

## **The International Criminal Court, Africa and the African Union:**

### **What way forward?**

**by Philomena Apiko & Faten Aggad**

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## Key messages

Regardless of whether more African countries will withdraw or not, the recent wave of withdrawals are symptomatic of a malaise in the international justice system.

Over the years, efforts were made to create regional African courts to tackle human rights issues.

However, the current structures of the AU are not yet fully ready to fulfill the role of the ICC on the basis of subsidiarity. Yet a number of promising avenues could be explored, notably special courts.

There is a need to revisit the issue of subsidiarity and consider what could be improved at the country level therefore strengthening the link between national, regional and international systems.

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## Table of Contents

Acknowledgements.....	v
Acronyms.....	vi
1. Introduction.....	1
2. Addressing justice in Africa: Narratives at play .....	2
2.1.1. 'Justice cannot trump peace' .....	2
2.1.2. Justice to achieve long-lasting peace .....	3
3. How have the narratives played out in practice?.....	3
3.1. A search for political solutions and the immunity debate .....	4
3.2. The abuse of the principle of universal jurisdiction by which sitting heads of state and senior officials are arrested and prosecuted .....	4
3.3. Dialogue between the AU, EU and UN on universal jurisdiction .....	5
3.4. Dialogue with the UNSC and call for amendment to Article 16 of the Rome Statute on the UNSC's power to defer cases .....	6
3.5. Cooperation with the ICC .....	8
3.6. Representation of the views of the AU at the ICC and concern over African-targeted prosecutions .....	8
4. Irreconcilable differences?.....	10
5. What role for the AU in ensuring justice? .....	12
5.1. Authority to engage .....	12
5.1.1. Formal mandate.....	12
5.1.2. Complementarity with regional courts.....	14
5.2. Acceptance – informal authority .....	15
5.3. Ability and capacity to engage .....	20
5.3.1. Human resource capacity .....	20
5.3.2. Budget allocated to financing the African court and hybrid courts.....	20
6. What next after the withdrawals? .....	21

## List of Boxes

Box 1: Decisions of the African Court on People's and Human Rights in 2014.....	16
Box 2: Summary of the sequence of the Habré case .....	18

## List of Figures

Figure 1: Key issues in the debate on justice and the role of the ICC in Africa .....	2
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## List of Tables

Table 1: Development is the jurisdiction from the ACHPR to the ACJHPR.....	13
Table 2: Facts on Hybrid Court for South Sudan (HCSS) .....	22

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<sup>1</sup> <http://ecdpm.org/events/why-do-we-need-the-african-union/>

## Acronyms

ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
ACJHPR	African Court of Justice and Human and Peoples' Rights
ACRWC	African Committee of Experts on the Rights and Welfare of the Child
AMU	Arab Maghreb Union
ASP	Assembly of States Parties
ASRS	African Member States to the Rome Statute
AU	African Union
CEAJ	Committee of Eminent African Jurists
CEN-SAD	Community of Sahel–Saharan States
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EACJ	EAC Court of Justice
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community Of West African States
EU	European Union
HCSS	Hybrid Court for South Sudan
ICC	International Criminal Court
IGAD	Intergovernmental Authority on Development
LRA	Lord's Resistance Army
MCMFA	Ministerial Committee of Ministers of Foreign Affairs
NEC	National Executive Committee
NGO	Non-governmental organisations
OAU	Organisation of African Unity
PSC	Peace and Security Council
REC	Regional Economic Community
SADC	Southern African Development Community
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General

## 1. Introduction

The African Union (AU) Member States were instrumental in the creation of the Rome Statute and the establishment of the International Criminal Court (ICC). Senegal was the first to ratify the Rome Statute.<sup>2</sup> Niger and the Republic of Congo were part of the 10 instruments simultaneously deposited to make the sixtieth ratification that brought the Rome Statute into force,<sup>3</sup> and Uganda referred the first case to the ICC. Currently the ICC is dealing with 10 cases under investigation, nine of which involve African countries, namely Sudan, the Democratic Republic of the Congo, Uganda, the Central African Republic, Kenya, Libya, Côte d'Ivoire and Mali. In addition to this, four countries – Guinea, Nigeria, Burundi and Gabon – are under preliminary investigation.

However, in a string of decisions from 2008-2016, the AU Assembly has criticised some of the ICC's prosecutions and investigations. Subsequently, in a letter dated 19 October 2016, South Africa notified the United Nations (UN) Secretary General (UNSG) of its intention to withdraw from the ICC, arguing, 'The Republic of South Africa has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court of obligations contained in the Rome Statute of the International Criminal Court.'<sup>4</sup> South Africa's withdrawal will take effect in October 2018. Just a few days earlier, on 12 October 2016, the Burundian parliament voted in favour of withdrawal from the ICC. The president backed the parliament's decision on 19 October 2016 when he signed a decree allowing the country to withdraw.<sup>5</sup> Burundi's notified the UNSG of its intention to withdraw from the Rome Statute on 27 October 2016.<sup>6</sup> The Gambia, Uganda and Namibia have also announced their intention to withdraw; however, they are yet to formally notify the UN of their intention. It is expected that more countries, such as Kenya,<sup>7</sup> will also withdraw, signalling the start of a massive withdrawal of African countries from the ICC.

The tensions between African countries and the ICC have built up over the years. But what is behind it? What role did the AU play? What are the alternatives?

The paper will analyse the underlying reasons behind the current relationship between the ICC and the AU. It will examine the narratives, which influence how the AU and its member states view the ICC's role as a judicial body try international crimes. The paper will also analyse the formal mandate of the AU in dealing with impunity and what steps it has take towards the extending the jurisdiction of the continental court to try international crimes.

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<sup>2</sup> United Nations. 1999. *Senegal first State to ratify Rome Statute of International Criminal Court*. Press release L/2905. Rome: United Nations. October 2016: [www.un.org/press/en/1999/19990203.l2905.html](http://www.un.org/press/en/1999/19990203.l2905.html).

<sup>3</sup> United Nations. 2002. *Ratification ceremony at the UN paves way for International Criminal Court*. Rome: United Nations. October 2016: [www.un.org/apps/news/story.asp?NewsID=3360&Cr=icc&Cr1#.VzRtQRV97q0](http://www.un.org/apps/news/story.asp?NewsID=3360&Cr=icc&Cr1#.VzRtQRV97q0).

<sup>4</sup> See the text of the letter addressed to the UN Secretary General here: [www.capetalk.co.za/articles/193225/south-africa-to-begin-exit-process-from-icc](http://www.capetalk.co.za/articles/193225/south-africa-to-begin-exit-process-from-icc).

<sup>5</sup> Chan, S. and M. Simons. 2016. South Africa to withdraw from the International Criminal Court. *New York Times* 21 October 2016. October 2016: [www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?\\_r=0](http://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?_r=0).

<sup>6</sup> See Burundi's notification to the UNSG here: <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf>.

<sup>7</sup> Two motions were approved in Kenya's Parliament (in 2013 and June 2016) backing Kenya's withdrawal from the ICC but the Cabinet is yet to deliberate on the matter.

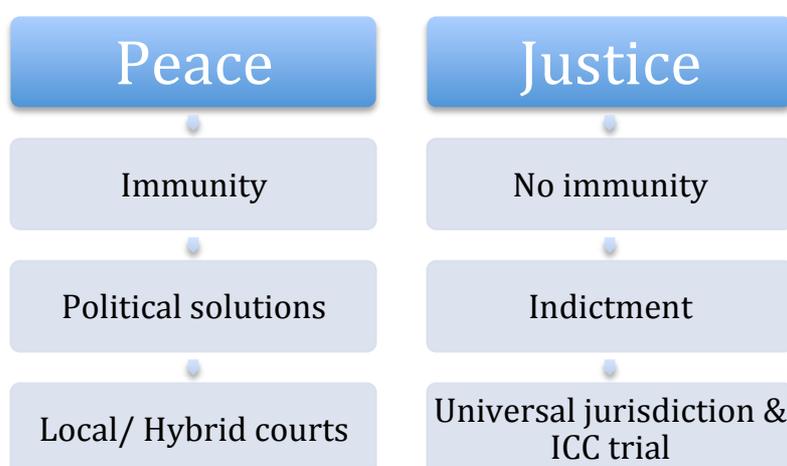
## 2. Addressing justice in Africa: Narratives at play

Views on the role of the ICC in Africa involve a complex layer of competing arguments that relate to interpretations around the following broad issues:

- 1) The **sequencing** of investigations/indictments and peace negotiations
- 2) The exercise of **immunity** and its impact on impunity
- 3) The application of the **subsidiarity** principle and the role of the ICC as a ‘court of last resort’

Simplified, these differences in interpretation have given rise to two key narratives that drive the respective positions of the different actors on a number of issues (see summary in Figure 1).

**Figure 1: Key issues in the debate on justice and the role of the ICC in Africa**



### 2.1.1. 'Justice cannot trump peace'

Former South African President and AU Mediator in Sudan, Thabo Mbeki summarised this narrative as follows: 'These charges against people - like Omar al-Bashir in Sudan or Uhuru Kenyatta in Kenya - they arise out of situations of conflict. Our first response as Africans is that here are Africans who are dying, so we need [to intervene] to end this conflict. Our first task is to stop the killing of these Africans. But the challenge that arises is when someone says that the issue of justice trumps the issue of peace.'<sup>8</sup> This argument gives priority to peace. While not dismissing the need to tackle impunity, (temporary) immunity should be guaranteed for key actors in order to secure their engagement in peace negotiations.

However, proponents of this view argue that "Peace versus Justice" is a false dichotomy. Both can be served through a political solution. They argue that there are no ideal solutions in the field of transitional justice; there are always tensions between the desire and need to prosecute the perpetrators of crimes so that full accountability is achieved, and the reality that, in order to end conflict, there will need to be multiple compromises in which justice can only be imperfectly implemented.<sup>9</sup> Therefore '[the creation of the

<sup>8</sup> Al Jazeera. 2013. Thabo Mbeki: 'Justice cannot trump Peace'. *Talk to Al Jazeera*. 23 November 2013. October 2016: [www.aljazeera.com/programmes/talktojazeera/2013/11/thabo-mbeki-justice-cannot-trump-peace-2013112210658783286.html](http://www.aljazeera.com/programmes/talktojazeera/2013/11/thabo-mbeki-justice-cannot-trump-peace-2013112210658783286.html).

