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THE INTERNATIONAL CRIMINAL COURT AND AFRICA: TRANSCENDING CLEAVAGES TO ACHIEVE COMMON GOALS

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Cover image: View of the International Court of Justice Bench during the reading of its Judgment in the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). The Court ruled that, in compliance with its obligations under the Convention Against Torture, Senegal must prosecute or extradite former Chadian President Hissène Habré. © Frank van Beek, UN Photo/ICJ-CIJ/.

ABSTRACT

In January 2017, at its Annual Assembly of Heads of State and Government, the AU decided by consensus on a strategy for mass withdrawal from the International Criminal Court (ICC), and the continent is developing plans for its own transnational criminal courts. Although they share common goals, the AU and the ICC have developed competing approaches to achieving peace, security and justice on the African continent, which remains fraught with violence and conflict affecting civilians in several countries. Yet new forms of criminal justice mechanisms have developed in Africa and offer promising opportunities for renewed cooperation. It remains for the ICC to engage and collaborate with them in order to bring justice closer to the people, and ease the tensions between national sovereignty and the international criminal justice system. This could reunite both the political and legal dimensions needed to tackle the continent's most egregious crimes.

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ABBREVIATIONS AND ACRONYMS

ACJHPR	African Court of Justice and Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
AU	African Union
CAR	Central African Republic
CSO	civil society organisation
DRC	Democratic Republic of Congo
EAC	Extraordinary African Chambers
ICC	International Criminal Court
NGO	non-governmental organisation
OTP	Office of the Prosecutor
PSC	Peace and Security Council
SCC	Special Criminal Court
TRC	Truth and Reconciliation Commission
UJ	universal jurisdiction
UNSC	UN Security Council

INTRODUCTION

In January 2017, at its Annual Assembly of Heads of State and Government, the AU decided by consensus on a strategy for mass withdrawal from the International Criminal Court (ICC).[1] This announcement followed moves by Burundi, South Africa and The Gambia to withdraw from the Rome Statute – the legal base of the ICC – in October 2016. African states constitute the biggest bloc in the ICC, with 34 out of the 124 current states parties, and this decision caused ripples.

However, the title of the AU's Withdrawal Strategy Document is misleading. A collective withdrawal from the ICC has no basis in international law. Every state is sovereign in its decision to leave the court or to remain and, so far, only Burundi has successfully initiated the process to withdraw.[2] Further, many ministers voiced their disagreement over the decision, particularly those representing Nigeria, Senegal and Cape Verde;[3] and 17 member states entered their reservations, which is significant as this is a non-binding strategy. Finally, a closer look at the content of the document reveals the AU's willingness to pursue dialogue based on a series of requests and amendments to the Rome Statute. For instance, it proposes that 'no referrals of particular situations on the African continent should be made without deference to the Assembly of the [African] Union'.[4]

Therefore, at this stage, the AU's decision is unlikely to have a material impact on the current workings of the ICC. Yet despite differing views among African states, the AU formally constitutes the mouthpiece of the continent, and has moral authority over it. Thus, on the political side, the decision is a powerful tool and illustrates the rising tensions and criticism towards the court over the past decades.

By the end of the 2000s African leaders began to criticise the ICC's apparent bias towards cases on the African continent. The first nine cases on the court's docket related to Africa. However, extensive literature has exposed a much more complex reality, where significant state interests and political calculations have been at stake. Some of the cases referred to the court by African states themselves illustrate how governments used ICC processes to

1 AU (African Union), 'Withdrawal Strategy Document', Draft 2, Version 12.01.2017. Addis Ababa: AU, 2017.

2 On 18 October 2016 Burundi initiated the process to withdraw from the International Criminal Court (ICC); The Gambia retracted its decision to withdraw from the ICC on 14 February 2017; and South Africa's notification of withdrawal to the UN Security Council (UNSC) was declared invalid and unconstitutional by the High Court of Pretoria on 22 February 2017.

3 Keppler E, 'AU's "ICC withdrawal strategy" less than meets the eye', HRW (Human Rights Watch), 1 February 2017, https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye, accessed 10 May 2017.

4 AU, 2017, *op. cit.*

stifle and marginalise internal opposition.[5] Conversely, although articles 13(b) and 16 of the Rome Statute respectively authorise the UN Security Council (UNSC) to refer or defer a case without the prior input of the states parties, these prerogatives have undoubtedly politicised the court. In particular, the UNSC's referral to the ICC of the situations in Sudan in 2005 and Libya in 2011 – both geo-politically strategic African countries – reinforced assumptions of a selective justice system serving Western interests.[6]

Although a judicial body, over the years the ICC has become less legal and more political. Providing justice for egregious crimes occurring in conflicts or violent civil wars, or stemming from terrorist attacks, inevitably intertwines matters of peace and security in a highly politicised context. The politicisation of the court itself, at both domestic and international levels, has further undermined it.

Yet, despite concerns over its legitimacy, the ICC is currently the only viable permanent instrument to provide retributive justice and reparations for the most serious international crimes – when a state is unable or unwilling to prosecute crimes falling under its jurisdiction. Any state party willing to turn its back on the ICC without a sustainable alternative would therefore impose a double punishment on those victims who could benefit from the ICC's action and support.

The Uppsala Conflict Data Program revealed that over the last quarter-century (1989–2014), an estimated 675 633 people had died in Africa because of organised violence.[7] Among them, at least 169 331 unarmed civilians were killed in one-sided violence.[8] Although new conflict trends are difficult to determine, ongoing crises affecting in particular North Africa, the Sahel, West Africa, the Horn and the Great Lakes region[9] are

5 This was notably the case in Uganda (2004), the Democratic Republic of Congo (DRC, 2004) and the Central African Republic (CAR, 2004). See Murithi T, 'Pan-Africanism and the politicization of the International Criminal Court', *Journal of African Union Studies*, 3, 1, 2014, p. 65.

