace, and act of aggression (ibid). In other words, the obligation of Sudan to cooperate with the ICC came from Resolution 1593 than the Rome Statute of the ICC. Thus, the ICC cannot force Sudan for cooperation in accordance with Rome Statute because Sudan is not party to the Rome Statute (Amnesty International, 2010). This implies that non-party states to the Rome Statute may be requested in accordance with the decision of the UNSC, and the UN Charter. Almost all states in the world are members to the UN. So, the ICC has an opportunity to request any state in cooperation with the UN on the violation of human rights.

In 2004, the UNSC adopted Resolution 1564³ which requested the UN Secretary General to rapidly establish an international commission of inquiry. It is to investigate reports on violations of international humanitarian law and human rights law in Darfur; and to identify the perpetrators of such violations (Ntoubandi, 2009). Then the ICID was formed in 2005 and it started its works in the same year (De Waal, 2008). On 25 January 2005, the ICID submitted a report to the UN depending on its findings which confirmed that the presence of violations of international humanitarian law and human rights law in Darfur such as war crimes and crime against humanity (Ntoubandi, 2009). In the report, the name of fifty one (51) individuals was submitted with evidence to the UN Secretary General. The list included Sudanese army officers, militia commanders, rebel commanders and President Al Bashir. Finally, the UNSC on the basis of the Commission's report referred the Darfur situation to the ICC through Resolution 1593 in 2005 (ibid). Sudan is not-party state to the ICC. Thus, referring the Sudan case through UNSC to the ICC is unfair because most of the veto powers including USA, Russia, and China in UNSC are not parties to the ICC. In addition, USA has committed various crimes in Afghanistan, and Iraq.⁴

The Recognition of the ICC for the UNSC Referral

In 2005, the ICC accepted the UNSC Resolution 1593 that referred the Darfur case to the ICC prosecutor. The Resolution was adopted by the UNSC in the vote of eleven (11) in favors, none against, and with four (4) abstentions like USA, China, Algeria, and Brazil (UN Security Council Resolution 1593, cited in Arieff et al., 2011).

The ICC Office of the Prosecutor (OTP) began its investigations in June 2005 and provided the first report to the UNSC on 29 June 2005. The ICC prosecutor prepared reports to the UN Security Council on the actions which has been taken to implement Resolution 1593 and provided hint regarding the challenges that the investigation team faced in Darfur (Ocampo, cited in Williamson, 2006). As to the report, there was only less cooperation from the Sudanese government. In addition, the Sudan government tried to establish its own Special

³ The UNSC Resolution 1564 is a resolution which requested the UN Secretary General to establish an inquiry commission for investigating the violations of humanitarian law and human rights in Darfur. See Burnley, A. B. (2004). *Darfur Timeline: Death Counts Rise and Rise despite Sanctions*. Available at <http://www.genocidepreventionnow.org>. Accessed on 23 March 2013.

⁴ Interview with Fisha Habtetsion, PhD Candidate in Federal Studies in Addis Ababa University, held in Addis Ababa, on 24 July 2013.

Criminal Court for investigating the Darfur issue. The Sudan's government action was to hinder the ICC's complementary role (Ntoubandi, 2009). The ICC prosecutor and its proponents articulate that this sort of Sudan's government action is to cover those issues in the name of national court. Most powers in Sudan are highly controlled by the central government particularly by president Al Bashir. So, the Special Criminal Court in Sudan might not work independently and might not address all issues (cited in Ntoubandi, 2009). The presence of strong Special Criminal Court in Sudan was unthinkable. Thus, the ICC Prosecutor issued an international arrest warrant on Ahmad Harun and Ali Kushayb and later against President Al Bashir for their alleged role in the crimes committed in Darfur (Ntoubandi, 2009). The absence of independent court in Sudan can be a serious obstacle not to investigate the crimes and to provide justice for victims. However, taking the issue to the ICC out of other alternatives may have more problems on the victims because Al Bashir might take further attack to escape from arrest or to delay his arrest.⁵

The ICC's Investigations and Evidences

The ICC Office of the prosecutor has collected evidences to impartially investigate the crimes committed in Darfur. For instance, it has gathered a wide range of evidences such as statements from victims, statements and materials from members of the Sudanese government, documents from the ICID, and it also conducted interview with some high-ranking civilian and military Sudanese officials. The ICC Office of the Prosecutor conducted seventy (70) missions in Seventeen (17) countries. It has conducted more than one hundred (100) formal witness interviews particularly with victims. This enabled to obtain important evidences regarding the crimes committed in Darfur and regarding the key participants on the crime like Al Bashir and other higher officials (Bensouda, 2007). Consequently, the ICC obtained more than three thousand (3,000) documents from over one hundred groups and individuals; and from the ICID. According to the ICC Prosecutor, there are credible evidences that crimes have been committed contrary to Rome Statute (Ocampo, cited in Williamson, 2006). Though the declaration of the ICC on the dependability of its evidences, it is doubtful because its evidences are still subjected to prove.⁶

Based on the evidences, the ICC prosecutor made Al Bashir as a big responsible person for planning and

executing of mass killing on the Fur, Masalit and Zaghawa and other ethnic groups. These ethnic groups were major ethnic groups in Darfur which strongly opposed the marginalization and religious suppression on South Sudanese people. Accordingly, the Sudan government in the leadership and decision of Al Bashir opened war against these ethnic groups. The armed forces and the Janjaweed Militia⁷ attacked the residents and destroyed their villages. There is no way to deny on the engagement of Al Bashir in the Darfur crisis directly or indirectly. Moreover, Bensouda intensified this point of view that the ICC identified atrocious incidents and most responsible perpetrators including Al Bashir. Thus, these evidences are important to conclude that there are reasonable grounds required by the Rome Statute to prove different types of crimes against humanity, genocide and war crimes. These crimes were allegedly committed during attacks on the villages and towns of Kodoom, Bindisi, Mukjar, Arawala in West Darfur and so on (Bensouda, 2007). In essence, to avoid insurgents, Al Bashir tried to destroy their support from major ethnic groups in South Sudan. The Janjaweed militias were operating attacks against civilians under the coordination of military intelligence along with the air force and regular army units of Sudan (De Waal, 2008).