<sup>9</sup> Sriram, C.L. and S. Pillay (eds). 2009. *Peace versus Justice? The dilemma of transitional justice in Africa*. Scottsville, South Africa: University of KwaZulu-Natal Press. Similar concerns were raised by some interviewees that the team conducted in the framework of this paper (interviews conducted in Addis Ababa, 23 & 24 May 2016)

ICC] is seen as problematic as, potentially, it obstructs efforts to reach peace accord, and is regarded with active suspicion by local people who are most concerned to get peace.<sup>10</sup>

Advocates of this argument have also questioned whether processes led by the ICC would result in justice for the victims of a given conflict. One key interlocutor, for instance, phrased this as follows: 'Is the ICC [through its processes] truly seeking justice for the victims?'<sup>11</sup> He further argued that holistic approaches, through reconciliation processes conducted within countries, could be more effective in bringing justice closer to the direct victims of the conflict.<sup>12</sup> This argument reinforces that which notes that the ICC is a court of last resort and should seek 'to complement, not replace, national Courts'.<sup>13</sup> Therefore, national and regional courts should be key drivers in prosecuting crimes within the continent.

### 2.1.2. Justice to achieve long-lasting peace

'Justice is a key prerequisite for lasting peace. International justice can contribute to long-term peace, stability and equitable development in post-conflict societies. These elements are foundational for building a future free of violence.'<sup>14</sup> The ICC Prosecutor, Fatou Bensouda, noted in 2013 that 'history has taught us that the peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated'.<sup>15</sup> She went on to argue that 'justice can have a positive impact on peace and security' through the 'shadow of the Court'.<sup>16</sup> In Uganda, where the ICC was mobilised by the Ugandan Government to prosecute the leaders of the Lord's Resistance Army (LRA), the 'I.C.C. arrest warrants against Joseph Kony and his top commanders are widely acknowledged to have played an important role in bringing the rebels to the negotiating table in the Juba Peace Process'.<sup>17</sup>

## 3. How have the narratives played out in practice?

The assessment of the role of the ICC has largely been detached from an objective review of its performance as an international justice body. As one observer put it "the ICC is neither as good as proponents think it is nor nearly as bad as critics believe it to be. It is certainly not as potent as either side of the debate insists."<sup>18</sup> Rather, it is the different actors' narratives and perceptions of its role that have significantly shaped the debate on the role of the Court. Divergent narratives have translated into differences on specific issues around the role of the ICC, its mandate and jurisdiction as well as the complementarity between African and international actors. This section provides an overview of how these narratives have played out in practice.

<sup>10</sup> *ibid.*

<sup>11</sup> Interview with respondent, Addis Ababa, 24 May 2016.

<sup>12</sup> See for instance, Olsen, T.D., L.A. Payne and A.G. Reiter. 2010. *Transitional justice in balance: Comparing processes, weighing efficacy*. Washington DC: US Institute of Peace Press.

<sup>13</sup> International Criminal Court (ICC). October 2016: [www.icc-cpi.int/about](http://www.icc-cpi.int/about).

<sup>14</sup> International Criminal Court (ICC). October 2016: [www.icc-cpi.int/about](http://www.icc-cpi.int/about).

<sup>15</sup> Bensouda, F. 2013. International justice and diplomacy. *New York Times*, Global Opinion, 19 March 2013. October 2016: [www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?\\_r=0](http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?_r=0).

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.* However, detailed research conducted in 2011 by the Refugee Law Project noted that 'the ICC had a limited impact in pressuring both the LRA and the government of Uganda to negotiate and in isolating the rebels from external sources of support, but the processes that led to the inception of the Juba talks had been ongoing long before the ICC became active in Uganda'. For the full report see Refugee Law Project Working Paper No. 22. October 2016: [www.iccnw.org/documents/RLP\\_Working\\_Paper\\_22.pdf](http://www.iccnw.org/documents/RLP_Working_Paper_22.pdf).

<sup>18</sup> Kesten, M. 2016. Seeing the forest for the trees: International Criminal Court and the peace-justice debate. *International Criminal Justice Today*, 20 July 2016. October 2016: [www.international-criminal-justice-today.org/opinion/seeing-the-forest-for-the-trees/](http://www.international-criminal-justice-today.org/opinion/seeing-the-forest-for-the-trees/).

### 3.1. A search for political solutions and the immunity debate

Both the AU and the ICC have a mandate to fight impunity. However, the AU is a political body while the ICC is an international judicial body. This is the key area of divergence in how they deal with fighting impunity. The AU will opt for a political solution focused on peacemaking and reconciliation, while the ICC will focus on the prosecution of cases.<sup>19</sup> Some observers have argued that the AU could adopt a nuanced approach in which it supports ICC-related interventions to promote accountability for past crimes.<sup>20</sup>

The ICC, on its part,<sup>21</sup> argued that it is not a political institution and will therefore seek to deliver on justice where it is needed. The Prosecutor is obliged to prosecute where the requirements of jurisdiction are met. Yet, it faced the criticism for being a “politicised mechanism, no less rooted in the ‘double standards’ of the international system than other bodies heavily influenced” by the UN Security Council (UNSC).<sup>22</sup> The ICC, it could be argued, should be cognisant of the fact that it is operating in an international *political* sphere. Regular dialogue that might occasionally result in a concession to schedule its proceedings in such a way as to enable political reconciliation processes to conclude may be required.<sup>23</sup> This is because, at the national level, a country might choose to go with restorative as opposed to retributive justice. Country systems may go against the impunity aspiration of the ICC. But diversity in some countries may in fact provide an opportunity to create synergies. For instance, it is worth noting that within Africa itself, immunity is not embedded in the legal framework of some countries. South Africa, Kenya, Uganda, Senegal, Mauritius and Burkina Faso have, for instance, constitutional laws that do not recognise the immunity of heads of state and use the universal jurisdiction principle in relation to international crimes. This has resulted in South Africa, for instance, being challenged domestically due to its failure to arrest the Sudanese president during a visit to South Africa in 2015.<sup>24</sup>

### 3.2. The abuse of the principle of universal jurisdiction by which sitting heads of state and senior officials are arrested and prosecuted

The debate on the ICC is linked to the greater debate on universal jurisdiction under international law. As early as 2008, the AU Commission published a report on the abuse of the principle of universal jurisdiction by some non-African states.<sup>25</sup> In this report, the AU Commission noted the potential for abuse arising from universal jurisdiction, including the proliferation of litigation and the disregard for the principle of sovereign equality of states.<sup>26</sup> The report also noted that, in order to avoid the abuse of jurisdiction, summonses issued to heads of state to appear before the courts of another country must be subject to the consent of the head of state concerned as well as respect for diplomatic confidentiality.<sup>27</sup> This is because universal jurisdiction over heads of state and senior officials may have an adverse impact on the effective

<sup>19</sup> Werle, G., L. Fernandez and M. Vormbaum (eds). 2014. Africa and the International Criminal Court. *International Criminal Justice Series* (Vol. 1), 2014:187.

<sup>20</sup> *Ibid.*

<sup>21</sup> Interview with Fatou Bensouda, Misdadige leiders móeten we berechten'. NRC Newspaper (Netherlands), 28 October 2016 <https://www.nrc.nl/nieuws/2016/10/28/misdadige-leiders-moeten-we-berechten-5032758-a1529034>

<sup>22</sup> McNamee, T. 2014. The ICC and Africa – Between aspiration and reality: Making international justice work better for Africa. Discussion Paper 2/2014. Johannesburg: Brenthurst Foundation, p.5.

<sup>23</sup> *Ibid.*

<sup>24</sup> See *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015). October 2016: [www.saflii.org/za/cases/ZAGPPHC/2015/402.pdf](http://www.saflii.org/za/cases/ZAGPPHC/2015/402.pdf).

<sup>25</sup> African Union. 2008. The Executive Council Thirteenth Ordinary Session, Report of the Commission on the use of the principle of universal jurisdiction by some non-African states as recommended by the Conference of Ministers of Justice/Attorneys General. Addis Ababa: African Union.

<sup>26</sup> *Ibid.*, para 79, p.17.

<sup>27</sup> *Ibid.*, para 82, p.17.

performance of their official functions as well as limiting the conduct of foreign relations.<sup>28</sup> This argument is similar to the one used by the AU and African members who are opposed to the ICC's indictment of sitting heads of state especially when peace processes are being negotiated.

The AU report, however, also noted that the mere likelihood of abuse of a concept in international law for example the principle of universal jurisdiction, does not nullify the concept's existence or its applicability.<sup>29</sup> The challenge is that the principle of universal jurisdiction is not applied uniformly. It varies among countries depending on how the principle is implemented under their national laws. There is also potential for a clash between universal jurisdiction and national constitutional texts, as in laws allowing for immunity for heads of state, for example, and amnesty laws granting pardons for crimes.

The AU Model National Law on Universal Jurisdiction over International Crimes<sup>30</sup> (Model Law) excludes sitting heads of state and senior officials from prosecution while in office. There is a potential for a clash between the applications of universal jurisdiction as it relates to sitting heads of state under the Model law and that used by other countries, notably in Europe, who have issued indictments on sitting heads of state.

### 3.3. Dialogue between the AU, EU and UN on universal jurisdiction

The AU Assembly has been critical of the lack of dialogue between the AU, EU and UN in addressing the AU's concerns on universal jurisdiction. In the Eleventh AU-EU Ministerial Troika, the AU-EU Technical ad hoc Expert Group was set up with a mandate to clarify the respective understanding of the African and EU positions on universal jurisdiction. However, despite the discussion on finding a durable solution, warrants against senior officials were still being issued. The AU then appealed to the UN to suspend all execution of warrants of arrest issued by individual European States (for example, the arrest warrant issued by France for Rose Kabuye, the Chief of Protocol to the President of Rwanda). The AU has remained adamant on the need for dialogue with the EU. In Decision Assembly/AU/Dec.213(XII), the AU Assembly urged both AU and EU commissioners to extend the necessary support to the work of the Joint Technical ad hoc Expert Group, and in subsequent decisions, the AU reiterated the need for dialogue with the EU.

