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CENTER FOR INTERNATIONAL LAW & POLICY IN AFRICA

Background on the ICC and African States' Relationship

By Sètondji Roland Adjovi

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BRINGING THE AFRICAN PERSPECTIVE TO THE ICC REFORM DISCUSSION

The International Criminal Court in Africa Project: Ensuring African State Concerns are Not Left Out of the ICC Reform Process
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About the Center for International Law and Policy in Africa

The Centre for International Law and Policy in Africa (CILPA) is an independent and non-profit think tank, based in Freetown, Sierra Leone, West Africa, which aims to shape discourse and build bridges between research, policy, and practice on issues of international law, and regional law in Africa. It is incorporated as a company limited by guarantee under Sierra Leonean law in accordance with the Companies Act No. 5 2009 (as amended). CILPA's work focuses on critical issues of public and private international law of particular relevance to the continent of Africa. As a research center, CILPA is dedicated to the scientific study of, and promotion of knowledge of international law, and regional law, especially African Union law, and their role as vehicles to advance peace, stability, security, as well as social and economic development.

Author Biography

Mr. Sètondji Roland Adjovi is an expert in human rights and international law, publishing and lecturing on both topics. He served on the United Nations Working Group on Arbitrary Detention from 2014-2016. Adjovi has served as senior legal officer with the Registry of the International Criminal Tribunal for Rwanda, as legal assistant for the African Union and as lead counsel in a successful case against Tanzania before the African Court on Human and Peoples' Rights in the matter of Rev. Christopher R. Mtikila v. the United Republic of Tanzania. Adjovi earned a bachelor's degree in law and public administration, a master's degree in political science, and a Master of Laws in Human Rights from various French Universities.

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African States have been at the center of global conversations about the work of the International Criminal Court. Long before the broader States Parties agreed a process to review and reform the ICC, African States had suggested several improvements to the Rome Statute system. It was therefore ironic that the review and reform process, once it was put in place, did not seem to tackle head on the African reform proposals which are critical to the success of the ICC. This research project aims at helping to contribute to addressing this gap. This paper is part of a series of papers on Bringing the African Perspective to the ICC Reform Discussion.

The publication of these Occasional Papers would not have been possible without the support of the Open Society Foundation, whose African Regional Office, based in Dakar, Senegal, funded the Center for International Law and Policy in Africa's (CILPA) project entitled "*The International Criminal Court in Africa Project: Ensuring African State Concerns are Not Left Out of the ICC Reform Process."* Special thanks go to Mr. Pascal Kambale, Ms. Sharon Nakandha and Ms. Oumou Dieng.

CILPA would also like to thank the consultants, for their diligent work throughout the project, and for ultimately delivering the thought-provoking papers contained in the first Occasional Paper series published by CILPA. We are dedicated to ensuring the knowledge produced is accessible and available as open source. The papers also had the benefit of being workshopped in Freetown, Sierra Leone in October 2022. In this regard we would like to thank all the expert participants that helped provide the authors feedback on their initial drafts and suggested areas for improvement. Special appreciation goes out to the workshop's lead discussants: Mr. Abubakar Koroma (University of Makeni); Prof. Charles C. Jalloh (CILPA and Florida International University) Mr. Ibrahim S. Yillah (Trust Fund for Victims at the ICC) and; Dr. Michael Kanu (Permanent Mission of Sierra Leone to the United Nations). The workshop program and list of participants is annexed to this report.

Last but not least, this project was made possible by the hard work and dedication of the CILPA team, under the leadership of the founder Prof. Jalloh who conceptualized this project and was supported in its implementation by Ms. Clea Strydom, project coordinator, assisted by Aglyn Kamara, CILPA's intern in Sierra Leone

The organisation of the workshop in Sierra Leone was supported by the Center for Accountability and the Rule of Law (CARL) in Sierra Leone, in particular, Mr. Ibrahim Tommy and Mr. Edward Conteh, and Aglyn Kamara, a CILPA intern.

Our hope is that the stimulating conversations begun in Sierra Leone and that continues here through this publication, will continue to challenge and inspire all of those who seek to further ensure that African State concerns are not left out of the ICC Reform Process.

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1. Introduction

This paper is the outcome of a consultancy for the Center for International Law and Policy in Africa (CILPA). It aims to assess the African concerns vis-à-vis the International Criminal Court (ICC) review process.