6 In the Withdrawal Strategy Document, the AU states: 'Many arguments have been made regarding the systemic imbalance in international decision-making processes. The inherent politics of such processes result in unreliable application of the rule of law. In this regard, the decisions of the United Nations Security Council (UNSC) are made on the basis of the interests of its Permanent Members rather than the legal and justice requirements' (AU, 2017, *op. cit.*).

7 Of this total, 419 078 deaths were as a result of state-based conflict, 169 331 one-sided violence, and 87 224 non-state conflict. According to the Uppsala Conflict Data Program, state-based conflict refers to armed conflict between two governments (ie, intrastate conflict); non-state conflict refers to armed conflict between two organised actors, neither of which being a state; and one-sided violence refers to an organised actor (a state or non-state actor) killing unarmed civilians. See Melander E, *Organized Violence in the World 2015: An Assessment by the Uppsala Conflict Data Program*. Uppsala: Uppsala University Publications, 2015, p. 1.

8 *Ibid*.

9 Aucoin C, 'Less armed conflict but more political violence in Africa', *ISS Today*, 12 April 2017, https://issafrica.org/iss-today/less-armed-conflict-but-more-political-violence-in-africa, accessed 5 May 2017.

significantly undermining the AU's ambitions of an Africa free of violence and conflict. The AU Constitutive Act of 2000 aims to 'promote and protect human and people's rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[10] The AU should therefore pursue efforts in combatting impunity and providing justice to the victims of atrocities stemming from conflict affecting the continent.

Established in 2002, the ICC was formed specifically to prosecute individuals charged with the most serious of crimes, including aggression, war crimes, crimes against humanity and genocide. Many African states took part in the international negotiations, which culminated in the adoption of the Rome Statute in 1998 to ensure accountability for mass atrocities and combat impunity through this unique court – the first permanent court of international criminal justice with a universal vocation.[11]

While sharing common goals, the AU, its member states and the ICC were therefore destined to work together in achieving peace, security and justice in Africa by complementing each other's efforts.

This paper discusses the current cleavages between the ICC and the AU. To help overcome this stand-off, it suggests strengthening the role and capacity of states in providing justice for the most serious crimes, as well as bringing international criminal justice closer to the people. It suggests that the hybrid courts developing around the world since the 2010s – such as the Extraordinary African Chambers (EAC) in Senegal in 2012 – could provide valuable new alternatives for international criminal justice. They offer promising frameworks for national and regional cooperation with the ICC in order to ease the tensions between international justice and national sovereignty, and attempt to repair the court's damaged legitimacy.

THE ICC AND THE AU: COMMON GOALS, COMPETING APPROACHES

Since they share common goals, the ICC and the AU need to strengthen their cooperation in holding perpetrators to account and providing justice and assistance to African victims of mass atrocities. However, despite this need, since 2009 the AU has repeatedly called upon member states not to cooperate with the court regarding warrants of arrest and surrender issued for Sudanese President Omar al-Bashir[12] and then Libyan leader Colonel

10 AU, Constitutive Act of 2000, adopted at the Lomé Summit, Togo, on 11 July 2000.

11 The ICC does not have universal jurisdiction, and is limited by territorial and nationality requirements provided for in Article 12 of the Rome Statute (see ICC, Rome Statute of the International Criminal Court, circulated as document A/CONF.183/9, 17 July 1998). However, it could become universal, as it aims to be ratified by all states.

12 AU, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, circulated as document Assembly/AU/13(XIII), 3 July 2009a; AU, *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)*, circulated as document Assembly/AU/10(XV), 27 July 2010.

Muammar Qaddafi.[13] In a highly politicised global environment, the different nature of both institutions – the ICC being a legal and the AU a political institution – tends to make them compete with rather than complement each other when matters of peace, security and justice intertwine. This section examines these Sudanese and Libyan cases, both of which have escalated tensions.

Politicisation and deteriorating relations: The ICC's intervention in Sudan and Libya

The UNSC Sudanese referral to the ICC

The years 2008–09 marked a tipping point in the relationship between the AU and ICC

The years 2008–09 marked a tipping point in the relationship between the AU and ICC, when growing tensions over the UNSC's referral to the court of the situation in the Darfur region of Sudan came to a head.

The civil war in Darfur erupted in 2003. It resulted from the insurgency of the Sudan Liberation Army and the Justice and Equality Movement against the government of Sudan, following years of political and economic marginalisation of the region. In response, the government is believed to have launched a genocidal campaign against civilians belonging to the same ethnicity as members of the two movements – mainly composed of Fur, Zaghawa and Masalit – the three largest non-Arab ethnic groups[14] in the country. These attacks were mostly perpetrated by the Janjaweed – Arabic-speaking fighters allegedly supported by the government. Reportedly, 350 000 to 400 000 people died in the first 29 months of the conflict, through violence, malnutrition and disease.[15]

On 31 March 2005 the UNSC consequently adopted Resolution 1593, referring the situation in Darfur to the ICC in order to open investigations into and prosecute serious crimes committed in the region. In doing so it exercised its power under Article 13(b) of the Rome Statute. Yet the UNSC's first referral of a situation that otherwise met neither the personal nor the territorial jurisdiction criteria of the ICC[16] was not approved unanimously. Sudan has not ratified the Rome Statute and consequently rejected the

13 AU, *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, circulated as document EX.CL/670(XIX), 1 July 2011.

14 They are also referred to as African tribal groups.

15 Reeves E, 'Genocide in Darfur: How the horror began', *Sudan Tribune*, 3 September 2005, http://www.sudantribune.com/Genocide-in-Darfur-How-the-Horror,11445, accessed 22 June 2017.