At the UN level the discussions on universal jurisdiction were introduced in 2009 by Tanzania on behalf of the Group of African states.<sup>31</sup> In Decision Assembly/AU/Dec.271(XIV),<sup>32</sup> the AU Assembly took note of the UN General Assembly Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction and invited all AU Member States to submit information and observations to the UN Secretary General before the (then) deadline of 30 April 2010. The Sixth Committee of the UNGA has continued its consideration of the principle of universal jurisdiction and the issue has been discussed by the UNGA in its sixty-fourth to sixty-ninth sessions.<sup>33</sup> In the seventieth session, the UNGA invited Member States and relevant observers to submit information and observations on the scope and application of universal jurisdiction including any applicable international treaties and their national legal rules and judicial practice.<sup>34</sup> The UNGA also requested the Secretary-General to prepare and submit to the UNGA at its seventy-first session a report based on such information and observations. The AU as an observer to the

<sup>28</sup> *Ibid.*, para 83, p.18.

<sup>29</sup> *Ibid.*, para 86, p. 18.

<sup>30</sup> African Union, Executive Council. African Union Model National Law on Universal Jurisdiction over International Crimes. Twenty-First Ordinary Session. 9-13 July 2012. Addis Ababa.

<sup>31</sup> United Nations General Assembly. 2009. Request for the inclusion of an additional item on the agenda in the sixty-third session: The scope and application of universal jurisdiction. A/63/237/Rev.1. 23 July 2009.

<sup>32</sup> African Union. 2010. Assembly of the Union, Fourteenth Ordinary Session, decision on the abuse of the principle of universal jurisdiction. Assembly/AU/Dec.271 (XIV), 31 January- 2 February 2010. Addis Ababa: African Union.

<sup>33</sup> See United Nations General Assembly resolutions 64/117, 65/33, 66/103, 67/98, 68/117 and 69/124.

<sup>34</sup> United Nations General Assembly, Sixth Committee. [http://www.un.org/en/ga/sixth/71/universal\\_jurisdiction.shtml](http://www.un.org/en/ga/sixth/71/universal_jurisdiction.shtml)

UN submitted a letter to Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs requesting for the inclusion of the AU Model Law as part of the information to be submitted at the UNGA's seventy-first session, which commenced on 13 September 2016. The letter describes the Model Law as a 'non-binding legal document meant to assist AU member states to adopt or strengthen their national legislations on the prosecution of those accused on international crimes.'<sup>35</sup> The Model Law provides for jurisdiction over the crimes of genocide, crimes against humanity, war crimes, piracy, trafficking in drugs and terrorism. The list of crimes is beneficial to the contentious debate on the scope of crimes covered under universal jurisdiction.

The development of the Model Law shows that the AU has made considerable efforts to engage with both the EU and UN on issues of concern around universal jurisdiction.

### 3.4. Dialogue with the UNSC and call for amendment to Article 16 of the Rome Statute on the UNSC's power to defer cases

The ICC's indictments in Africa have been viewed as a reflection of neo-colonial rule under the guise of international justice, thereby posing a threat to Africa's sovereignty, peace and stability.<sup>36</sup> This view is reinforced by the referral process of the ICC in which non-state parties to the Rome Statute can still be indicted by the ICC if the UNSC decides to refer them. A referral requires nine affirmative votes, but any permanent member of the UNSC can exercise its veto power to prevent a referral. Support for the ICC would be strengthened if genuine efforts to reform political influence and the way in which cases for prosecution are selected were undertaken.<sup>37</sup>

Following the arrest warrants for President al-Bashir in 2009 and again in 2010, the AU Assembly called upon the UNSC to defer the proceedings under Article 16 of the Rome Statute – a request that was continued in subsequent AU Decisions. However, the UNSC did not defer the proceedings in al-Bashir's case despite these requests by the AU. Similarly, on 21 October 2013, Kenya requested that the UNSC defer the proceedings in the Kenya case before the ICC. The AU subsequently supported this request in a letter to the UNSC on 1 November 2013. Rwanda proposed a resolution to the UNSC for the deferral of the cases against President Uhuru and Deputy President Ruto. However, on 15 November 2013, the UNSC did not adopt the draft resolution (seven members voted in favour and eight abstained).<sup>38</sup>

In Decision Assembly/AU/Dec.245(XXIII), the AU Assembly requested that the African Member States to the Rome Statute (ASRS) address a number of issues, including the power of the UNSC, as granted in Article 16, to defer cases for up to one year, with the possibility of renewing the deferral. In Decision Assembly/AU/Dec.27(XIV), the AU endorsed the recommendations of the second meeting of the ASRS, which called, among other things, for the amendment of Article 16 of the Rome Statute. South Africa, on behalf of the ASRS, proposed an amendment to Article 16 to allow the UN General Assembly to defer the cases for one year if the UNSC had failed to take a decision within a specified time frame. This proposal has however not been adopted by the Assembly of States Parties (ASP).

Following the continued failure by the UNSC to defer cases concerning sitting heads of state, the AU has been dismayed by the lack of dialogue with the UNSC and its apparent reluctance to hear the AU's concerns. The AU Assembly requested the African Group in New York and the African Members of the Bureau of ASP to ensure that the concerns of the AU are properly addressed through consultations with

<sup>35</sup> See Letter by African Union to Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel. 10 February 2016. [http://www.un.org/en/ga/sixth/71/universal\\_jurisdiction/african\\_union\\_e.pdf](http://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf)

<sup>36</sup> McNamee, *op. cit.*, note 22, p.6.

<sup>37</sup> *Ibid*, p.7.

<sup>38</sup> <http://www.bbc.com/news/world-africa-24961169> .

other regional groups in order to find a workable solution. The AU Assembly has repeatedly called upon Member States to speak with one voice to ensure that the proposed amendments to the Rome Statute are considered by the ICC. The lack of dialogue with the UNSC has also contributed to the AU's negative view of the ICC. Since Africa makes up a large portion of the Rome Statute member states, it should be able to leverage its position positively to make reforms, but in practice this has not been so.

In Decision Assembly/AU/Dec.586(XXV), the AU Assembly recommended the formation of an open-ended Ministerial Committee of Ministers of Foreign Affairs (MCMFA). Subsequently the MCMFA on the ICC was established and had its inaugural meeting on 27 September 2015. The MCMFA's twofold mandate was to: ensure that the decisions of the Assembly on the ICC are implemented; and to and strateg with a view to ensuring the suspension of the proceedings against President Omar al-Bashir and withdrawal of the referral case in The Sudan by the UNSC, as well as the termination or suspension of the proceedings against Deputy President William Samoei Ruto of Kenya by the Court or the UNSC respectively.<sup>39</sup> On 5 April 2016, the proceedings against Deputy President Wiliam Ruto were vacated by Trial Chamber V(A) on the basis that the evidence of the prosecutor was weak.<sup>40</sup> However, the case may be prosecuted in future if new evidence is adduced. The case against President al-Bashir is still ongoing.

Since its establishment the members of the MCMFA on the ICC have made efforts to meet with the UNSC which shows that the AU had taken considerable efforts to engage in a dialogue with the UNSC concerning deferring proceedings involving heads of state. In Decision Assembly/AU/Dec.493(XXII), the AU stressed the need for the UNSC to reserve a timely and appropriate response to the AU's requests for deferrals in order to avoid a sense of lack of consideration for the whole continent.

The AU's call for the amendment of Article 16 cannot be separated from the wider call for the reform of the UNSC to be more representative of the members of the UN. The AU in its Common Position on the Proposed Reform of the United Nations<sup>41</sup> (Ezulwini Consensus) noted that at the time the UN was created, Africa was represented but not in a strong position. This has changed with the emergence of Africa as a global player. The AU therefore called for full representation of Africa on the UNSC with 'not less than two permanent seats with all the prerogatives and privileges of permanent membership including the right of veto' and 'five non-permanent seats'.<sup>42</sup> This would address the criticism levied against the veto power by the five permanent members of the UNSC, three of which are not party to the Rome Statute, but can exercise their veto power on whether to refer or defer cases before the ICC. The discretionary power granted to the UNSC to defer cases might need to be amended to transfer this power to an independent oversight body.

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<sup>39</sup> African Union. 2016. Progress Report of the Commission on the Implementation of Decisions of the Assembly of the African Union on the international Criminal Court, Executive Council, Twenty-eighth ordinary Session, 23-28 January 2016.

<sup>40</sup> For more on the Decision of the ICC to vacate the case against Ruto, see <https://www.icc-cpi.int/kenya/rutosang>

<sup>41</sup> African Union. 2005. *The Common Position on the Proposed Reform of the United Nations (The Ezulwini Consensus)*. Executive Council, 7<sup>th</sup> Extra Ordinary Session, 7-8 March 2005. Ext/EX.CL/2 (VII).

<sup>42</sup> Ibid.

### 3.5. Cooperation with the ICC

Although, the AU has called upon AU Member States to speak with one voice to ensure that the concerns of the AU are met with regards to the ICC, Botswana entered a reservation to the entire AU Decision Assembly/AU/Dec.482(XXI).<sup>43</sup> Among other things, this Decision stated that the AU deeply regretted that the UNSC had at the time not acted upon the request by the AU to defer the prosecution of President Omar al-Bashir and the senior state officials of Kenya (President Uhuru Kenyatta and Deputy President Ruto).<sup>44</sup> The Decision also stated that Member States such as Chad, which had welcomed President Omar al-Bashir, had done so in conformity with the Decisions of the AU Assembly and should not be penalised. Botswana's reservation shows that not all AU members are opposed to the jurisdiction of the ICC.

Botswana has maintained its stance on its support for the work of the ICC. On 29-30 October 2015, the ICC held a High-level ICC Regional Seminar in Botswana, on cooperation between the ICC and states, as well as the connection between cooperation and regional and national capacity building.<sup>45</sup> At the meeting Botswana's Foreign Minister Dr. Pelonomi Venson-Moitoi (nominee for the AU Commission Chair) called upon states to 'strengthen relations between African States and the Court by engaging and identifying critical measures that will improve [African States'] communication channels with the Court'.<sup>46</sup> The Prosecutor of the ICC, Fatou Bensouda, has saluted Botswana's leading role in the promotion of the international rule of law its steadfast support for the ICC.<sup>47</sup>

Other AU member states that support cooperation with the ICC include Nigeria, Ghana, Cote d'Ivoire and Mali. For example, Cote d'Ivoire cooperated in the arrest warrants and surrendered Laurent Gbagbo and Charles Ble Goude to the ICC. Niger handed over Ahmad Al Faqi Al Mahdi who was accused of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012.<sup>48</sup> On 21 September 2016, Gabon requested the ICC Prosecutor to open an investigation into Gabon for international crimes, which occurred since May 2016. This shows that some African countries still consider the ICC as a relevant judicial body.