Many civilian peoples were killed by military attacks and the others died due to hunger and disease; and widespread rape, burning and looting of villages were committed. The Sudanese government has also placed tight controls on humanitarian activity and later expelled most of the humanitarian agencies from Sudan. This escalated the problem in Darfur (ibid). Therefore, the ICC believed that the attack on Darfur was a deliberate act which was planned and organized by the highest officials of the Sudanese government particularly by President Al Bashir. Omar Al-Bashir has been accused as an indirect co-perpetrator in attacking high number of civilian population in Darfur. These crimes were allegedly committed during a counter-insurgency campaign since April 2003. It was alleged that they have been planned and conducted by the Sudanese government against the rebel movements in Darfur.

The Issuance of Arrest Warrants on President Al Bashir

The ICC Prosecutor requested the Pre-Trial Chamber for issuing an arrest warrant against President Al Bashir on

⁵ ibid

⁶ Simon Akindes (interview), Education and Training Leader, in Institute of Peace and Security Studies in Addis Ababa University, held in Addis Ababa, on 15 July 2013.

⁷ Janjaweed Militias were forces which attacked civilian peoples and destroyed villages in Darfur. They were mainly from Arab tribes and they attacked other ethnic groups in Darfur with the help of Al Bashir government. See ICID. (2005). *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*. <http://www.un.org>, Accessed on 25 January 2013.

14 July 2008 depending on the existing findings. On 4 March 2009, the ICC Pre-Trial Chamber accepted evidences and issued an arrest warrant against Al-Bashir (ICC, 2011). The arrest warrant was issued against Omar Al-Bashir on total of seven (7) counts of crimes. These are five counts of crimes against humanity such as murder, extermination, forcible transfer, torture and rape; and two counts of war crimes such as the act of intentionally directing attacks against a civilian population (Blommestein and Ryngeart, 2010). In the first arrest warrant, Al Bashir was requested in the war crime and crime against humanity. It did not include the crime of genocide due to the suspicion of the ICC Pre-Trial Chamber on the credibility of the ICC Prosecutor's evidences.

After reiterative appeal of the ICC Prosecutor, a second warrant of arrest was issued against Al Bashir on 12 July 2010 which included counts of genocide unlike the first arrest warrant (ICC, 2011; Tladi, 2015). The ICC Prosecutor presented almost enough evidence for the ICC Pre-Trial Chamber I regarding the committing of genocide in Darfur. The evidence assured that various forces under the leadership of Al Bashir caused serious bodily and mental harm and also physical destruction against some ethnic groups. Therefore, as heads of state and commander in chief of the Sudanese armed forces, Omar Al Bashir was responsible for the acts of genocide committed by the armed forces (Madhuloodhanan, 2008). In this case, President Al Bashir became a wanted person. However, the ICC has been facing resistance in accomplishing its tasks concerning President Al Bashir. Particularly, the AU opposed the ICC's arrest warrant and restrained the ICC's activities.

Actually, the evidences which are submitted by the ICC prosecutor have seemed enough to accuse Al Bashir in crimes against humanity, war crime and genocide. The problem is in indentifying the way how Al Bashir can come to the court; and the consequences of arresting and prosecuting him. Regarding this issue, Adar noted that the ICC's arrest warrant may influence Al Bashir to improve his conduct due to the fear of arrest and prosecution by the ICC and the hope of dropping the charge against him. Thus, the ICC proponents believe that the indictment may force Al Bashir to ensure the implementation of the peace processes. In addition, Al Bashir may understand that confrontation with the ICC would not serve his long term interests, both at home and abroad. The indictment is likely to marginalize Al Bashir at home and abroad. It may undermine his political credibility and may lead him to be removed from power. Thus, Al Bashir may strive for the effective implementation of the peace process in cooperation with other actors (Adar, 2010). The ICC's arrest warrant against Al Bashir might influence Al Bashir to take further measures against civilians and may escalate the violence there. He might decide to consolidate his power by

removing all the rebel groups rather than surrendering himself to the ICC. Similarly, the AU articulates that the ICC's arrest warrant against Al Bashir may hinder the ongoing peace process in Sudan (De Waal and Stanton, 2009). The AU pointed out that in addition to restraining the peace process, the arrest warrant on president Al Bashir is against international law because it breaches the principle of sovereignty and immunity.

THE AFRICAN UNION STANCE ON THE ICC'S ARREST WARRANT

In February 2009, the AU Assembly took decision contrary to the ICC's arrest warrant on Al Bashir. In addition, it provided the responsibility to the AU Commission to send delegations to the UN that manifested the position of the AU on Al Bashir case. The AU Commission delegations asked the UNSC to delay the arrest warrant in accordance with article sixteen (16) of Rome Statute. In July 2009, the AU Assembly met in Sirte, Libya and called its member states not to accept the ICC's arrest warrant on Al Bashir and not to cooperate with the ICC (AU Assembly, cited in Du Plessis and Gevers, 2011). Again, in 2010 on its 15th Ordinary Session in Kampala, the AU Assembly reflected its opposition on the arrest warrant of Al Bashir. It also called its member states not to cooperate with the ICC on Al Bashir case (AU Kampala Decision, cited in Du Plessis and Gevers, 2011). Similarly, in 2011 the AU Assembly requested the UNSC to defer the indictment of Al Bashir (Du Plessis and Gevers, 2011).