16 According to Article 12 of the Rome Statute, the preconditions to the exercise of the ICC's jurisdiction require that the alleged perpetrator of the crime is a national of a state party, the alleged crime was committed on the territory of a state party, or that the state voluntarily accepts the ICC's jurisdiction. Article 13(b) allows the UNSC to overcome these requirements in the interest of international peace and security. See ICC, Rome Statute, *op. cit*.

jurisdiction of the court. This aspect of universal jurisdiction (UJ)[17] given to the ICC through the UNSC in the Rome Statute remains controversial.

In particular, the manner in which the UNSC used this power evoked substantial criticism. When in 2008 the AU – first through its Peace and Security Council (PSC) and since 2009 through its Assembly of Heads of State and Government – expressly requested the UNSC to defer the investigation and prosecution of the Sudanese case[18] for a year in order to implement diplomatic interventions, the UNSC ignored this call. Less than a year later, on 4 March 2009, the ICC ignored the AU's strong reservations by issuing an arrest warrant for al-Bashir.[19] This decision to pursue a sitting head of state – of a country that is not a state party to the ICC – only heightened tensions.

Although Resolution 1593 invited 'the Court and the African Union to discuss practical arrangements that would facilitate the Court's work',[20] the case marked the start of the rift between the AU and the ICC, which was worsened by the opening of investigations in Libya in 2011.

The UNSC Libyan referral to the ICC

Triggered by the 'Arab Spring' popular uprisings in the Middle East and North Africa, large protests broke out in Libya in February 2011 against Qaddafi's rule and rapidly escalated into a civil war. In an acknowledgement of alleged human rights violations that included murders, rapes and forced disappearances, the UNSC adopted Resolution 1970 on 26 February 2011, referring the situation in Libya to the ICC. A second resolution on

17 The principle of universal jurisdiction (UJ) is 'based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'. See Robinson M (2001) in Philippe X, 'The principles of universal jurisdiction and complementarity: How do the two principles intermesh?', *International Review of the Red Cross*, 88, 862, 2006, p. 377. This statement refers to an 'aspect of universal jurisdiction' – the nuance is important because, in principle, the ICC does not have UJ: 'The Rome Statute of the ICC does not include UJ per se … However, when the ICC decides to seize a matter that involves neither a State Party nor a citizen of a State Party, arguments can be made and have been made that the ICC is in that regard exercising a form of UJ.' (Dube A, 'The AU Model Law on universal jurisdiction: An African response to Western prosecutions based on the universality principle', *Potchefstroom Electronic Law Journal*, 18, 3, 2015, pp. 451–52.)

18 AU, PSC (Peace and Security Council), *Communiqué of the 142nd Meeting of the Peace and Security Council*, 21 July 2008, circulated as document PSC/MIN/Comm(CXLII); AU, *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan*, circulated as document Assembly/AU/Dec.221(XII), 3 February 2009.

19 Following the UNSC referral, the ICC opened investigations into Darfur in June 2005.

20 UNSC, 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court', Resolution 1593, SC/8351, 31 March 2005, https://www.un.org/press/en/2005/sc8351.doc.htm, accessed 26 May 2017.

17 March 2011 – Resolution 1973 – led to a controversial NATO intervention named Operation Unified Protector. The AU, as well as China, Russia and South Africa (the latter a non-permanent member of the UNSC at the time), strongly condemned the operation and its airstrikes. They advocated for peaceful dialogue and diplomacy to stabilise the conflict. However, the US, the UK and France, which were leading the NATO operation, ignored that call and pursued the operation, while the ICC issued arrest warrants for Qaddafi and his closest allies on 27 June 2011. After NATO's airstrikes and the eventual killing of Qaddafi on 20 October 2011, China and Russia voiced their dissatisfaction with the operation, which they said had vastly exceeded the scope of Resolution 1973.

Some of the biggest grievances against the ICC have been related to the UNSC referrals in the cases of Darfur and Libya

The cases of Darfur and Libya catalysed criticism from Africa and around the world toward the ICC. Yet it is important to highlight that some of the biggest grievances against the ICC have been related to the UNSC referrals in those cases. This is unsurprising, as the functioning of the UN and especially its Security Council is often perceived as advancing its permanent members' interests (especially those of the Western powers) rather than pursuing peace and security at a global level.[21] By assigning such a power to the UNSC through the Rome Statute, the progressive politicisation of the ICC was assured and its legitimacy jeopardised from the outset. This is exacerbated all the more given that three of the five permanent members of the UNSC, namely the US, Russia and China, have not even ratified the Rome Statute.

Much-needed reform of the UNSC has stalled for decades, and the veto power of its five permanent members remains entrenched. Therefore, to improve ICC–Africa relations in the short term, additional paths must be explored, and addressing the ICC–AU stand-off is crucial.