### 3.6. Representation of the views of the AU at the ICC and concern over African-targeted prosecutions

The AU has also been critical of the lack of dialogue between the AU and the ICC. The AU has criticised the former ICC Prosecutor Moreno Ocampo, noting that he had 'been making egregiously unacceptable, rude and condescending statements on the case of President Omar al-Bashir of Sudan and other situations in Africa'.<sup>49</sup> Jean Ping, the former chairperson of the AU Commission (2008-2012) stated that 'we have no problem with the ICC and we are against impunity. But the way prosecutor Luis Moreno-Ocampo is rendering justice is the issue.'<sup>50</sup> Mr. Ping is also quoted as saying '[w]hat have we done justify being an

<sup>43</sup> African Union. 2013. Assembly of the Union, Twenty-first Ordinary Session, decision on international jurisdiction, justice and the International Criminal Court (ICC). Assembly/AU/Dec.482(XXI), 26-27 May 2013. Addis Ababa: African Union.

<sup>44</sup> *Ibid.*, para 3.

<sup>45</sup> International Criminal Court. 2015. *High-level ICC Regional Seminar concludes in Botswana, 30 October 2015*. The Hague: International Criminal Court. 24 April 2016: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1164>

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> <https://www.icc-cpi.int/mali/al-mahdi/Documents/AlMahdiEng.pdf>

<sup>49</sup> African Union Assembly. 2016. Assembly/AU/Dec.296(XV). And interviewee, Skype 20 June 2016.

<sup>50</sup> *Mail&Guardian*, al-Bashir charges wont help Darfur, says AU. 14 July 2010. <http://mg.co.za/article/2010-07-14-au-albashir-charges-wont-help-darfur>.

example are there no worst countries like Myanmar [Burma]<sup>51</sup> Former AU Chairperson President Mugabe (2015-2016) criticised the ICC saying '[t]his is not the headquarters of the ICC, we don't want it at all in this region'.<sup>52</sup> These sentiments towards the ICC are reflected in Decision Assembly/AU/Dec.296(XV), where the AU rejected the request by the ICC to open a Liaison Officer to the AU in Addis Ababa.

This shows that as early as 2008, the AU has been critical of the ICC's prosecutions which are focused on African countries despite there being gross violations of human rights in other areas of the world, for example in Syria. Although the AU has been critical of the focus of prosecutions in Africa, it should be remembered that some of these cases have been direct referrals by African states, namely Uganda, the Central African Republic, the Democratic Republic of Congo and Mali. Some critics suggest that some Member States use ICC prosecutions as a political tool to fight opposition but are critical when the ICC's prosecution clash with their self-interest.

The AU Assembly has been vocal in expressing its concern at the indictment of sitting presidents (i.e., President al-Bashir, the late President Qaddafi and President Uhuru Kenyatta). One of the criticisms of the ICC is its failure to consult the AU before a decision to prosecute cases has been made, as the indictments may interfere with simultaneous peace negotiations. In Decision Assembly/AU/Dec.221(XII), the AU Assembly expressed its deep concern at the indictment made by the Prosecutor of the ICC against President al-Bashir. The concern was that this would affect the peace process by undermining the ongoing efforts for resolution of the conflict in Sudan at that time. Similarly, when President Uhuru was served a summons to appear before the ICC in 2011, the AU was concerned that this would disrupt the peace process following the 2007 post-election violence as well as Kenya's efforts to fight terrorism in the region. This highlights the need for the coordination in the sequencing of ICC indictments in relation to peace processes conducted by the AU. Following the indictment of the President Kenyatta and Deputy Vice President Ruto, Prime Minister Hailemariam Desalegn, in his capacity as AU Chairperson (2013-2014) expressed concern with how the ICC and UNSC destroyed the Kenyan leaders from carrying out their duties and saw 'no excuse why these trials should not be brought closer home' especially since the ICC had been ignoring the requests from Africa.<sup>53</sup> Similarly, AUC Chairperson Dlamini Zuma has called upon the ICC to balance the need for reconciliation and the need for justice.<sup>54</sup> The AU has stressed the need for international justice to be conducted in a transparent and fair manner in order to avoid any perception of a double standard, in conformity with the principles of international law.<sup>55</sup>

Despite the tense relationship between the AU and ICC, the court has continued to organise seminars in collaboration with the AU to establish greater engagement and mutual understanding between the two bodies. The First Joint African Union- International Criminal Court seminar was held on 18-19 July 2011 at the AU headquarters in Addis Ababa.<sup>56</sup> The Fourth Joint First Joint African Union- International Criminal Court seminar was held on 23 October 2015.

<sup>51</sup> Farouk Chotia, 'Africa's Fatou Bensouda is New ICC Chief Prosecutor,' *BBC News*. 12 December 2011. Available at <http://www.bbc.co.uk/news/world-africa-16029121>

<sup>52</sup> *AlJazeera*, 'African Union Chief Mugabe says ICC unwelcome in Africa', June 16 2015. <http://america.aljazeera.com/articles/2015/6/16/mugabe-says-icc-unwelcome-in-africa.html>

<sup>53</sup> Wambui Ndonga, Stop messing with Kenya, AU tells ICC. *Capital News online*. 12 October 2013. <http://www.capitalfm.co.ke/news/2013/10/stop-messing-with-kenya-au-tells-the-icc/>

<sup>54</sup> *Ibid.*

<sup>55</sup> African Union, Assembly of the Union, Twenty-first Ordinary Session, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec.482(XXI), 26-27 May 2013.

<sup>56</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=pr1160>

## 4. Irreconcilable differences?

In June 2009, Libya, Senegal, Djibouti and Comoros called for the withdrawal of African States from the ICC's jurisdiction over the indictment of al-Bashir,<sup>57</sup> but at that time most AU Member States opted to ask the UNSC to defer the proceedings against President al-Bashir. The call for mass withdrawal of Africa from the ICC was reignited during the Twenty-sixth Ordinary Session of the AU in 2015, following the decision of the UNSC to reject the AU's request to defer the proceedings of Deputy William Ruto and President Kenyatta. This time, it was Kenya that was at the forefront, urging the AU states that were party to the Rome Statute to withdraw from the ICC's jurisdiction. Kenya's interests stemmed from the fact that Ruto and Kenyatta were subject to proceedings before the ICC.

The AU in Decision Assembly/AU/Dec.245(XIII)Rev.1, decided that in view of the fact that the request by the AU to the UNSC to defer the proceedings initiated against President al-Bashir of the Sudan had not been met, the AU member states would not cooperate in the arrest and surrender of President al-Bashir. Some African countries have agreed to this non-cooperation in the arrest of President al-Bashir. In contrast, the EU has issued statements in support of the arrest warrants for al-Bashir. It also has guidelines to deal with the arrangement between states that are party to the Rome Statute and the United States on the surrender of persons to the court.

During the first AU call for non-cooperation in the arrest of al-Bashir in 2009, Chad initially entered reservations to this decision because at that time Chad and Sudan had tensions over the conflict in Darfur. However, in July 2010, al-Bashir visited Chad and was not arrested. Similarly, al-Bashir visited other African states that are members of the ICC (Kenya, Djibouti, South Africa, Uganda and Malawi) and was not arrested, illustrating the fact that political factors influence how countries cooperate with the ICC. President al-Bashir has visited Chad five times since the ICC issued the second arrest warrant. The first visit was a week after the second arrest warrant was issued, and Chad did not arrest al-Bashir when he attended a meeting of the Community of Sahel-Saharan States.<sup>58</sup> On 27 August 2010, al-Bashir visited Kenya to attend the adoption of the new constitution, and despite pressure from the ICC and EU, Kenya did not arrest him. However, under pressure from the ICC, Kenya refused to host the Intergovernmental Authority on Development (IGAD) Summit, as al-Bashir would be attending. In 2011, the Kenyan court ordered the government to arrest al-Bashir should he again travel to Kenya. In Malawi, al-Bashir attended the Common Market for Eastern and Southern Africa (COMESA) Summit on 14-15 October 2011, but Malawi's former president, Bingu wa Mutharika, believed African leaders should be tried locally instead of by the ICC and al-Bashir was not arrested.<sup>59</sup>

When al-Bashir visited South Africa for the AU Summit in June 2015, the Government of South Africa did not arrest him, citing the fact that he enjoyed immunity as a visiting head of state. President Jacob Zuma of South Africa has stated unequivocally that South Africa supported the AU's position concerning the arrest of al-Bashir. Zuma is quoted in relation to the arrest warrant as saying, 'There is an African stance on this and we are not different from it... [T]he United Nations Security Council should have listened to Africa before issuing the interdict.'<sup>60</sup> On 15 June 2015, South Africa's ruling party, the African National Congress,

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<sup>57</sup> Sudan Tribune. 2009. African leaders back away from ICC withdrawal demand. *Sudan Tribune* 10 June 2009. October 2016: [www.sudantribune.com/spip.php?article31443](http://www.sudantribune.com/spip.php?article31443).

<sup>58</sup> BBC. 2010. Sudan's President al-Bashir defies arrest warrant in Chad. *BBC News* 21 July 2010. October 2016: [www.bbc.com/news/world-africa-10718399](http://www.bbc.com/news/world-africa-10718399).

<sup>59</sup> CICC Secretariat. 2011. *Visit of ICC suspect al-Bashir to Malawi: Latest statements and news*. The Hague: International Criminal Court. October 2016: [www.iccnw.org/?mod=newsdetail&news=4862](http://www.iccnw.org/?mod=newsdetail&news=4862).