On that basis, our task was twofold: first, preparing a research paper on key African concerns focused on providing strategic recommendations about the ICC reform process, and then presenting that paper at a workshop to benefit from the comments of other experts. The workshop took place on 7 and 8 October 2022, and we got substantive comments that have been considered in finalising this research paper.

Our research has been built around two key issues: the place of Africa in the current state of affairs at the ICC; and the perceptions of the relation between the ICC and Africa. Reading the ICC review report, one would be able to notice that those perceptions and the related concerns are not addressed in the process. Hence, we will make some recommendations to correct this perspective once we have presented our findings on the two key issues, before concluding.

2. Africa in the Current State of Affairs at the ICC

There is a misconception about the relationship between Africa and the ICC. This must be rectified from the outset: African States have actively sought positive engagement with the ICC, from drafting to enforcing the Rome Statute.

Indeed, African States had representatives at the table throughout the various stages of drafting the Rome Statute. During the conference in Rome, leading to the convention's adoption in July 1998, only four African States were absent, namely Equatorial Guinea, Gambia, Sahrawi Arab Democratic Republic[1] and Somalia.[2] Throughout the

[1] Sahrawi Arab Democratic Republic is a Member State of the African Union. However, it is not a Member State of the United Nations. It is not even recognized as a State outside of the continent. Hence, it could not have been invited to the negotiations.

[2] Somalia has collapsed as a State for quite some time, especially in the 1990s. That might be the

negotiations, African representatives could put forward ideas and proposals that would serve the interests and concerns of the African States and peoples. Some States, such as those of the Southern African Development Community, played an important role, especially South Africa.[3] Whether this was successful or not is a different story with causes which are beyond the scope of this paper.

African States were also very active at the time of entry into force. Senegal was the first country to ratify the Rome Statute on 2 February 1999. At the time of the entry into force on 1 July 2002, 16 African States were already party to the treaty establishing the ICC.[4] In terms of proportion, one could say that on 1 July 2002, when the Rome Statute came into force, one-third of the States Parties were African. Today, 33 African States are among the 123 State Parties, forming the largest regional group.[5] And, unless there is evidence presented to the contrary, one must assume that the engagement of the African States, including the ratification, was voluntary, with various stakeholders at the national level involved, including civil society pushing for such involvement.[6]

Since the entry into force of the Rome Statute, the African States have continued to engage with the Court, with proposals for changes in both substantive and procedural laws, including on many other aspects.

However, before considering the African engagement, it is worth stating that the Rome Statute has already been revised once and amended three times. This indicates that other States have been successful in presenting amendments, suggesting that African States Parties could also succeed if they mobilise around their amendments to build broader coalitions. The African States have so far refrained from ratifying those changes in the convention. Chronologically, here is the situation:

(i) Only two African States (Botswana and Mauritius) have ratified the amendment to Article 8 adopted on 10

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reason for it not to have attended the meeting in Rome in 1998.

[3] See M. Glasius, *The International Criminal Court. A Global Civil Society Achievement*, London and New York, Routledge, 2006, pp. 23-24. Available online (https://library.oapen.org/bitstream/id/0f158280-410b-494a-a8c1-2cf4f32663a9/1006036.pdf).

[4] See the list of ratifications in a chronological order on the website of the Court (https://asp.icc-cpi.int/states-parties/states-parties-chronological-list).

[5] See the list of African States which are party to the Rome Statute on the website of the Court (https://asp.icc-cpi.int/states-parties/african-states). See also Appendix 1 with the date of signature and ratification or accession.

[6] C.C. Jalloh, Regionalizing International Criminal Law? *International Criminal Law Review* 9 (2009), 445-499. Available online (https://ecollections.law.fiu.edu/faculty_publications/250).

June 2010[7] which has not yet entered into force.[8]

(ii) Only one African State (Botswana) has so far ratified the amendment on the crime of aggression adopted on 11 June 2010,[9] which has entered into force since 17 July 2018.

(iii) None of the African States has ratified the amendment to Article 124 on 26 November 2015,[10] which has not yet entered into force, as of 15 December 2022.