Between peace, security and justice

The Sudanese and Libyan cases also illustrate the opposing natures of the ICC and the AU and a *fortiori* their competing approaches when it comes to achieving peace, security and justice on the continent. On the one hand, the ICC is a judicial body created to hold accountable the alleged perpetrators of the crimes of aggression, crimes of genocide, war crimes and crimes against humanity. Consequently, the ICC acts according to its given mandate based on the competences it was provided with by its states parties through their elaboration and ratification of the Rome Statute. Although undermined by politicised referrals, once a case is opened its primary purpose remains to provide justice. On the other hand, the AU is a political body composed and representing the interests of its member states. As a regional instrument of cooperation and integration, it deals with many political, economic and social considerations. The AU's purpose remains 'to foster

21 Ofodeme JA & U Nwali, 'The International Criminal Court and the place of Africa in the international justice system', *American Journal of Humanities and Social Sciences*, 3, 4, 2015, pp. 114–17.

integration to promote peace, security and cooperation hence solidarity,'[22] not forgetting that 'politics permeates into each and every sector'.[23]

The divergent nature of the ICC and the AU undoubtedly has an impact on how they approach impunity for massive human rights violations. The ICC prioritises justice, whereas the AU emphasises the importance of peace and security prior to any prosecutions, through mediation processes involving all relevant stakeholders. The Sudanese and Libyan cases are revealing in this regard. In 2005 the AU engaged in peace talks with government forces and armed opposition groups in Darfur, which resulted in the signing of the Darfur Peace Agreement between the Sudanese government and one rebel group.[24] Although other rebel groups rejected the agreement, the president, al-Bashir, consequently became a key interlocutor of the AU in its efforts to address the conflict. The AU thus perceived the ICC's warrant for al-Bashir's arrest as a significant interference with its diplomatic peacebuilding endeavour. In a press statement in July 2008, the AU's PSC 'expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace'.[25] The PSC also referred to a previous statement by the Assembly of Heads of State and Government that stated that 'the abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations'.[26] Similarly, in the Libyan case the AU continuously advocated for a peaceful resolution to the conflict, through mediation and dialogue, prior to military operations and prosecutions. Yet the ICC issued arrest warrants for Qaddafi and his allies on 27 June 2011, not even four months after opening the case on 11 March 2011.

The divergent nature of the ICC and the AU undoubtedly has an impact on how they approach impunity for massive human rights violations

One can, however, question the AU's reticence to confront its leaders in the context of systematic killings, rapes and other gross human rights violations. In 2007 the AU and the UN jointly launched a hybrid peacekeeping operation – the AU/UN Hybrid Operation in Darfur (UNAMID) – owing to the Sudanese parties' unwillingness to engage in genuine peace negotiations. According to Eric Reeves, the Darfur region was subject to 'Janjaweed assaults, typically conducted in concert with Khartoum's regular military forces [that had] been comprehensively destructive of both human life and livelihood' leading to a 'genocide of attrition'.[27] Intentionally or not, the lengthy negotiations with al-Bashir enabled the profound destruction of the entire region, whose inhabitants are still dying today, including from the spread of disease and malnutrition.[28] Whereas the ICC's

22 Chirisa IEW *et al.*, 'A review of the evolution and trajectory of the African Union as an instrument of regional integration', *SpringerPlus*, 3, 101, 2014, p. 1.

23 *Ibid.*, p. 2.

24 Nathan L, 'The failure of the Darfur mediation', *Ethnopolitics*, 6, 4, 2007, p. 495.

25 AU, PSC, Press statement, circulated as document PSC/PR/BR(CXLI), 141st Meeting in Addis Ababa, 11 July 2008.

26 AU, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, circulated as document Assembly/AU/14 (XI), 1 July 2008.

27 Reeves E, *op. cit.*

28 *Ibid.*

The tension between the pursuit of peace and demands for justice is a dilemma at the heart of the international criminal justice system

approach is to arrest alleged perpetrators to shed light on ongoing crimes, the AU remains resolute in seeking a political consensus at all costs prior to legal prosecutions, although long negotiations may compromise the urgency of action against such egregious crimes.

The tension between the pursuit of peace and demands for justice is a dilemma at the heart of the international criminal justice system.

The AU's political and diplomatic approach to conflict highlights key features and characteristics of Africa's international relations. The core principles of sovereignty and territorial integrity – acquired through significant suffering by African states during the long and often violent process of decolonisation – remain entrenched in inter-state affairs on the continent. Understandably, African leaders show a deep reluctance to interfere with their peers' internal affairs. Yet the ICC functions very formally in an extremely politicised environment. It lacks some suppleness and adaptability – especially in Africa.

African states therefore increasingly advocate for 'African solutions to African problems'.[29]

Africa's ambiguous commitment to criminal justice and the protection of human rights

African states themselves are party to dozens of international and regional human rights conventions,[30] and have their own national mechanisms of criminal justice and protection of human rights. Nevertheless, Africa has also developed continental mechanisms in support of its member states' existing national frameworks.

Article 4 of the AU Constitutive Act is one of the pillars in the protection of human rights on the continent. It embeds the importance of achieving peace and security in Africa by protecting human and people's rights, ensuring good governance and the rule of law. In particular, Article 4h of the AU Constitutive Act provides it with the right to intervene in a member state, 'pursuant to a decision of the Assembly, in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'[31] – a prerogative unique to Africa. This reflects a significant shift from the former Organization of African Unity – from which the AU emerged in 2002 and whose key principle was non-interference – to the AU's equally important principle of non-indifference. The AU's right to intervene has thus provided the normative framework for a number of engagements across the

29 AU, 2009a, *op. cit.*; AU, *Decision on the Implementation of the Decisions on the International Criminal Court (ICC)*, circulated as document EX.CL/731(XXI), 16 July 2012a; AU, 2011, *op. cit.*

30 Othman MC, *Towards a System of International Justice*, report presented at International Symposium of the Africa Group for Justice and Accountability and Wayamo Foundation, Arusha, 18–19 October 2016, p. 6.

31 AU, Constitutive Act of 2000, *op. cit.*

continent. However, undermined by capacity and political constraints, AU intervention has not always been able to resolve the most violent conflicts on the continent. The past decade has also demonstrated limited commitment from African states to implement additional regional justice commitments.