The Raison D'être of the AU to Oppose the ICC's Arrest Warrant

The AU Constitutive Act article four (4) articulates to respect human rights, the rule of law, and to condemn impunity though the AU's intense opposition against the ICC's arrest warrants (The AU Assembly, cited in Amnesty International, 2010). The AU expressed its fear on indicting a heads of state which may cause a problem in the unity of Africa (Statement of the South African Department of Foreign Affairs, cited in Simon, 2011). Some scholars say that violence in Darfur is being decreased. However, the 2011 ICC report indicated that the violence and pattern of targeting civilians was continued (cited in Simon, 2011). In addition, the Human Rights Watch reported that only in the first three months of 2011 over seventy thousand (70,000) people were fled from their home land (Human Rights Watch, 2011). As to the AU, the ICC's arrest warrant is meaningless in achieving peace in Darfur rather it increases the pain of civilians in Darfur. Thus, the AU decided not to cooperate with the ICC regarding the Al Bashir case and even in the

case of other heads of states in Africa. This became major obstacle for the ICC not to arrest and to prosecute President Al Bashir.

The ICC's Arrest Warrant as Barrier to the Peace Process in Sudan

The AU and its proponents opposed the ICC's arrest warrant against Al Bashir because the prosecution of Al Bashir may aggravate conflict. This situation may disturb the peace and stability of the region. It may also cause divisions on the AU member states and may paralyze the AU. According to some scholars, African leaders have little respect and patience for President Al Bashir. However, they afraid the prospect of an anarchic Sudan (cited in De Waal and Stanton, 2009). The AU articulates that arrest warrant on Al Bashir may hinder the ongoing peace process between the Sudanese government and South Sudanese fighting groups. As to AU, prosecuting active participants in the peace process mean increasing the risks by prolonging conflicts. In other words, it will endanger the fragile peace processes. As long as the war between the Sudanese government and SPLA/M brought to an end through the Comprehensive Peace Agreement (CPA), the ICC's arrest warrant may disturb this situation (cited in Odero, 2011). Moreover, as to De Waal, the charging of President Al Bashir could deteriorate the CPA and may cause a further conflict. For instance, the ICC Prosecutor brought charges against Al Bashir in July 2008 and the Sudanese government bombed Kutum in November 2008 (cited in Stanton, 2009).

Mehari pointed out that the ICC's arrest warrant may decrease the intensity of future violence which might be committed through the African leaders if the leaders have not committed a considerable crime before. However, President Al Bashir has already committed an atrocious crime in Darfur. Consequently, Al Bashir may take attack on civilians as the only means to consolidate his power and to delay his arrest. This may escalate the atrocity in Darfur (Mehari, 2012). For instance, on 4 March 2009, immediately after the ICC's arrest warrant, the Sudanese government cancelled the licenses of ten major relief organizations which feed and care for displaced persons in the Darfur refugee camps. This implies that the arrest and prosecution of Al Bashir will increase the intensity of the conflict in Darfur (De Waal cited in Stanton, 2009). Therefore, the justice process by the ICC may deteriorate the peace process and escalate the violence in Sudan because the responsible bodies may frustrate and fail to respect the agreement (Odero, 2011). Furthermore, as to Meernik, the individuals and leaders who have been accused of instigating and executing atrocities against citizens are parties in the peace process. Thus, the issuance of an arrest warrant against Al Bashir may disturb the peace process (cited in Murithi, 2012).

President Al Bashir is a heads of state and he is one of the actors in the peace process. If he is arrested, no one will be responsible for the peace process in Sudan. Thus, it could stall the peace process and lead to crisis.⁸ The AU believes that the ICC focus on justice might restrain the peace process and lead to serious violence.⁹

The ICC's arrest warrant against Al Bashir is also ill-timed because the conflicting parties are in the peace negotiation. The question to justice must come later i.e. after the peace and stability will be ascertained in the country. Al Bashir is the prominent person in the Sudanese government. He may take the lion share in the effectiveness of the peace process. Thus, the ICC's attempt for arresting and prosecuting him may lead to more fatal conflict (AU Peace and Security Council, 2009). The major contestation between the ICC and AU regarding Al Bashir is the issue of timing because the arrest warrant might restrain the peace process in Sudan.¹⁰

The Inconsistency of the ICC's Arrest Warrant with the International Law

The AU also refused the ICC's arrest warrant on the basis of International Customary Law.¹¹ As to the AU, the ICC's arrest warrant against Al Bashir abuse the principle of universal jurisdiction (AU Assembly, 2008). Moreover, on 18 April 2008, the Ministers of Justice and Attorney Generals in Africa discussed in Addis Ababa, Ethiopia over the ICC's charges against Al Bashir. They strengthened the AU's position. They noted that the arrest warrant could endanger the international law, order, and security because it is obvious violation of sovereignty and territorial integrity. Therefore, the arrest warrant on Al Bashir must not be enforced by any AU member and other states (AU Assembly cited in Simon, 2011). The AU and most of its member states have still a static position. The AU has been forcing its member states to withhold the ICC's decision on Al Bashir. As to the AU, its decision regarding Al Bashir must be

⁸ Fisha, Simon and Solomon (interview)

⁹ Interview with Bright Mando, a Legal Officer in the AU Office of Legal Counsel, African Union, held in Addis Ababa, on 6 May 2013.