<sup>60</sup> Mbola, B. 2009. AU leaders will not extradite al-Bashir. *SANews*. October 2016: [www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir](http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir).

issued a statement saying, 'The National Executive Committee (NEC) of the African National Congress holds the view that the International Criminal Court (ICC) is no longer useful for the purposes for which it was intended – being a court of last resort for the prosecution of crimes against humanity.'<sup>61</sup>

Uganda is the latest country to not cooperate in the arrest of President al-Bashir. This is in contrast to its position in July 2009 where, after inviting al-Bashir to the International Global Smart Partnership dialogue, it had to cancel the invitation. The reason noted was that Uganda could not invite al-Bashir and then not apprehend him, yet it had called upon other countries to apprehend Kony of the LRA.<sup>62</sup> This decision was taken amidst the AU's decision on non-cooperation with the arrest of al-Bashir. However, on 12 May 2016, al-Bashir attended the inauguration of President Museveni of Uganda, despite the arrest warrant issued by the ICC. Museveni is quoted as saying, 'Forget about this ICC useless thing. Earlier we thought the ICC was useful, but to us, now African leaders, we see it is useless. It's a bunch of useless people.'<sup>63</sup> During the inauguration, representatives from the US delegation as well as representatives from the EU Member States and Canada walked out of the inauguration ceremony after President Museveni's remarks, especially given the presence of al-Bashir. There is underlying self-interest at play in President Museveni's statement. Although Uganda itself referred the first case to the ICC in January 2004 (involving the LRA), President Museveni's criticisms against the ICC could be in solidarity with Kenyan President Kenyatta. Some critics have argued that African leaders use the ICC for political reasons to get rid of their opposition, which in Uganda's case was the LRA. These competing interests between cooperation when it suits and non-cooperation when it does not need to be acknowledged.

Contrary to the calls for mass withdrawal by some African Member States, the EU has been vocal in calling for the universality of the ICC's jurisdiction. The EU Common Position recognises that the crimes prosecuted by the ICC are of concern to the EU and its Member States and affirms that universal accession to the Rome Statute is essential for the full effectiveness of the ICC. Similarly, the EU Action Plan to support the Common Position deals with the universality and integrity of the Rome Statute, among other things.

Amidst the AU's deteriorating relationship with the ICC, and because of concern over the selectivity of the ICC's African-targeted prosecutions, there have been calls for the empowerment of the African Court of Justice and Human and Peoples' Rights (ACJHPR) to try international crimes. Other underlying factors could be pan-Africanism and the need for African solutions to African problems. The ACJHPR would therefore be the alternative to the ICC. Subsequently, the Malabo Protocol was adopted in June 2014.<sup>64</sup> In addition to leaving open the possibility for the addition of new crimes, it gives the ACJHPR jurisdiction over international crimes and includes more crimes under ACJHPR jurisdiction than the ICC. They are genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. Genocide, crimes against humanity, war crimes and aggression are already well established in the Rome Statute. The other crimes, such as mercenarism, terrorism, and corruption, money laundering, and trafficking in hazardous wastes are already defined in existing AU treaties. The list also includes the crime of unconstitutional

<sup>61</sup> Mutambo, A. 2015. South Africa's ANC slams ICC over attempts to arrest Sudanese President al-Bashir. *Daily Nation* 16 June 2015. October 2016: [www.nation.co.ke/news/africa/ANC-slams-ICC-Bashir/-/1066/2753510/-/jdrm6sz/-/index.html](http://www.nation.co.ke/news/africa/ANC-slams-ICC-Bashir/-/1066/2753510/-/jdrm6sz/-/index.html).

<sup>62</sup> CICC Secretariat. 2009. *Uganda: Coverage of cancellation of al-Bashir's venue to Uganda*. The Hague: International Criminal Court. October 2016: [www.iccnw.org/?mod=newsdetail&news=3438](http://www.iccnw.org/?mod=newsdetail&news=3438).

<sup>63</sup> CNN. 2016. Uganda's Museveni extends 30-year grip on power. *CNN International Edition* 12 May 2016. October 2016: <http://edition.cnn.com/2016/05/12/africa/uganda-museveni-inauguration/>.

<sup>64</sup> African Union. 2014. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). Adopted 27 June 2014.

changes of government, which is one of the causes of conflict in Africa, but the Malabo Protocol differs from the Rome Statute in that it grants immunity to heads of state and government while they are in office. This has been criticised as giving African leaders an incentive to stay in power longer to avoid prosecution for any international crimes committed during their term in office.

Some of the regional economic communities, like the East African Community (EAC), had suggested empowering its regional court to try international crimes but later supported the AU's initiative to use the ACJHPR. The problem, however, is that only nine African countries have signed the Malabo Protocol and none has ratified it. This calls to question whether the AU is really committed to empowering the ACJHPR to try international crimes. Apart from the lack of ratification, there is concern about the financing of the ACJHPR.

## 5. What role for the AU in ensuring justice?

In the last several years, the AU has provided a platform for discussing the concerns of African Member States with the ICC. It has also played a central role in seeking engagement with the UNSC. At the same time, AU structures are presented as offering alternatives to the ICC, notably the ACJHPR, which was established in 2014 but which is not yet operational. The ACJHPR has a mandate that goes beyond the one currently given to the African Court on Human and Peoples' Rights (ACHPR). But what potential do these structures hold?

### 5.1. Authority to engage

#### 5.1.1. Formal mandate

The AU has the mandate to address justice and human rights on the continent. Article 3(h) of the Constitutive Act of the African Union outlines the aim of the AU to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights (African Charter) and other relevant human rights instruments. In addition to this, Article 4(h) provides for the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. This is a shift from non-interference under the Organisation of African Unity (OAU) to the AU's policy of non-indifference. Under Article 4(m), the AU shall respect democratic principles, human rights, rule of law and good governance. Article 4(o) provides for respect for the sanctity of human life and for the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities. These articles of the Constitutive Act give the AU its authority to engage in cases of accountability for international crimes. Article 3(d) empowers the AU to 'promote and defend African common positions on issues of interest to the continent and its peoples'.<sup>65</sup>

Article 3(2)(b) of the Statutes of the Commission of the AU give the AU Commission the right to initiate proposals to be considered by other organs of the AU. Article 3(2)(i) mandates the Commission to 'work out draft common positions of the Union and coordinate the actions of Member States in international negotiations'.<sup>66</sup> The AU Commission, through the AU Mission in Brussels, will serve as the secretariat to the open-ended MCMFA and provide institutional support to the African Group in The Hague to ensure effective coordination of its activities in summit decisions.

<sup>65</sup> African Union. 2000. *Constitutive Act of the African Union*. Addis Ababa: African Union.

<sup>66</sup> African Union. 2002. *Statutes of the Commission of the African Union*. Addis Ababa: African Union.

The AU has undertaken steps to expand the jurisdiction of the continental court to deal with international crime. Below is a synopsis of the developments in the jurisdiction from the ACHPR to the ACJHR.

**Table 1: Development in the jurisdiction from the ACHPR to the ACJHR**

Court	Statute	Mandate and jurisdictional developments	Date adopted	Date of entry into force	Signatories	Ratifications
African Court on Human and Peoples' Rights (ACHPR)	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	<ul style="list-style-type: none"> <li>- Hear cases and disputes in relation to the interpretation and application of the African Charter, its Protocol and any other relevant Human Rights instrument ratified by the States concerned.</li> <li>- Provide an advisory opinion on any legal matter relating to the African Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission on Human and Peoples' Rights (African Commission)</li> <li>- Complement the protective mandate of the African Commission</li> </ul>	10 June 1998	25 January 2004	52	30
African Court of Justice (ACJ)	Protocol of the Court of Justice of the African Union	<ul style="list-style-type: none"> <li>- Principal judicial organ of the AU</li> <li>- Jurisdiction over the interpretation and application of the Act; the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; any question of international law; all acts, decisions, regulations and directives of the organs of the Union; all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; the nature or extent of the reparation to be made for the breach of an obligation</li> </ul>	11 July 2003	11 February 2009	44	16
African Court of Justice and Human Rights (ACJHR) (merged court)	Protocol on the Statute of the African Court of Justice and Human Rights	<ul style="list-style-type: none"> <li>- Merged the ACHPR and ACJ to establish a single court, the ACJHR.</li> <li>- Jurisdiction over the interpretation and application of the Constitutive Act; the interpretation, application or validity of other AU Treaties and all subsidiary legal instruments adopted within the framework of the AU or OAU; the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), or any other legal instrument relating to human rights, ratified by the States Parties concerned; any question of international law; all acts, decisions, regulations and directives of the organs of the AU; all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the AU and which confer jurisdiction on the Court; the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the AU; the nature or extent of the reparation to be made for the breach of an international obligation</li> <li>- Complementary mandate with the African Commission and the African Committee of Experts on the Rights and Welfare of the</li> </ul>	1 July 2008	Not entered into force	30	5

		Child. - Divides the court into two sections: general affairs and human rights.				
African Court of Justice and Human Rights (ACJHPR)	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)	- Amends the title of the court to include 'Peoples' to it. - Incorporates the mandate of the merged ACJHR - Vests the court with original, appellate jurisdiction including international criminal jurisdiction. - Divides the ACJHR into three sections: general affairs, human rights and international crimes (the general affairs and human rights sections exist under the merged ACJHR) - Complements the protective mandate of the African Commission of Human and Peoples Rights.	27 June 2014	Not entered into force	9	0

As seen from the table, the jurisdiction of the continental court has grown from the purely human rights mandate of the ACHPR, to the establishment of the ACJHPR under the Malabo Protocol with an expanded jurisdiction covering the mandates of not only the ACHPR, ACJ the merged ACJHR but also introduces jurisdiction over international crimes. However, the Malabo Protocol is not yet in force. In tracing the growing mandates, it is important to note that in essence four different courts that have been introduced in the AU/OAU. So what does this mean for the succession of the Africa courts? Theory would dictate that the courts would chronologically succeed each other but in practice there could be a transition from the first court, the ACHPR to the ACJHPR. At present, only the ACHPR is established and active, with its seat in Arusha, Tanzania. The subsequent Protocols allow for the continuation of the ACHPR pending their establishment.

### 5.1.2. Complementarity with regional courts

The ACHPR has competence to hear matters relating to human rights violations. The ACJHPR, as empowered by the Malabo Protocol, has competence to try international crimes. Since the AU works in collaboration with regional economic communities (RECs), questions of subsidiarity and complementarity may arise.