As early as the 1980s, the African Charter on Human and Peoples' Rights (adopted in 1981, entered into force in 1986) consecrated the promotion and protection of human rights. These rights' application is ensured by the 1986 African Commission on Human and Peoples' Rights in cooperation with the African Court on Human and Peoples' Rights (AfCHPR), established in 1998 through the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

In the 2010s, when the relationship between the ICC and the AU had already deteriorated considerably, the AU requested[32]

> the Commission … to reflect on how best Africa's interests can be fully defended and protected in the international judicial system, and to actively pursue the implementation of the Assembly's Decisions on the African Court of Justice and Human and People's Rights being empowered to try serious international crimes committed on African soil.

In 2012 the AU adopted the Model Law on Universal Jurisdiction (AU Model Law)[33] as guidance to develop UJ legislation within its member states' domestic systems. This aims to broaden the African legal arsenal to combat impunity and limit external interference in providing justice on the continent. Moreover, the AU initiated the development of its own regional criminal justice mechanisms given that, in its original conception, the AfCHPR has no jurisdiction over international crimes. In June 2014 the AU thus adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).[34] The Malabo Protocol aims to extend the jurisdiction of the yet-to-be-merged African Court of Justice and Human Rights[35] – renamed the African Court of Justice and Human and Peoples' Rights (ACJHPR) – to 14 international crimes, including crimes of genocide, crimes against humanity and war

32 AU, 2011, *op. cit.*

33 AU, *Model National Law on Universal Jurisdiction over International Crimes* (AU Model Law), Draft adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters in Addis Ababa, Ethiopia, 7–15 May 2012b.

34 AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Twenty-third Ordinary Session of the Assembly, Malabo, Equatorial Guinea, 27 June 2014 (Malabo Protocol).

35 In July 2008 the AU adopted the Merger Protocol to merge the African Court on Human and Peoples' Rights and the African Court of Justice to form the African Court of Justice and Human Rights. However, the protocol has yet to receive the 15 ratifications required prior to its entry into force. See AU, Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Eleventh Ordinary Session of the Assembly, Sharm el-Sheikh, 1 July 2008 (Merger Protocol).

crimes.[36] However, neither the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol) nor the Malabo Protocol has yet received the required number of ratifications to enter into force. At the time of writing, the Merger Protocol had only received six ratifications[37] since 2008, while the Malabo Protocol had received none.[38] Currently the AfCHPR and the African Court of Justice remain the only operative regional judicial bodies, with no criminal jurisdiction.

The AfCHPR itself has been ratified by only 30 of Africa's 55 states. Since its creation no government has referred a case of human rights violations against another member state, although the court deals with state responsibility for human rights violations. By 11 October 2016, 97% of applications to the court had been brought by individuals or non-governmental organisations (NGOs) – 110 by individuals, five by NGOs and three by the African Commission on Human and Peoples' Rights.[39]

Many African civilians continue to suffer atrocities stemming from conflict, and have limited recourse to justice at the continental level

Many African civilians continue to suffer atrocities stemming from conflict, and have limited recourse to justice at the continental level. While individual criminal responsibility for international crimes is yet to be effected through the ACJHPR, ongoing tensions between the AU and the ICC reduce the chances for the civilians and communities affected to see justice rendered for crimes of genocide, crimes against humanity and war crimes in cases where national jurisdictions involved may be unwilling or unable to do so.

Thus the need to restore communication and cooperation between the court and the continent is strong. Although the relationship between the AU and the ICC has deteriorated significantly, it is not irreparable.

While the ICC is increasingly perceived as being inaccessible and elitist, the AU has also not been a model of openness. The AU still resists the formation of a liaison office for the ICC,[40] which has considerably restricted dialogue between the two institutions.

36 Article 28A provides that 'the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder: 1) Genocide 2) Crimes Against Humanity 3) War Crimes 4) The Crime of Unconstitutional Change of Government 5) Piracy 6) Terrorism 7) Mercenarism 8) Corruption 9) Money Laundering 10) Trafficking in Persons 11) Trafficking in Drugs 12) Trafficking in Hazardous Wastes 13) Illicit Exploitation of Natural Resources 14) The Crime of Aggression'. See AU, Malabo Protocol. *op. cit.*

37 AU, Protocol on the Statute of the African Court of Justice and Human Rights, Status of ratification, https://www.au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights, accessed 10 May 2017.

38 AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Status of ratification, https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, accessed 10 May 2017.

39 Othman MC, *op. cit.*, p. 6.

40 FIDH (International Federation for Human Rights), 'The African Union defies the International Criminal Court and dares trample on the memory of Darfuri victims!', 30 July 2010, https://www.fidh.org/en/region/Africa/sudan/The-African-Union-defies-the, accessed 17 May 2017.

Rather than working as a top-down institution – away from states' and victims' concerns – the ICC needs to provide room for genuine and close cooperation on a more equal and horizontal basis. While the AU's concern is to defend and protect Africa's interests in the international judicial system, the court should both strengthen the capacity of states to provide justice for the most serious crimes, and bring justice closer to the people in an attempt to restore its legitimacy on the continent.

INCLUSIVE APPROACHES TO INTERNATIONAL CRIMINAL JUSTICE

Although created to homogenise and universalise the international criminal justice system, the ICC cannot work in isolation. International criminal justice should be a shared concern, as 'an effective and efficient system of international justice should also be part of a local DNA, otherwise it turns into an anti-body and can potentially be rejected'.[41] The competence of the court largely depends on the cooperation of its states parties, as they are the primary stakeholders and guarantors of its working effectively.