¹⁰ Interview with Solomon Dersso, a Senior Researcher at the Addis Ababa Office of Institute for Security Studies (ISS), held in Addis Ababa, on 17 May 2013.

¹¹ International Customary Law is a law which generates rules binding on all states and usually, it is not in written form. In International Customary Law provides immunity for the heads of states and requires to be applicable in all states in the world. See Greenwood, C. (2008). *Sources of International Law: An Introduction*. <http://www.untreaty.un.org>. Accessed on 20 June 2013.

respected by the non-party states and states parties of the ICC because the ICC's arrest warrant violates international law on sovereignty (Du Plessis, 2012).

As to the AU, the ICC's arrest warrant on Al Bashir also breaches the law of immunity of heads of states. The International Customary Law advocates and illustrates that heads of states have immunity. The immunity of heads of states includes personal inviolability; special protection for their dignity; immunity from criminal and civil jurisdiction; and from arrest and prosecution in a foreign state on charges concerning all crimes (Oxford University, 2008). As to the AU and its proponents, in International Customary Law, heads of states have an immunity which protects them from arrest and prosecution. In essence, the consent of the states is very crucial for arresting and prosecuting heads of states like President Al Bashir (Amnesty International, 2010). Most African leaders argued that arresting and prosecuting of heads of states is dangerous. The AU becomes conservative on the principle of immunity and showed its opposition on arrest warrant of Al Bashir because Al Bashir has immunity like other heads of states. In addition, Article 98 of the Rome Statute articulates that the consent of the sending state is important to capture perpetrators such as Al Bashir by the other states (Tladi, 2015). Most of the AU member states including states parties to the ICC are violating their obligations under the Rome Statute. They want to abide by International Customary Law regarding the heads of states' immunity such as President Al Bashir (ibid).

The Confusion on Article 27 and 98 of the Rome Statute

The AU put that the responsibility of states parties and non-party states must be clear. The Article 27 of the Rome Statute makes the immunity of heads of states valueless during prosecution. It concludes that any kind of immunity cannot be an obstacle to prosecute perpetrators where as the Article 98 provides an emphasis for immunity (Rome Statute, Article 27 and Article 98).

Article 27 of the ICC articulates that official capacity is irrelevant during prosecution.

Rome Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence (ICC, 1998, p.22).

However, to some extent article 98 of the Rome Statute is likely to accept the immunity of heads of states under the protection of the international customary law. Article 98 provides an emphasis for immunity (Rome Statute Article 98, 1998). It articulated regarding the way of cooperation with respect to waiver of immunity and consent to surrender.

The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity (ICC, 1998, p. 66).

Article 27 and Article 98 are nearly to contradict each other (Akande, 2004). Thus, the AU raised the contradiction between the two articles as one of the problems which confuses it. The confusion on the articles led it to take a contrary side against the ICC's arrest warrant on Al Bashir. As to the AU, these articles must be clarified appropriately to easily identify the obligation of states parties and non-party states with respect to arresting and surrendering individual perpetrators such as Al Bashir. Some scholars like Akande articulated that Article 27 must override Article 98 regarding to the states parties (cited in Simon, 2011). Most African states have ratified the Rome Statute. However, there is confusion in states parties and non-party states in indentifying their responsibilities. This implies that they did not seriously analyze the Rome Statute during the initiation time.¹²The ICC promotes non-party states to support its works in all possible ways depending on agreements. However, the non-party states to the Rome Statute have no obligation under the Rome Statute to cooperate with the ICC (Simon, 2011). Article 98 of Rome Statute states that if the state cooperation forced to breach international law such as the diplomatic immunity of a person of the third state, the consent of the third state will be taken into account (cited in Simon, 2011). As to the AU, Sudan is non-party state to the ICC and unwilling to surrender President Al Bashir. Therefore, the ICC must not focus on Al Bashir (Simon, 2011). However, the Article 27 of Rome Statute invalidated the immunity of the heads of states. In addition, the ICC has got jurisdiction on the Darfur case in cooperating with the UNSC to investigate crimes and to prosecute individual perpetrators. Thus, the ICC has a legitimate power to request Sudan like other states parties to the ICC.

The ICC's Particular Focus on Africa

The AU also claims that the ICC is unfairly targeting

¹² Fisha (interview)

Africa. In the Eighteen Ordinary Session of the AU Assembly in January 2012, and in the Extraordinary Session of the AU Assembly in October 2013, it decided that the ICC's demand of accountability from the African leaders should be applied to all other leaders around the world (AU Assembly, 2012; and AU Assembly, 2013). As to the AU, the ICC has no power to deprive the immunity of heads of states in non-party states such as Sudan (Tladi, 2015). It is being supposed that the ICC mainly concentrates on Africa than the other parts of the world. Most of the cases in the ICC are from Africa. This led the AU to the conclusion that the ICC has been looked to prosecute only Africans (Mehari, 2012). All ongoing cases in the ICC are from Africa though the existence of various crimes in other parts of the world. Thus, this is unfair and it manifests that the ICC by itself is not independent from political influence of powerful states.¹³ To some extent, the AU argument implies that the focus of the AU is not on the prevalence of crimes committed by the African leaders rather the disproportion of cases in the ICC. Some scholars, like Mutua noted that the AU's position is dominantly political than legal. Articulating about the disequilibrium of power in international politics and the pressure of powerful states on international organizations like the ICC during the question of bringing justice is really political (Mutua, 2010).