Article 88(2) of the Treaty Establishing the African Economic Community obliges Member States to undertake to promote the co-ordination and harmonisation of the activities of the regional economic communities of which they are members with the activities of the African Economic Community. Article 7(2) of the Protocol on Relations between the African Union and Regional Economic Communities mandates the Committee on Coordination to coordinate and harmonise a number of policies between the AU and RECs, including human rights and humanitarian affairs, among others. The AU recognises eight RECs, namely the Arab Maghreb Union (AMU), COMESA, the Community of Sahel–Saharan States (CEN–SAD), EAC, the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), IGAD, and the Southern African Development Community (SADC).

Four of the RECs (EAC, ECOWAS, COMESA and SADC) have operational courts, albeit the SADC Tribunal has been suspended. The EAC Court of Justice (EACJ) has been instrumental in interpreting the EAC Treaty<sup>67</sup> to protect the rights of individuals. Under this treaty, the EACJ has original, appellate and human rights jurisdiction. However, this is to be determined by a protocol to operationalise its extended jurisdiction. Since the inauguration of the EACJ in 2001, this protocol has not been adopted. Nevertheless, the EACJ has relied on Article 7(2) of the EAC Treaty, which states that 'the principles of democracy, the

<sup>67</sup> East African Community. Treaty for the Establishment of the East African Community, signed on 30 November 1999, entered into force 7 July 2000, amended on 14 December 2006 and 20 August 2007.

rule of law, social justice and the maintenance of universally accepted standards of human rights<sup>68</sup> are operational principles of the EAC. In addition, Article 6 of the EAC Treaty makes specific reference to the promotion of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights. This has been interpreted to mean that the EACJ has *de facto* extended its mandate to address violations of human rights.<sup>69</sup> Unlike the EACJ the ECOWAS Court of Justice has competence to hear human rights cases from individuals alleging a violation of their rights. Article 4 of the Revised Treaty of the Economic Community of West Africa<sup>70</sup> lists the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'<sup>71</sup> as one of the fundamental principles of the Revised ECOWAS Treaty. Article 3(4) of the Supplementary Protocol<sup>72</sup> amending the Protocol relating to the ECOWAS Court of Justice gives the court jurisdiction to hear human rights cases. The EACJ and ECOWAS Court therefore play a complementary role to the existing ACHPR and the human rights section when the ACJHPR is finally established.

However, none of the REC courts have jurisdiction to try international crimes. Article 46H of the amended statute annexed to the Malabo Protocol provides for complementarity between the ACJHPR and national courts and regional courts where specifically provided for in the RECs. This means that for the time being, given the absence of REC courts to try international crimes, the complementarity will operate between the national courts and the ACJHPR. In addition, Article 46L(3) allows the ACJHPR to seek the judicial assistance and co-operation of regional courts and conclude agreements for that purpose. Given the overlapping mandates that may occur if RECs empower their courts to try international criminal cases, Article 46L(3) therefore provides an avenue for cooperation to bring about effective and efficient adjudication of such cases.

## 5.2. Acceptance – informal authority

Since the other courts are not in existence, reference will be made to the existing ACHPR, which has played an important role in addressing the violation of human rights cases. The activities of the ACHPR show some positive signs (see Box 1) and has dealt with cases including freedom of expression and unlawful arrest and detention.

<sup>68</sup> East African Community. 2000. *The Treaty for the Establishment of the East African Community*. Arusha: East African Community.

<sup>69</sup> Gathi J. 'Mission Creep or a Search for Relevance: The East Africa's Court of Justice's Human Rights Strategy', 2013, *Duke Journal of Comparative and International Law*, Vol 21, 249-296; See Possi A. 'Its Official: The East African Court of Justice can now adjudicate human rights cases', <https://africlaw.com/2016/02/01/its-official-the-east-african-court-of-justice-can-now-adjudicate-human-rights-cases/>

<sup>70</sup> Economic Community of West Africa. *Revised Treaty of the Economic Community of West Africa*. Abuja.

<sup>71</sup> *Ibid*, article 4(g).

<sup>72</sup> Economic Community of West Africa. 2005. Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1,2,9 and 30 of the Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 paragraph 1 of the English version of the said Protocol.

**Box 1: Decisions of the African Court on People's and Human Rights in 2014**

**Konate v. Burkina Faso:** The applicant, working as editor of the weekly newspaper L'Ouraganin, published two articles that led to his conviction for defamation of character, public insult and insulting a magistrate. He was sentenced to 12 months' imprisonment and large fines. The applicant argued that his conviction and punishment contravened his right to freedom of expression as protected under Article 9 of the Charter and Article 19 of the International Covenant on Civil and Political Rights.

**Zongo and others v. Burkina Faso:** This case involved the alleged assassination of Norbert Zongo, an investigative journalist and director of the weekly paper *l'Indépendant*, and three colleagues in December 1998. The applicant argued that, following the alleged assassination, the local authorities had failed to mount a proper investigation and failed to act with due diligence in seeking, trying and judging those involved in the death of Zongo and his companions. In only the second case to be decided on its merits, the Court found that Burkina Faso had indeed failed to take measures to ensure the applicant's right to be heard by a competent national court, thereby violating articles 1, 7, 9(2) of the Charter and Article 66 of the ECOWAS Treaty.

**Chacha v. Tanzania:** This case concerned the alleged unlawful arrest, detention, charging and imprisonment of the applicant contrary to Tanzanian laws. It was declared inadmissible due to the applicant's failure to exhaust local remedies.

**Mtikila v. Tanzania:** The case centered on Tanzanian laws that require candidates running for local government, parliament and the presidency to be members of a registered political party, effectively banning independent candidates. In June 2013, the court delivered its judgment, unanimously finding that Tanzania's ban on independent candidates had violated the applicant's Article 10 and 13(1) Charter rights and, by majority, that the same ban violated the applicant's Article 2 and 3 Charter rights.

Source: Windridge, O. 2015. 2014 at the African Court on Human and Peoples Rights—a Year in Review. Guest post. *Opinio Juris* 11 January 2015. October 2016: <http://opiniojuris.org/2015/01/10/guest-post-2014-african-court-human-peoples-rights-year-review/>. Checked against Decisions of the African Court <http://www.african-court.org/en/>.

Despite the achievements by the ACHPR, there are still some challenges to its informal acceptance. Although African Member States support the legal instruments of the AU, there is a lack of ratification of key legal human rights instruments to date, which indicates they do not want to be bound to the requisite obligations. An example is the Maputo Protocol, which protects the rights of women. In fact, there is opposition by some Member States who are against some of the protected sexual and reproductive rights. There is also a lack of ratification for the Protocol on the Statute of the African Court of Justice and Human Rights to set up the merged ACJHR. To date, only five countries have ratified this Protocol since it was adopted on 1 July 2008. Similarly, there has been no ratification of the Malabo Protocol, which extends the jurisdiction of the ACJHR to try international crimes. Even Kenya, which pledged financial support to the operationalisation of the ACJHR, has not ratified the Malabo Protocol. And, even where ratification has occurred, there is still a lack of domestication of the AU human rights instruments into national legal systems. Countries have also been slow to make a declaration allowing individuals and citizens access to the ACHPR. To date, only eight countries have made such a declaration, the latest being Benin on 1 March 2016,<sup>73</sup> and Rwanda will be withdrawing its declaration,<sup>74</sup> which will be effective next year, thereby

<sup>73</sup> <http://www.au.int/en/pressreleases/21074/benin-makes-declaration-allow-ngos-and-individuals-directly-access-african-court>

<sup>74</sup> <http://www.ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>; see decision of the ACHPR in the case of *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application 003/2014. <http://en.african-court.org/images/Cases/Ruling%20on%20Jurisdiction/Apl.%20003-2014%20Ingabire%20Victoire%20Umuhoza%20v.%20Rwanda%20Ruling%20on%20Jurisdiction%20ENG.pdf>

limiting direct access for individuals to the court, which is necessary in cases involving human rights violations.

Furthermore, Member States have also been slow in meeting their state reporting commitments under the AU human rights instruments. For example, Member States to the African Charter are supposed to issue an initial report to the African Commission on Human and Peoples' Rights (African Commission) two years after ratification or accession to the African Charter, and periodic reports are required every two years after the initial report. The state reports are a forum for constructive dialogue as they enable the African Commission to monitor the implementation of the African Charter and identify any challenges a country might face.

There have been concerns over the proliferation of various AU mechanisms dealing with human rights; however, the ACHPR complements the mandate of the African Commission and may refer cases to it. In addition, the African Commission may bring a case involving mass human rights violations before the ACHPR. This power is significant as it can be a channel for individuals and non-governmental organisations (NGOs) that have no direct access to bring a matter to the ACHPR. Such individuals and NGOs can refer the matter to the African Commission. This is especially relevant in countries that have not made a declaration allowing for individual submissions to the ACHPR. The African Commission and the African Committee of Experts on the Rights and Welfare of the Child (ACRWC) have a resolution on cooperation with each other, as there is some overlap on areas of jurisdiction, such as children's rights, which are also covered in the African Charter.

Furthermore, concern has been raised about the danger of merging the ACJ and the ACHPR under one court (ACJHR) as this will stretch the court's jurisdiction and resources and could affect the ACHPR's work on human rights. The reason for merging the two courts was economic, given a lack of resources to run both, but there could also be a benefit to merging the two because it would resolve the jurisdictional competition between them. This is because Article 3(h) of the Constitutive Act states that the aim of the AU shall be to protect and promote human and people's rights in accordance with the ACHPR and other relevant human rights instruments. Article 2 of the Protocol of the Court of Justice of the African Union establishes the ACJ as the principal judicial organ of the AU. Article 19 gives the ACJ jurisdiction over and interpretation of the Constitutive Act, which would include human rights as per Article 3(h). By merging the two courts, the cases will be divided into general affairs and human rights under. The Malabo Protocol introduces a third section, the international criminal law section, which will adjudicate on international crimes under the ACJHR.