The ICC should therefore explore the full potential of its principle of complementarity to help ease the tensions between international justice and state sovereignty, which are particularly strong in Africa. The court and its states parties can and must learn from each other's approaches and experience, and the court should incorporate knowledge-sharing and capacity-building initiatives in its agenda.

Consolidating positive complementarity

In 2003, while defining its general strategy, the Office of the Prosecutor (OTP) of the ICC encouraged states parties to strengthen their domestic legislation, and emphasised that 'the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success'.[42] The ICC should indeed not be considered as an end in itself, but rather a temporary substitute for weak national criminal mechanisms.

Strengthening domestic legislation in combatting international crimes is a key step to dispensing justice to the victims of human rights violations

The ICC is based on the principle of complementarity, which means that states have the primacy to prosecute the crimes provided for under the Rome Statute. It is not a court of first instance but a court of last resort, which should intervene only if one of its states parties is unable or unwilling to prosecute crimes falling under its jurisdiction. Strengthening domestic legislation in combatting international crimes is therefore a key step to dispensing justice to the victims of human rights violations, and would provide alternatives to the growing tensions between the court and the continent.

Increasingly aware of its own limitations and crisis of legitimacy, the ICC revitalised this founding principle in the OTP's 2009–12 prosecutorial strategy. Here, the reoriented

41 Othman MC, *op. cit.*, p. 6.

42 ICC–OTP (International Criminal Court – Office of the Prosecutor), *Paper on Some Policy Issues Before the Office of the Prosecutor*. The Hague: ICC–OTP, 2003.

principle of 'positive complementary' is referred to as the 'proactive policy of cooperation aimed at promoting national proceedings'.[43]

Yet despite this shift in approach to complementarity, at the time of writing only a handful of African states (including South Africa, Kenya, Uganda, Côte d'Ivoire and Senegal) had incorporated international crimes included in the Rome Statute into their penal codes.[44] Moreover, 'the complementarity turn may have arisen not out of a core belief that the ICC actually can "end impunity" but of a realization that it can't – at least not alone'.[45]

The main innovations have developed at the regional level through ad hoc hybrid courts, which try crimes in specific locations and over specific periods. They have the potential to significantly benefit the national systems of the states in which they are established. In this regard, 'for countries suffering from systemic violations of international criminal law, hybrid tribunals are seen as offering the potential for a catalytic transition to normalcy based on a tripartite grounding of legitimacy, capacity building, and norm penetration'.[46] Indeed, those hybrid tribunals have strong national roots. Unlike internationalised ad hoc tribunals that are exclusively composed of international judges and staff, hybrid courts also include local personnel and judges, and refer to both international norms and aspects of domestic legislation when relevant.

The ICC should in particular learn from the success of the recent EAC, which was officially inaugurated in Senegal in February 2013. This justice process was unprecedented in many ways.

On 22 August 2012 Senegal created the EAC at the request of the AU to prosecute former Chadian president Hissène Habré, in exile in the country since 1990. Four EACs were temporarily[47] established within the Senegalese court framework: an Extraordinary Investigative Chamber as part of the Tribunal Régional Hors Classes (with four Senegalese investigative judges), an Extraordinary Indicting Chamber (with three Senegalese judges), an Extraordinary Trial Chamber and an Extraordinary Appeals Chamber (with respectively two Senegalese judges and a president from another AU member state) as part

43 ICC–OTP, *Prosecutorial Strategy 2009–2012*. The Hague: ICC–OTP, 2010.

44 FIDH, 'Why a special criminal court for the Central African Republic deserves your support', 19 February 2015, https://www.fidh.org/en/region/Africa/central-african-republic/17015-why-a-special-criminal-court-for-the-central-african-republic-deserves, accessed 25 May 2017.

45 Kersten M, 'The complementarity turn in international criminal justice', Justice in Conflict, 30 September 2014, https://justiceinconflict.org/2014/09/30/the-complementarity-turn-in-international-criminal-justice, accessed 21 August 2017.

46 Hobbs H in Kersten M, 'As the pendulum swings: The revival of the Hybrid Tribunal', Justice in Conflict, 26 April 2017, p. 21.

47 The EAC has been dissolved following the rendering of final judgement in the case of Hissène Habré.

of the Senegalese Court of Appeal.[48] Applying both national and international law, they had jurisdiction to investigate crimes of genocide, crimes against humanity, war crimes and torture that occurred in Chad during Habré's rule, from 7 June 1982 to 1 December 1990. Thus 'at the regional level, [the EAC] was the first African initiative against the impunity of serious crimes committed on African territory by African citizens against African populations'.[49] Never before had an African state led UJ-based prosecutions against an African national (albeit while facing strong resistance and frequent stalling under Abdoulaye Wade's presidency in Senegal), l*et a*lone a former head of state.

These hybrid courts feature a concrete implementation of the rationale of the ICC's principle of positive complementarity, and so build domestic capacity, by ensuring that the justice provided aligns with the standards of international justice. National systems hosting these ad hoc mechanisms are reinforced prior to the opening of prosecutions. Between 2007 and 2010, Senegal successfully amended its laws to enable Habré to be tried before the EAC.[50] The model of criminal justice applied as part of these hybrid tribunals could also inspire national reform of norms and judicial bodies. For instance, following the Habré trial in Senegal, the momentum spread to Chad. Although victims' efforts to hold perpetrators to account had stalled with cases pending since 2000,[51] the formal opening of the Habré trials in Senegal in 2013 reignited the pursuit of justice. In 2015 a national court convicted 20 former agents of Habré's regime on counts of murder, torture, kidnapping and arbitrary detention, and ordered compensation be paid to victims..[52]

The ICC and hybrid courts attempt to compensate for gaps in domestic criminal justice systems and could thus work together more successfully. Indeed, the EAC competently prosecuted crimes that fell outside the ICC's jurisdiction.[53] Although the ICC has only played a small role in the EAC,[54] the court should foster such regional developments and build on them, as they offer new opportunities for positive complementarity. The composition of these hybrid courts enables states to remain in charge of the proceedings while benefitting from direct external support. This increases the legitimacy of these trials, as they are locally rooted, mindful of stakeholders' cultures and values, and accessible to victims and their communities.