The ICC's Actions as a Manifestation of a Neo-Colonial Plot

Some African leaders expressed that the ICC does not care about the prevalence of justice rather it is working as a right hand of the powerful western countries to fight against impunity in Africa and to increase their benefits (Avocats Sans Frontieres, 2012). Moreover, they articulated that the ICC's arrest warrant on Al Bashir is an implication of neo-colonialism. For instance, the Rwandan president Paul Kagame said that the ICC is a new form of imperialism that seeks to undermine poor African countries and other weak countries (cited Avocats Sans Frontieres, 2012). Similarly, the former Libyan president, Mohammed Gaddafi, said that the ICC's arrest warrant on Al Bashir is an implication of terrorism and imperialism (cited in Simon, 2011). Some African leaders in the AU noted that the ICC's arrest warrant on Al Bashir is a manifestation of neo-colonialism. Nevertheless, South Sudan has not taken a position regarding the issue.¹⁴

¹³ Fisha and Solomon (interview)

¹⁴ Interview with Arop Kuol Deng, the South Sudan Ambassador to Ethiopia, South Sudan Embassy, held in Addis Ababa, on 18 April 2013.

The ICC has confined its investigations and prosecutions in Africa. This implies that the ICC is working to avoid confrontation with major powers. Thus, it almost becomes a tool of western powers foreign policy.

For instance, USA committed a crime against humanity and war crimes in Afghanistan, Iraq and in other states. However, the ICC ignored these realities and mainly emphasized on developing world particularly on Africa. Thus, this is a manifestation that the ICC is a neo-colonial conspirator rather than an impartial prosecutor (Schabas, cited in Odero, 2011). In addition, the composition of the UNSC by itself is problematic because the veto powers such as USA, Russia, and China are non-parties to the ICC. However, the UNSC referred the Darfur case to the ICC. This shows that the ICC is an instrument to influence weak states and to maximize the interest of powerful states.¹⁵

The Attempts of the AU to Protect Al Bashir from Arrest and Prosecution

Some of the AU's activities look like that the organization is protecting Al Bashir. The AU opposed the ICC's arrest warrant and decided not to give Al Bashir to the ICC (Justice Africa, 2013). It directly or indirectly applies some mechanisms seemingly to defend Al Bashir from arrest and prosecution.

Arranging Meeting in Favour of Al Bashir

The AU has scheduled meeting in the favour of Al Bashir. Particularly, the 19th AU Summit was arranged to be conducted in Malawi in July 2012. Unfortunately, Malawi government announced that it could not host Al Bashir. If he engaged in the meeting, it could give him up to the ICC (Cook, 2013). Following the Malawi's stance, the AU changed the summit to be conducted in Ethiopia for the sake of defending Al Bashir from the ICC's arrest and prosecution (Anna Maunganidze and Dzinesa, 2012). This manifests that the AU is strongly following those issues concerning Al Bashir case. Akande further elaborate the issue that the contestation between the ICC and AU increases the attention of the international community where the AU meeting could be delivered. It is to understand whether host state might cooperate with the AU or with the ICC (Akande, 2012). Some proponents of the AU said that Malawi refused to invite Al Bashir because it was to not damage its relation with donors particularly from the European countries (AU, 2012). It implies that AU wants the free participation of Al Bashir like other heads of states at all meetings which are prepared by the AU and other actors.

¹⁵ Solomon (interview)

Manipulating Great Powers and Regional Organizations

The AU and the Sudan government have been working for convincing some regional organizations such as the Arab League, the Organization of the Islamic Conference (OIC), Community of Sahel-Saharan States and so on. These regional organizations almost supported the AU's position against the ICC's arrest warrant on Al Bashir. They criticized the ICC's arrest warrant on president Al Bashir (Arieff et al., 2011). Moreover, Al Bashir has been invited to engage on various meetings. For instance, President Al Bashir attended on the Summit of the Community of Sahel-Saharan States in Chad on 22 July 2010 (Elise, 2011). Similarly, the Arab League invited Al Bashir in different summits by ignoring and opposing the ICC's arrest warrant on Al Bashir. In addition, the Arab League argued that the ICC is western imposed court and it is an instrument for neo-colonialism (Tladi, 2015).

The AU has also tried to manipulate great powers on Al Bashir case. The great powers such as China and Russia supported the AU's position. They asked the deferral of the arrest warrant before and after the publicizing of the ICC's Pre-Trial Chamber arrest warrant on Al Bashir. As to them, the delivery of the ICC against President Al Bashir might cause for the failure of peace process and might escalate the instability in Sudan (Baldo, 2010; War Crimes Research Office, 2009). This manifests that the AU's good diplomatic and economic relations with China and Russia enable to gain support on its decisions concerning Al Bashir case. As to Simon, though not successful, the AU Assembly also requested all the UN member states particularly the EU member states to delay the arrest warrant against Al Bashir (Simon, 2011). Both China and India welcomed Al Bashir to their territory in 2015. This shows that some great powers which have strong relation with Africa are not cooperating with ICC (Keuleers, 2016).

Plan to Found African based Criminal Court

The AU also announced that the African problems must be solved by the Africans themselves including the issues of war crimes, crimes against humanity and genocide. For addressing these problems, Africa must have one strong African international court. Particularly, during its twelfth (12th) and thirteenth (13th) Ordinary sessions, the AU Assembly focus on having strong Africa based international criminal court rather than external court like the ICC. The African criminal court on human and peoples' rights may try to see serious international crimes (Decisions and Declarations of the Assembly of the African Union, cited in Simon, 2011).