Amidst the limitations facing the ACHPR and the lack of ratification of the Malabo Protocol to give effect to the ACJHR, the AU has resorted to establishing special hybrid courts to try perpetrators of international crimes. The AU Assembly was instrumental in commencing the trial of Hissène Habré, the former president of Chad, who was accused of crimes against humanity, war crimes and torture. In Decision Assembly/AU/Dec.127(VII), the AU mandated the Government of Senegal to try Habré 'on behalf of Africa',<sup>75</sup> as his crimes fell within the AU's jurisdiction as per Article 4(h) of the Constitutive Act. This is the first time a court of an African state has been given universal jurisdiction to try a former president of another state. Subsequently, the Extraordinary African Chambers were established in Senegal to try Habré. Although the trial of Habré is a positive step towards fighting impunity on the African continent, the length of time that it took to get to trial (approximately 25 years) is disheartening. The process towards the prosecution of Habré was not easy (see box 2), as the case involved parallel proceedings instituted against Habré in Chad, Senegal, Belgium as well as a case on extradition before the International Court of Justice

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<sup>75</sup> African Union. 2006. Assembly of the Union, Seventh Ordinary Session, Decision on the Hissène Habré Case and the African Union. Assembly/AU/Dec.127 (VII), 1-2 July 2006. Addis Ababa: African Union.

(ICJ). In addition to this, by failing to expeditiously prosecute Habré, Senegal's was in violation of its obligations under the UN Convention on Torture. Regionally, the ECOWAS Court of Justice heard a matter instituted by Habré alleging that Senegal, in the proceedings against him, had violated his human rights by disregarding fundamental legal principles including the non-retroactivity of criminal law. The AU in keeping with its mandate to fight impunity, had to decide on the appropriate forum to prosecute the case, culminating in the establishment of the Extraordinary African Chambers. Nevertheless, the successful prosecution of Habré signifies there is a judicial forum available to prosecute international crimes outside the ICC and in the absence of the ACJHPR, which is yet to be established.

**Box 2: Summary of the sequence of the Habré case<sup>76</sup>**

Hissène Habré was overthrown in December 1990 and went into exile in Senegal. The Chad National Commission of Inquiry into the crimes and misappropriations committed by ex-President Habré, his accomplices and/or accessories<sup>77</sup> (29 December 1990- May 1992) was set up to investigate illegal detentions, assassinations, disappearances, torture, mistreatment, other attacks on the physical and mental integrity of persons; plus all violations of human rights, illicit narcotics trafficking and embezzlement of state funds between 1982 and 1990. On May 17 1992, the Commission in their report found Habre responsible for an estimated 40,000 deaths.

On 25 January 2000, seven Chadian nationals and the Chadian Association of Victims of Crimes and Political Repression (*Association des victimes des crimes et de repression politique de Chad*) filed a civil suit with the Regional Tribunal of Dakar against Habré. On 3 February 2000, Habré was indicted on charges of complicity in crimes against humanity and acts of torture and barbarous acts. On 4 July 2000, the Court of Appeal of Dakar granted Habré's request to cancel the indictment and bar proceedings against him on the grounds that Senegalese law did not provide for jurisdiction over crimes against humanity or acts of torture committed by foreign nationals outside the territory of Senegal. On 20 March 2001, the Supreme Court of Senegal confirmed the decision on appeal. On 30 November 2000, Chad nationals living in Belgium filed charges in Brussels against Habré. On 20 September 2005, Belgium issued an international arrest warrant for Habré based on the principle of universal jurisdiction. By a decision of 25 November 2005, the Court of Appeal of Dakar declared itself incompetent to rule on the extradition request stating it had no jurisdiction.

Faced with the question of which of appropriate jurisdiction, on 27 November 2005, Senegal asked the AU to indicate the jurisdiction that is competent to try this matter the Habré case. Subsequently on 24 January 2006, the AU in Decision Assembly/AU/Dec.103(VI) set up a Committee of Eminent African Jurists (CEAJ) with a mandate to consider all aspects and implications of the Habré case as well as the options available for his trial. Meanwhile on 18 May 2006, the UN Committee Against Torture ruled that Senegal had violated the UN Convention Against Torture and called upon Senegal to prosecute or extradite Habré. On 2 July 2006, the AU based on the report of the CEAJ, mandated Senegal to 'prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court'. Senegal's President Wade agreed to the request.

On 31 January 31 2007, the Senegalese National Assembly adopted a law allowing Senegalese courts to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when committed outside of Senegal. Subsequently, the Constitution of Senegal was amended to allow for past crimes against humanity to be prosecuted. This provision allowed for Habré to be tried for past crimes. On 16 September 2008, fourteen victims filed complaints with a Senegalese prosecutor accusing Habré of crimes against humanity and torture.

<sup>76</sup> Information was paraphrased based on data from the FIDH The Worldwide Human Rights Movement. *Chronology of Hissene Habre Case*. 27 May 2016. <https://www.fidh.org/en/issues/litigation/litigation-against-individuals/hissene-habre-case/chronology-of-the-hissene-habre-case>

<sup>77</sup> Chad: Report of the Commission of Inquiry into the crimes and misappropriations committed by ex-President Habré, his accomplices and/or accessories, May 7 1992 <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf>

The first judgement delivered by the ACHPR, *Michelot Yogogombaye v Senegal*<sup>78</sup> was brought with a view to obtaining suspension of the on-going proceedings instituted by Senegal with the objective to try and sentence Habré. The case was brought by Mr Yogogombaye, a Chad national residing in Bienne, Switzerland. The case was however not admissible before the court, as Senegal had not made a declaration under article 34(6) of the Protocol to the ACHPR accepting the jurisdiction of the court to allow individuals to submit cases to it. Habré turned to the ECOWAS Court of Justice to stop Senegal from prosecuting him. On 1 October 2008, Hissène Habré filed a complaint before ECOWAS Court alleging that Senegal, in the proceedings against him, had violated his human rights by disregarding fundamental legal principles including the non-retroactivity of criminal law, the authority of *res judicata*, equality before the law, independence of the judiciary, separation of powers and the right to a fair trial. On 18 November 2010, the ECOWAS Court partially upheld Habré's claim and found that a trial in a Senegalese court under the existing national legal framework would violate the prohibition of retroactive criminal laws, but left open the opportunity for accountability. The ECOWAS Court reasoned that although the crimes of which Habré was accused did not, at the time, constitute crimes under Senegalese law, they were regarded as such under international law. The court then ruled that Senegal must try Habré through a 'special or ad hoc procedure of an international character.'

On the international scene, on 19 February 19 2009, Belgium asked the International Court of Justice (ICJ) to order Senegal to prosecute or extradite Habré.

Between 2008- 2010, plans towards the trial of Habré were stalled as Senegal refused to move forward until it received full funding for the trial, and President Wade threatened to expel Habré unless funding arrived. The EU and the AU send numerous delegations to negotiate with Senegal. Senegal first seeks €66 million, then €27 million, and finally agrees to an €8.6 million budget.

On 31 January 2011, the AU called for the 'expeditious' start to Habré's trial based on the ECOWAS decision of a special or an ad hoc procedure. And on 24 March 2011, Senegal and the AU announced an agreement on an "Ad hoc International Court" to try Habré and agree to meet in April to final the Statute and Rules of the Court. However, given the potential conflict between the ruling of the ECOWAS court, and the mandate of the AU, on 11 July 2011, President Wade decided to send Habré back to Chad where a Chadian court had sentenced him to death in absentia, following an expeditious trial in 2008.

On 22 July 2011, Chad requested Senegal to extradite Habré to Belgium. However, on 10 January 2012, the Dakar Court of Appeal refused the new extradition request. On 20 July 2012, the ICJ requested Senegal to prosecute Habré without delay if he was not extradited.

On 2 April 2012, Macky Sall was elected as President of Senegal replacing President Wade. On 24 July 2012, Senegal agreed to the AU's proposal for the establishment of a special tribunal within the Senegalese system to try Habré. The judges of this tribunal would be composed of judges appointed by the Chairperson of the AU Commission. On 22 August 2012, Senegal and the AU signed the agreement creating the Extraordinary African Chambers, and the Statute of the Extraordinary African Chambers was adopted. The chambers were inaugurated on 8 February 2013 and the trial commenced on 20 July 2015 until February 2016. The verdict was delivered on 30 May 2016 and Habré was sentenced to life imprisonment.

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<sup>78</sup> See *Michelot Yogogombaye v The Republic of Senegal* Application No. 001/2008. <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.001-2008%20Michelot%20Yogogombaye%20v%20Senegal-%20English.pdf>

### 5.3. Ability and capacity to engage

#### 5.3.1. Human resource capacity

The ACHPR consists of 11 judges elected by the AU Assembly from a list of candidates nominated by AU Member States. The judges are elected in their personal capacity but no two serving judges can be nationals of the same state. Due consideration is also given to gender and geographical representation. The judges are elected for a period of six years and are eligible for re-election only once. The president of the ACHPR holds office on a full-time basis while the other 10 judges work part-time. A registrar who deals with managerial and administrative work assists the president. Under the ACJHR the number of judges was increased to 16 judges and the Malabo Protocol retained this number in the ACJHPR. The 16 judges will be divided among the three sections of the court: general affairs, human and peoples' rights and international criminal law. The Malabo Protocol also provides for a registry comprised of a Registrar and three assistant registrars expanding the staff in the Registry. More so, the Protocol creates the Office of the Prosecutor and a Defence Office.

#### 5.3.2. Budget allocated to financing the African court and hybrid courts

The allocation of resources to the ACJHPR would need to be increased once the Malabo Protocol comes into force in order to cater for matters in all three sections of the court. This is pertinent given the expanded jurisdiction under the Malabo Protocol to cover international crimes, which will include the investigation of such cases as well as financing the trial chamber and the appeals chamber. To put things in perspective, the proposed 2016 budget of the ICC, which is mandated to prosecute international crimes, amounted to €153.32 million, representing an increase of €22.66 million, or 17.3%, over the 2015 approved budget.<sup>79</sup> In comparison to the amount allocated to the existing ACHPR in 2016 was US\$10,286,401. If this is the indication of the budget estimate for the court, there is some concern that the resources will not be adequate for the investigative process required by the ACJHPR in the prosecution of international crimes. AU Member States therefore need to honour their financial commitments to the funding of AU organs and it is hoped that with the new financing formula of the AU, the contributions by member states to fund both the operating budget and programmes of the AU, will increase.