The composition of hybrid courts enables states to remain in charge of the proceedings while benefitting from direct external support

48 AU, Government of Senegal, *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990* (Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990), 22 August 2012, Article 2.

49 Foka Taffo F, 'The Hissène Habré Case', ACCORD, 23 December 2015, http://www.accord.org.za/conflict-trends/the-hissene-habre-case, accessed 26 May 2017.

50 Brody R, *Victims Bring a Dictator to Justice: The Case of Hissène Habré*. Berlin: Bread for the World, 2017, p. 9.

51 *Ibid.*, p. 13.

52 *Ibid.*, p 14.

53 The court has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute on 1 July 2002. See ICC, Rome Statute, *op. cit.*, Article 11.

54 The ICC and EU sent two high-level missions to assist negotiations over the budget.

In this regard the EAC is noteworthy because 'this trial did not take place in Europe but rather on the African continent. This lead [sic] to significantly more acceptance in Africa than there is for cases coming from The Hague.'[55]

The ICC can learn from the success of hybrid courts such as the EAC in bringing international justice closer to the people. Over the years the ICC has evolved into a state- and institution-centred mechanism, removed from its primary beneficiaries – ordinary people. These people have experienced abandonment and disappointment, and popular criticisms against the court have mounted. National practitioners from legal, political and social fields can also provide essential insights in debates and create a bridge between victims, states and the court. In this highly politicised environment, giving a voice to and empowering these actors could mitigate the tensions and help to restore legitimacy to the court.

Giving voice to victims and civil society organisations

Although progressive in terms of victim reparations, the ICC has increasingly alienated victims of injustice. The court is based in The Hague, but the first nine prosecutions were located in Africa. The geographical distance between the courtroom and conflict-affected regions created a number of challenges. Besides requiring victims and witnesses to travel all the way to the court's headquarters in the Netherlands – which is expensive, potentially confusing and intimidating for highly traumatised individuals – it also made it difficult for other people from those regions to attend the trials. This undermined the age-old principle of access to justice. It also hampered the creation of local, national and regional social movements calling for justice, and reduced leverage for civil society organisations (CSOs) to campaign and provide support to victims.

Often characterised as 'one of the world's most patient and tenacious campaigns',[56] the EAC model is once again of particular relevance. This criminal justice process set itself apart in that it was triggered by an unprecedented civilian initiative. Souleymane Guengueng, a former prisoner under Habré's regime, created an association for victims to claim justice. He conducted 792 interviews and persuaded victims to testify before the Truth and Reconciliation Commission (TRC) created by new Chadian president Idriss Déby. Evidence accumulated and the TRC concluded that Habré's regime was accountable for 40 000 deaths. The Chadian Association for the Promotion and Defence of Human Rights called on other CSOs to support the case. Human Rights Watch consequently formed a coalition and compiled a 714-page dossier documenting the Habré government's responsibility for widespread killings and atrocities. Once this evidence was gathered, it remained to find a government to lead the trial. After initially refusing to do so, in July 2006 the AU mandated Senegal – where Habré was living in exile – to judge him 'on behalf

55 Duchrow J in Brody R, *op. cit.*, p. 5.

56 *Toronto Globe and Mail*, 'Q&A: The case of Hissène Habré before the Extraordinary African Chambers in Senegal', HRW, 3 May 2016, https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal, accessed 26 May 2017.

of Africa';[57] and the government eventually agreed to create the court. On 30 May 2016 Habré was found guilty and sentenced to life imprisonment on counts of crimes against humanity, torture and war crimes.[58] This decision was confirmed on appeal,[59] in a final judgement rendered on 27 April 2017.[60]

Although the entire process dragged on for 15 years after the first complaint against Habré was filed in Senegal on 26 January 2000, its outcome largely met victims' expectations.[61] Clement Abaifouta, head of the Association of Victims of Crimes of the Hissène Habré Regime, said on hearing the sentence: 'I feel total satisfaction … It's the consecration of justice here in Africa. I don't have words for how I'm feeling now. It is a big joy, a big day. A victory for the victims.'[62]

This is a significant victory for both CSOs and victims, who helped in proving Habré's guilt. They welcomed the court ruling ordering Habré to pay approximately EUR[63] 90 million ($10.5 million)[64] in victim compensation,[65] a sum increased to around EUR 125 million (approximately $145.2 million) following an appeal, to benefit 7 396 designated victims.[66] 'The case of the victims of the ex-dictator Habré shows impressively how important it is for victims of human-rights violations to testify in court, and therefore publicly, on the brutal acts and the injustice done to them.'[67] Guengueng himself declared that, 'to me and many of the victims it served as a remedy to speak in front of the judges. It was liberating.'[68]

The successful cooperation between the AU and Senegal enabled the pursuit of a former head of state. It demonstrates that the AU can consent to the prosecution of top-ranking

57 Brody R, *op. cit.*, p. 9.

58 *Ministère Public c. Hissein Habré*, Chambre Africaine Extraordinaire d'Assises (Extraordinary Trial Chamber), 30 mai 2016 – Dispositif.