Most of the AU member states stress that the presence of strong African court on human rights is essential to promote democracy and combat impunity. The court is expected to function as complementary to national courts. Particularly, they gave more emphasis for organizing regional court after the indictment of Al Bashir (Song, cited in Du Plessis and Gevers, 2011). The AU also opposed the presence of the ICC Liaison Office in Addis Ababa despite its significance to closely negotiate in all issues including the Al Bashir case (Elise, 2011). This implies that most African countries seek to have continental level court than other external court. In May 2012, the AU formulated a draft which deals regarding the establishment of an African Court of Justice and Human Rights. In the Draft, the court will have jurisdiction on the crime against humanity, war crime, and genocide (Daily Monitor Newspaper, cited in Avocats Sans Frontiers, 2012; Du Plessis, 2012). The African leaders' effort to establish their own criminal court implies that the relation between the ICC-AU might be polarized. For ICC, this action may create fear of completely loss its jurisdiction on African states and their supporters. Regarding this issue, some scholars like Murithi noted that this sort of attempt by the AU may be to intimidate the ICC and to avoid the possible future of the ICC's indictment on the heads of states in Africa. The AU interaction with the ICC is almost weakened. Most the actions of the AU seem to avoid the future engagement of the ICC in Africa. Still, the fate of African states which are parties to the ICC is unclear whether they will withdraw from the ICC or not (Tladi, 2015).

Influencing its Member States to Avoid cooperation with the ICC

In various summits, the AU reiteratively called and reminded its member states to ignore the ICC's call of cooperation in arresting President Al Bashir since the issuance of the arrest warrant. For instance, on AU Assembly Summit in July 2009, in Sirte, Libya; in July 2010, in Uganda; in October 2013, in Addis Ababa, Ethiopia, and on other summits, the AU concluded that the member states must not cooperate with the ICC in relation to Al Bashir case. This is the AU decision to respond to the ICC's arrest warrant on Al Bashir. The AU has also manipulated non-party African states to the ICC, which are more than twenty states, to influence other African states to cease cooperation with the ICC (Oxford University, 2010; AU Assembly, 2013). Similarly, in October 2013, the AU requested the states parties to the ICC to know and discuss on the consequences of indicting sitting heads of states. In addition, it decided "any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union"

(African Union Assembly, 2013: 2-3).

After the ICC issued the first arrest warrant, Al Bashir travelled into many non-party states of the ICC such as Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, and Zimbabwe, and to some the ICC states parties such as to Chad and Kenya (Arieff et al., 2011). In October 2011, during the period of the former Malawi's president, Binguwa Mutharika, Malawi's government hosted and Al Bashir attended in the Common Market for Eastern and Southern African States summit. Malawi hosted him because the AU was urging its member states not to cooperate with the ICC (Du Plessis, Maluwa, and O'Reilly, 2013). It implies that the ICC has been working hard in convincing and influencing the African and some other states to host and treat Al Bashir like other heads of states. The AU's action became a big challenge particularly for African states which are parties to the ICC because it violates the principles of ICC. Elise point out that Al Bashir attended in Kenya on 27 August 2010 during the celebrations for the country's new constitution. However, as a state party to the ICC, Kenya did not take any measure to arrest Al Bashir. This is not because of Kenya's negligence to respect the ICC's rules rather it is due to the strong influence from the AU and other states. Thus, the AU's call for non-cooperation is contrary to the ICC's rule (Oyugi, 2014).

At the 2010 Summit, the AU again decided that the AU member states not to cooperate with the ICC in arresting president Al Bashir. The AU Commission also decided to impose a sanction on the ICC states parties if they cannot support and apply the non-cooperation principle with the ICC on the Al Bashir case (Human Rights Watch, 2010). All states that have ratified the UN genocide convention including non-party states to the Rome Statute have responsibility to cooperate with the ICC. However, some states such as Ethiopia, Egypt, Libya, and Saudi Arabia have neglected it and invited Al Bashir to come in their territory (Simon, 2011). The AU declared that its member states must act in accordance with Article 23 of the AU Constitutive Act (African Union Assembly, 2012). It further declared that all its member states must abide by this decision. Failure to abide would invite sanctions. In particular, the decision urged all its member states to comply with the AU Assembly decisions regarding the Al Bashir case (ibid). For instance, the AU was strongly forcing Malawi to host Al Bashir like other African leaders in its territory. However, due to Malawi's firm stance, the AU changed the summit to Ethiopia. Then, the AU criticized the Malawi president Joyce Banda. The AU pointed out that Joyce Banda has been influenced by the neo-colonial mind set because its opposition was instigated by the western powers. It was to obtain loan from them (Hungwe, 2012). In general, the AU has been taking long step in convincing most of its member states to protect Al Bashir from arrest and

prosecution (Mutua, 2010). In addition, some African states like Libya under president Gaddafi took a hard position against the ICC's arrest warrant on Al Bashir. It also strongly pressurized the states parties of Rome Statute to withdraw from it (Akande, 2009). Now, Kenya and South Africa are considering to withdraw from being a party to the ICC and not to cooperate with the ICC in arresting Al Bashir (Tladi, 2015; Keuleers, 2016).

Important debates are taking place in South Africa as well as within the African Union (AU) as a whole about the future of Africa's participation in the International Criminal Court (ICC), which was set up in 1998 to help end impunity for the most serious crimes of concern to the international community. South Africa claims to be considering a withdrawal from the ICC, and its Supreme Court of Appeal (SCA) is debating whether or not the country is required to arrest incumbent African presidents who have been indicted by the ICC (Keuleers, 2016: 1).