Funding for the hybrid courts is important as alternative fora for the prosecution of international crimes. In November 2012, Senegal and international donor countries agreed to a budget of €8.6 million to cover the Habré trial – an amount that provides an estimated budget for establishing a hybrid court in Africa (the Hybrid Court for South Sudan (HCSS), for example, which is yet to be established).

Although funding the former structures is important, it is also important to consider funding for important NGOs, particularly those active in the area of sensitisation and in the collection of witness accounts (in the case of hybrid courts). The latter tend to be neglected, especially when they are collecting witness accounts at an early stage of the process.<sup>80</sup>

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<sup>79</sup> International Criminal Court Assembly of States Parties. 2015. *Proposed Programme Budget for 2016 of the International Criminal Court*. Fourteenth Session ICC-ASP/14/10. 18-26 November 2016. The Hague.

<sup>80</sup> Interviewee on the South Sudan Hybrid Court. Addis Ababa, September 2016.

## 6. What next after the withdrawals?

Responses of African countries in early 2016 for calls for a mass withdrawal have shown that there are divisions within the continent regarding future support to the ICC. While some have gone ahead and announced their withdrawal, others have indicated that they would continue to engage with the ICC but have pointed to the urgency to address the rift between the ICC and a number of African countries in order to preserve the Court. Most recently, this view was articulated by Sidiki Kaba, the current president of the Assembly of States Party to the Rome Statute, who noted that “[the establishment of the ICC] was an important step in the fight against impunity...which constitutes a serious threat to Africa, its stability and its security of our society... [However] we cannot dismiss out of hand the apprehensions and criticisms of African countries. They need to be examined seriously and addressed”<sup>81</sup> This would require action at different levels, including the need to reform the UNSC “to overcome a selective international justice”, the important for “a universal ratification of the Rome Statute to give an equitable chance for justice to all victims across the world”, the role of State parties to “defend the independence of the Court against any political interference” and to “develop complementarity” by strengthening national justice systems capable of fulfilling the mandate of the ICC “to prosecute Africans in Africa” considering that the latter should remain a “Court of last resort”.<sup>82</sup>

In this respect, our analysis above brings to the fore a number of opportunities that could be considered.

**First, it will be critical to encourage and support ratification of Malabo Protocol at country level.**

Apart from encouraging states to ratify the Protocol, it would be critical to strengthen the engagement of non-state actors, association of lawyers, and to the sensitisation of the judiciary on the complementarity between national courts and the future ACJHPR. The role of the legislature (Parliament) should not be underestimated as they play a key role in proposing bills and amendment to laws. They should be sensitised on the need to domesticate laws criminalising international crimes. For international partners, this poses the challenges of linking engagement strategies at the different levels (national, regional and international). Country-level actors, including civil organisations, especially in countries where the constitutional framework is particularly favourable to transitional justice (e.g., Kenya, South Africa, etc.), could play a critical role in ensuring that their respective governments continue to engage. The success of African courts will also depend on the engagement of local actors in ensuring the speedy ratification of instruments and monitoring of their implementation. Support could also target regional networks (e.g., Pan-African Lawyers Union), which successfully combine engagement at the continental level with capacity support and monitoring at the national level.

**Second, more attention should be given to hybrid courts and regional courts as a mechanism to strengthen complementarity and stimulate innovation where it occurs.**

As noted above, the Habre case – despite a number of challenges – has provided an opportunity to combine different legal systems in order to secure justice for the victims. In this respect, supporting processes of establishing hybrid courts in post-conflict societies, for example the Hybrid Court on South Sudan (HCSS) could provide another opportunity to explore new forms of cooperation in the area of international criminal justice (see Table 2). The HCSS could be useful in overcoming the criticisms faced by the ICC while, at the same time, supporting a transition period and addressing accountability for international crimes. Another benefit of hybrid courts is that they address the gap brought about by lack of capacity of national courts to try international crimes, as the cases are adjudicated in accordance with international standards. Consultation

<sup>81</sup> Press Conference, Sidiki Kaba, President of the Assembly of State Parties to the Rome Statute, 24 October 2016. <https://www.youtube.com/watch?v=1-uyaCJSaWQ&feature=youtu.be&t=71>

<sup>82</sup> *ibid*

with international partners shows that there is a readiness to finance the HCSS. Our consultations with stakeholders indicated that support should, however, not necessarily be delayed until the HCSS is activated but that it could be strategically targeted at activities in preparation for its launch. More specifically, support could be targeted at **civil organisations** that are currently documenting witness accounts in neighbouring countries such as Uganda and Kenya. Such support could cover logistical costs as well as providing safe storage for material collected for future consideration by the HCSS.

**Table 2: Facts on Hybrid Court for South Sudan (HCSS)**

Mandate	An independent hybrid court to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period
Jurisdiction over crimes	Genocide Crimes Against Humanity War Crimes Other serious crimes under international law and relevant laws of the Republic of South Sudan, including gender-based crimes and sexual violence
Judges	A majority of judges on all panels, whether trial or appellate, shall be composed of judges from African states other than the Republic of South Sudan. The judges of the HCSS shall elect a president of the court from amongst their members.
Registrar	The registrar of the HCSS shall be appointed from African states other than the Republic of South Sudan.
Prosecutor	Prosecutors shall be composed of personnel from African states other than the Republic of South Sudan.
Defence	Defence counsels of the HCSS shall be composed of personnel from African states other than the Republic of South Sudan, notwithstanding the right of defendants to select their own defence counsel.
Location	The Chairperson of the AUC shall decide the location of the HCSS

The AU has made some progress towards the establishment of the HCSS. For example, the 2014 Report of the AU Commission of Inquiry on South Sudan highlighted the human rights violations in the country and called for the establishment of mechanisms to address such violations.<sup>83</sup> The AU Peace and Security Council (PSC) in its 609<sup>th</sup> Meeting on 12 July 2016, called upon the international partners to ‘support the peace process in South Sudan especially the establishment of the Hybrid court and other transitional justice institutions.’<sup>84</sup> The PSC in its field mission to the Republic of South Sudan (from 28- 31 October 2016), highlighted ‘the urgent need for the establishment of accountability, justice and reconciliation mechanisms as provided for in the Peace Agreement, including appropriate mechanisms to address issues relating to sexual violence in a timely manner, with a view to ensuring justice for the victims’. On 21 October 2016, the AUC Chairperson Dlamini Zuma, stated that the AU is ‘working to operationalize... the Africa Union Hybrid Court on South Sudan to deal with impunity, promote national unity and justice in the country’.<sup>85</sup> This shows the AU’s support for the establishment of hybrid courts to try perpetrators of international crimes.

<sup>83</sup> African Union. 2014. *Final report of the African Union Commission of Inquiry on South Sudan*. Addis Ababa: African Union. October 2016: [www.peaceau.org/uploads/auciss.final.report.pdf](http://www.peaceau.org/uploads/auciss.final.report.pdf).

<sup>84</sup> <http://www.peaceau.org/en/article/communique-of-the-609th-meeting-of-the-psc-on-the-situation-in-south-sudan>

<sup>85</sup> Zuma, N.D. 2016. *Women’s rights – our collective responsibility*. Statement presented on the occasion of the commemoration of the Africa Human Rights Day. Addis Ababa: African Union. October 2016: [www.au.int/en/newsevents/31522/commemoration-africa-human-rights-day](http://www.au.int/en/newsevents/31522/commemoration-africa-human-rights-day)

**Finally, instituting dialogue between the ICC, national courts and the AU on the issue of complementarity is critical.** The ICC was meant as a court of last resort and as a complementary court for serious crimes where national courts are unable or unwilling to prosecute international crimes. The Preamble of the Rome Statute makes it clear that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. However, not all national legal systems have legislation dealing with international crimes and not all member states of the Rome statute have domesticated it. The ICC needs to work together with national courts to strengthen their capacity to prosecute cases domestically in accordance with the principle of complementarity. Ensuring successful accountability at the national level requires any technical external assistance to be informed by and be in accordance with the local legal framework.<sup>86</sup> This is to respect state sovereignty as well as ensure efficacy and public confidence in national judicial systems. Local legal frameworks should reflect the definitions of the international crimes, liability for perpetrators, fair trial rights for the accused as well as protection for witnesses and victim reparations.<sup>87</sup> Technical assistance and capacity building is necessary especially for countries that may be willing to prosecute international crimes but lack the expertise to try complex cases. Although the Rome Statute is clear on the complementarity with national courts it is silent on the complementarity with regional courts like the AU's ACJHPR. Similarly, the Malabo Protocol is silent on the complementarity with the ICC. There is therefore the potential for a clash between the overlapping jurisdiction of the ICC and the ACJHPR once the Malabo Protocol comes into force. A suggestion would be for the two courts to sign an agreement on complementarity.<sup>88</sup> However Articles 54(3)(c) and 87(6) of the Rome Statute provide for cooperation and assistance between the ICC and intergovernmental organisations, which may be agreed upon by such an organisation. Similarly, Article 46L(3) of the Malabo Protocol permits the ACJHPR to seek co-operation or assistance of regional or international courts, non-States parties or co-operating partners of the AU and may conclude agreements for this purpose. This provision anticipates cases where jurisdiction over cases may overlap and allows for cooperation to ensure harmonious adjudication of international crimes.<sup>89</sup>

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<sup>86</sup> <https://www.ictj.org/news/greentree-meeting-advances-complementarity-policy-practice>

<sup>87</sup> *Ibid.*

<sup>88</sup> McNamee, *op cit.*, 22, p.13.

<sup>89</sup> See Deya, D. *Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes.* [http://www.osisa.org/sites/default/files/is\\_the\\_african\\_court\\_worth\\_the\\_wait\\_-\\_don\\_deya.pdf](http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf)

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#### **HEAD OFFICE SIÈGE**

Onze Lieve Vrouweplein 21  
6211 HE Maastricht  
The Netherlands *Pays Bas*  
Tel +31 (0)43 350 29 00  
Fax +31 (0)43 350 29 02

#### **BRUSSELS OFFICE BUREAU DE BRUXELLES**

Rue Archimède 5  
1000 Brussels *Bruxelles*  
Belgium *Belgique*  
Tel +32 (0)2 237 43 10  
Fax +32 (0)2 237 43 19

[info@ecdpm.org](mailto:info@ecdpm.org)  
[www.ecdpm.org](http://www.ecdpm.org)  
KvK 41077447