59 The Appeals Chamber overturned Habré's conviction for the direct commission of rape but upheld all the other convictions.

60 *Le Procureur Général c. Hissein Habré*, Chambre Africaine Extraordinaire d'Assises d'Appel (Extraordinary Appeals Chamber), 27 avril 2017 – Dispositif.

61 Brody R, *op. cit.*, p. 6.

62 Maclean R, 'Chad's Hissène Habré found guilty of crimes against humanity', *The Guardian*, 30 May 2016, https://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal, accessed 18 August 2017.

63 EUR is the currency code for the euro.

64 All US dollar equivalents provided in this paper were calculated on 27 October 2017.

65 Interactive Forum on the Extraordinary African Chambers, 'Summary Report – The reparations awarded to victims of Hissein Habré's crimes', 4 August 2016, http://forumchambresafricaines.org/summary-report-the-reparations-awarded-to-victims-of-hissein-habres-crimes/?lang=en, accessed 18 August 2017.

66 *Le Procureur Général c. Hissein Habré*, Chambre Africaine Extraordinaire d'Assises d'Appel (Extraordinary Appeals Chamber), 27 avril 2017 – Dispositif.

67 Brody R, *op. cit.*, p. 5.

68 Grovestins A, 'Hissène Habré guilty: "Justice guarantees human dignity and liberty"', Justice Hub, 30 May 2016, https://justicehub.org/article/hissene-habre-gulty-justice-guarantees-human-dignity-and-liberty, accessed 18 August 2017.

government representatives once they have left office. It also shows that reinforcing both state and civil participation in dispensing criminal justice may provide alternatives to the growing tensions between the continent and the court. These hybrid courts can provide room for better cooperation between the ICC and the AU in order to realign the political and legal dimensions needed to tackle the most egregious crimes.

Hybrid courts can provide room for better cooperation between the ICC and the AU in order to realign the political and legal dimensions needed to tackle the most egregious crimes

Remarkably, on 3 June 2015 the Central African Republic (CAR) promulgated a law establishing the Special Criminal Court (SCC) to prosecute war crimes and crimes against humanity that have occurred in the country since 2003. The law provides that the SCC will be composed of national and foreign judges – predominantly from the CAR and other African countries – supported by international experts, and will work alongside the ICC.[69] This new form of complementarity with the ICC seems promising. It offers new opportunities of cooperation to reinforce the provision of international criminal justice on the continent.

Although not yet established, South Sudan has also committed itself to the creation of the Hybrid Court for South Sudan and the Truth, Reconciliation and Healing Commission, in partnership with the AU.

Thus far, either the ICC or the AU has supported these criminal justice developments. They could provide the framework for renewed cooperation between both institutions. Of course, not all African countries are parties to the court. Yet Article 12 of the Rome Statute provides that such a state can still accept the jurisdiction of the ICC by declaration with respect to the crime in question. Future hybrid courts could therefore provide room for cooperation with both the AU and the ICC on specific crimes and locations.

CONCLUSION

Although the relationship between the AU and the ICC has deteriorated significantly, tensions have not yet become intractable. Since 2008 the AU has embarked on a campaign against some decisions of the ICC and repeatedly urged for a number of reforms through the African states parties to the court. The strategy on a mass withdrawal summarises most of the positions that the AU has taken regarding the ICC since the Sudanese referral and which have been largely ignored. While it does not yet require African states parties to withdraw from the Rome Statute and reject the competency of the ICC, this AU strategy seems to constitute a final warning, before a potential implementation.

In this regard, the AU has called on African states to speak with one voice, and pushed to develop an official common African position. This, however, has proven impossible considering the diversity of views across the continent. Many African states entered reservations regarding the AU withdrawal strategy or reaffirmed their confidence in, and support of, the ICC.

69 Mattioli-Zeltner G, 'Taking justice to a new level: The Special Criminal Court in the Central African Republic', HRW, 13 July 2015, https://www.hrw.org/news/2015/07/13/taking-justice-new-level-special-criminal-court-central-african-republic, accessed 26 May 2017.

Providing justice for international crimes including aggression, war crimes, crimes against humanity and crimes of genocide is a complex task. It involves sensitive and fastidious legal proceedings in a highly politicised environment. And when it concerns top-level party and government officials, the mission is even more perilous.

Although a long and hazardous process, the EAC is an important precedent to prosecute and condemn a former head of state. Its example must pave the way for other legal campaigns in post-conflict and conflict-affected regions, where victims and their communities are still seeking recognition and justice. At the 29th AU Summit in Addis Ababa in January 2017, the AU Commission and Africa Legal Aid jointly organised a seminar on 'Carrying Forward the Legacy of the Extraordinary African Chambers in the Habré Trial: an African Solution to an African Problem'.

These hybrid criminal justice mechanisms bring justice closer to the people. They ease the tensions between state sovereignty and international justice by helping to address the pressing need to reinforce national justice mechanisms. Beyond their retributive mandate, they also aim to provide reparations and support to the victims of crime, and to cooperate with TRCs to prevent the resurgence of violence in deeply wounded communities. The ICC would do well to capitalise on hybrid courts to restore its relationship with Africa and strengthen its shift towards positive complementarity.

Crimes of genocide, crimes against humanity and war crimes leave behind them ravaged societies – marked by fear, mistrust and divisions – with long-lasting wounds. They take generations to heal. Providing justice in these instances should be an inclusive and societal enterprise, and should meet the needs of both peace and justice to successfully combine the legal and political dynamics needed to tackle the most egregious crimes in conflict-affected regions, thereby interrupting the cycle of continued human rights violations.

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