The AU as an Obstacle for the ICC not to Arrest and Prosecute Al Bashir

The AU is an obstacle despite not the first obstacle to the ICC not to arrest and prosecute Al Bashir. In essence, there are number of states in Africa and other part of the world which have mainly been hindering the ICC's activities on the Al Bashir case. Several states have been inviting Al Bashir in various times regardless of the ICC's arrest warrant. Thus, considering the AU as a major obstacle to the ICC's actions on Al Bashir case is not right.¹⁶ The ICC Prosecutor called for regional cooperation and emphasized the importance of an effective working relationship with the AU to end impunity in Sudan. The ICC needs the AU's help particularly on the Al Bashir case. However, the AU firmly refused the ICC efforts particularly on Al Bashir case and it has strongly been defending Al Bashir from arrest and prosecution (Oyugi, 2014). The AU has got a gap to protect Al Bashir from arrest and it helps Al Bashir to move freely in some African countries. Moreover, the AU has been arranging favourable situations for President Al Bashir to hide him from arrest and to do his works freely like other heads of states. For the implementation the AU's stance, the AU is manipulating regional organizations and states for treating Al Bashir. Shafi and Bakr pointed out that the Arab League is not willing to cooperate with the ICC in arresting and prosecuting Al Bashir. This may be due to the membership of Sudan and some other African states to the Arab League, and the AU's smooth relation with Arab League (Shafi and Bakr, 2010).

The AU also pressurized its member states to

¹⁶ Fisha and Simon (interview)

cooperate with the AU in inviting and treating Al Bashir. Furthermore, the AU is utilizing the great powers like China to refuse the ICC's arrest warrant on Al Bashir following the China's good economic and political relation with Africa. This has enabled the AU to protect Al Bashir from arrest and prosecution through the ICC. Even if there is a possibility of imposing sanction on Al Bashir by western states and the UNSC, it will not be big problem for Sudanese government. Sudan might obtain significance support from China, Russia, the AU, and the Arab League. China is a key source of small arms and other manufactured goods to African states including for Sudan. In reverse, China obtains access for natural resources, especially oil. China had refused the UNSC resolution's attempt to impose sanctions on the petroleum of Sudan to force Al Bashir for resolving the conflict in Darfur. Thus, it is easy for the AU to obtain the cooperation of China in respecting, supporting and implementing of its decisions regarding Al Bashir (Akuffo, 2010). These manifests that directly or indirectly the AU has been hindering the ICC's activities in Africa as whole and on Al Bashir case in particular.

As one of the regional organizations, the AU could have cooperated in executing the ICC's decisions on the perpetrators such as Al Bashir. However, for the time being, the AU is in the position of protecting Al Bashir from arrest and prosecution. Simon confirmed that the enforcement of the Rome Statute of the ICC is dependent on the consent and cooperation of states and regional organizations such as the AU. This weakens the speedy and organized implementation of the ICC decisions (Simon, 2011). The regional organizations may have a big role for the effective enforcement of the ICC's decisions. Thus, the AU must cooperate with the ICC to arrest and prosecute Al Bashir because the AU's open support is important to end impunity. The AU is also important in strengthening the capacity of national systems to investigate and prosecute crimes within the jurisdiction of the court. If the AU was cooperative with the ICC, it would encourage its member states to facilitate the activities of the court (Bensouda, 2007). In addition, it would encourage the AU member states to ratify the Rome Statute and assist the existing states parties to the ICC to incorporate Rome Statute with their respective national legal systems. This may enable the ICC to arrest and prosecute Al Bashir (ibid).

The African states which are parties to the Rome Statute have engaged in two obligations i.e. the obligation from the ICC in accordance with Article 87 of

Rome Statute¹⁷ and Article 23 of the AU Constitutive Act. The Rome Statute in its article 87 articulates that those states parties must fully cooperate with the ICC. On the other hand, the AU Constitutive Act Article 23 point out that the AU member states must abide by the AU decision and cooperate with it. Here, these states are in dilemma because the ICC and AU could not agree on the Al Bashir case. Some states are going to accomplish their obligation in accordance with the ICC decisions while the others are going in accordance with the AU decisions (Du Plessis and Gevers, 2011; Tladi, 2015). This manifests that the AU usually raise the international law on the principle of sovereignty and on the immunity of heads of states, and Article 23 of the AU Constitutive Act to protect Al Bashir from arrest and prosecution. Through Article 23 of the AU Constitutive Act, the AU has been trying to convince and to force its member states to respect its decisions regarding any issues including Al Bashir case. Consequently, most of African states have been manifesting their commitment to the AU constitutive Act than the Rome Statute. It may create a question on persons' mind why most African states provides more emphasis to the AU constitutive Act than Rome Statute. The AU influenced its member states including the states parties to the ICC through various decisions in accordance with the Article 23 of AU Constitutive Act. Du Plessis and Gevers point out that the African states which are states parties to Rome Statute engaged in two opposite obligations. The AU influenced its member states to accept its decisions. Otherwise, it may impose sanction on the member states in accordance with the AU Constitutive Act (Du Plessis and Gevers, 2011). In essence, it is hard to proceed in accordance with two different rules or obligations. Thus, it is unremain the domination of one obligation over the other in its implementation by the states parties. The two different obligations simultaneously is irreconcilable issue. The AU decisions are binding in its member states irrespective of their interpretation than the Rome Statute. Thus, the AU obligation prevails over the Rome Statute (ibid).

Elise confirmed point of view that the ICC's states parties have clear obligations under the Rome Statute to cooperate with the ICC in executing arrest warrants for critical functioning of the ICC. However, the failure of arresting Al Bashir during his visit in the states parties of the ICC such as Kenya and Chad manifests that the AU has strongly influenced its member states than the ICC.

¹⁷ Article 87 (1) (a) of Rome Statute provides the ICC an authority to make requests to the states parties for cooperation. Article 87(7) also states that failure to cooperate can amongst other things, lead to a referral of the state to the UNSC. See Du Plessis, M. (2012). "African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions." Institute for Security Studies Paper, Number 241.

Thus, most African states are enforcing the AU's decisions at the expense of their obligations from the ICC. The states parties should arrest the president when he enters in their territory, or at least they should prevent his visits (Elise, 2011).

CONCLUDING REMARKS

The African states had played a big role for the establishment and functioning of the International Criminal Court (ICC). Most of them are states parties to the Rome Statute which was adopted in 1998. After 1998, they had contributed for the works of ICC in various cases. The African Union (AU) was also convincing and influencing its member states to be parties to the ICC and to cooperate with the ICC's activities. Consequently, the African states, and the AU cooperated with the ICC on some cases, like in the Central African Republic (CAR), Democratic Republic of the Congo (DRC), and Uganda, or Lord's Resistance Army (LRA) cases.

After the Darfur case referred to the ICC particularly following the ICC's arrest warrant on Al Bashir, the AU started its opposition against the ICC's activities in Africa. The ICC carried out investigations and obtained evidences which show that president Al Bashir was the main responsible person for the crimes committed in Darfur. As to the ICC, it found the evidences which are sufficient enough to charge Al Bashir. For instance, the Janjaweed militia and the Sudanese armed forces attacked the fur, Masalit and Zaghawa ethnic groups, and looted and burned their villages. The ICC obtained evidences from the report of ICID, and through gathering data from victims and other participants of the Darfur conflict. Depending on these evidences, the ICC issued two arrest warrants on Al Bashir in 2009 and 2010. Following the ICC's arrest warrant on Al Bashir, the AU has taken an extreme position against such arrest warrant. As to the AU, President Al Bashir must not be arrested and prosecuted by the ICC because it may deteriorate the peace process in Sudan. President Al Bashir is claimed to be the main actor in the Sudan peace process. Thus, arresting him means escalating the instability in Sudan and it may increase the pain of innocent civilians. Somewhat, this AU's reason is more acceptable than the other reasons. However, it is doubtful that ensuring peace before justice brings sustainable peace in Sudan. In addition, the major aim of the ICC is ensuring the prevalence of justice rather than making a cost benefit analysis on the situations. It prosecutes perpetrators and enables the victims to withdraw from the grip of crimes and thereby avoiding a revenge attack by the victims against the former perpetrators.

Some African leaders also state that the ICC's activities in Africa are manifestations of neo-colonialism because

the ICC has been focusing only with Africa. Most of the cases in the ICC are from Africa. However, this justification is almost not acceptable since most of the cases, to which the ICC has paid attention in Africa, like the DRC, CAR, and LRA cases are self-referrals. Moreover, most African states are also states parties to the ICC. The AU has also articulated that the ICC's arrest warrant on Al Bashir breaches the international law on sovereignty of states and immunity of heads of states. However, this power has been given to the ICC through the Rome Statute in the consent of states parties. The power of the ICC is also supported by the UN to go beyond the principle of sovereignty, and immunity of heads of states. For instance, the Rome Statute, in its article twenty seven (27), notes that the immunity of heads of states or any official is meaningless during prosecution. Thus, the AU cannot have a ground to raise this kind of justification because the power has been given with the consent of more than thirty (30) African states which are states parties to the ICC. In this regard, the AU's intention seems to demolishing the ICC's early works in an effort to restrain the possibility of the future interference in Africa which might include other heads of states.

The non-existence of an implementing police force provided a chance to the AU to protect Al Bashir from arrest and prosecution. The AU utilizes various mechanisms in the favour of Al Bashir such as arranging meeting in the favour of Al Bashir; manipulating great powers and regional organizations; influencing member states; and attempting to found African based criminal court. For instance, the AU shifted its summit from Malawi to Ethiopia following the Malawi's stance not to host Al Bashir and to respect the ICC's decision. The AU is also manipulating great powers and regional organizations to buy support for its decisions and to shield Al Bashir from any ICC-sponsored threat. Great powers like China and Russia opposed the ICC's arrest warrant and requested the UNSC to delay the case. Similarly, regional organizations, like the Arab League opposed the ICC's arrest warrant and invited Al Bashir at different summits.

The arrest and prosecution of Al Bashir is being delayed. This manifests that the obligations from the AU have been outweighing the obligations from the ICC on states parties regarding Al Bashir case. The AU more pressurizes its member states to accept and comply with its decisions than the ICC's decisions. It seeks to use also a sanction as an instrument to coerce those member states which do not respect its decisions. On the other hand, the two obligations are going polarized because of the disagreement between the ICC and AU on the case of Al Bashir. This makes difficult for the states parties to proceed by compromising the two obligations. The AU is looking to take an extremist position against the ICC's

arrest warrant on Al Bashir and the ICC in general. This is very hard for African states particularly those states which are states parties to the ICC to accommodate the two contrary obligations. Most of the African states can choose to abide by the African Union Constitutive Act than the Rome Statute over the Al Bashir case and on other similar issues. In essence that the AU can strongly influence African states than the ICC due to its geographical proximity and historical bondage with them.

The AU also attempts to establish African based criminal court. It seems to pose a threat to the ICC not to focus on Africa. Thus, all premises imply the efforts of the AU to protect Al Bashir from arrest and prosecution. Among other factors, the AU has become the main hindrance for the ICC not to arrest and prosecute Al Bashir. Al Bashir has been moving freely across different African and other countries with the strong cooperation of the AU. This implies how much the ICC is dependent on the states and regional organizations to enforce its decisions. If the AU were collaborating with the ICC, it would arrest Al Bashir through its states parties. In other words, the absence of the AU's support to Al Bashir means absence Al Bashir's free movement in Africa and in other parts of the world. This might allow the ICC even to intervene in Sudan to arrest Al Bashir by its states parties in Africa and other countries. However, the ICC relations with the African states and AU seem in danger.

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