(iv) None of the African States has ratified the various amendments to Article 8 adopted in 2017 and 2019, namely:

- Article 8 (blinding laser weapons) adopted on 14 December 2017[11] and entered into force on 2 April 2020;
- Article 8 (weapons, the primary effect of which is to injure by fragments undetectable by x-rays in the human body) on 14 December 2017[12] and entered into force on 2 April 2020;
- Article 8 (weapons which use microbial or other biological agents or toxins) adopted on 14 December 2017[13] and entered into force on 2 April 2020; and
- Article 8 (intentionally using starvation of civilians) adopted on 6 December 2019[14] and entered into force on 14 October 2021.

African engagement with the Rome Statute will be done through the Working Group on Amendments[15] established by the Assembly of States Parties in 2009. Indeed, out of seven proposals received and listed on the website,[16] two came from African States.[17]

The first proposal came from South Africa on 30 November 2009.[18] It suggested two additional paragraphs and reads as follows, with the suggestions in italics:

[7] ICC, Resolution RC/Res.5.
[8] See ICC, Resolution ICC-ASP/16/Res.5, 14 December 2017, paragraph 1: "Decides to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018".
[9] ICC, Resolution RC/Res.6.
[10] ICC, Resolution ICC-ASP/14/Res.2.
[11] ICC, Resolution ICC-ASP/16/Res.4.
[12] ICC, Resolution ICC-ASP/16/Res.4.
[13] ICC, Resolution ICC-ASP/16/Res.4.
[14] ICC, Resolution ICC-ASP/18/Res.5.
[15] ICC, Resolution ICC-ASP/8/Res.6.
[16] See the website of the Working Group on Amendments (https://asp.icc-cpi.int/WGA).
[17] The other proposed amendments came from Mexico (U.N. Doc. C.N.725.2009), Trinidad and Tobago (U.N. Doc. C.N.737.2009), Norway (U.N. Doc. C.N.439.2015), Belgium (U.N. Doc. C.N.480.2017) and Switzerland (U.N. Doc. C.N.399.2019).
[18] U.N. Doc. C.N.851.2009.TREATIES-10.

Article 16 Deferral of Investigation or Prosecution

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

2) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above.

3) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377(V) of the UN General Assembly.

The second proposal came from Kenya on 14 March 2014.[19] It is more extensive and reads as follows:

1. Article 63 – Trial in the Presence of the accused

Under the Rome Statute, article 63(2) envisages a trial in absence of the Accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same.

Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration.

From the above, it is our humble opinion that an amendment to article 63(2) may be considered along the following lines:

"Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.

(3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial."

[19] U.N. Doc. C.N.1026.2013.TREATIES-XVIII.1.

2. Article 27 – Irrelevance of official capacity

Article 27(1) provides that "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a Member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of Sentence.

Further article 27(2) provides that Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

The meeting also may consider proposing an amendment to article 27 by inserting in paragraph 3 the words

"Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions"

3. Article 70 - Offences against Administration of Justice

This particular article presumes that such offences save for 70(1) (f) can be committed only against the Court. Noting the current situation in the Kenyan cases especially Trial Chamber V (b), this article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when such offences are committed. It is proposed that paragraph 1 be amended as follows:

"The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:"

4. Article 112 – Implementation of IOM

Article 112 (4) Assembly of States Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy. This includes the conduct of officers/procedure/code of ethics in the office of the prosecutor. The Office of the Prosecutor has historically opposed the scope of authority of the IOM. Under Article 42 (1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority over the management and administration of the office. There is a conflict of powers

between the OTP and the IOM that is continuously present in the ASP.

It is proposed that IOM be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.

5. Complementarity

The Preamble of the Rome Statute provides "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,". In accordance with African Union resolution, an amendment is proposed to the above preambular provision to allow recognition of regional judicial mechanisms as follows:

"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions."

In terms of human resources, it is worth noting that Africans have also occupied high-ranked positions within the Court. First, African Judges have been sitting at the Court since its inception.[20] Then, in the Office of the Prosecutor, two Africans were Deputy Prosecutors,[21] while one African was a Prosecutor.[22] It is important to highlight that Fatou Bensouda was Deputy Prosecutor for nine years before becoming the Prosecutor for another nine years. Then, within the registry, an African held the position of Deputy Registrar for five years.[23] Finally, numerous Africans have been working or have worked at the Court, in all units and sections of the Court, including as counsel.

Finally, regarding the cases before the Court, African States have been active in bringing them before it. In each of the cases before the Court, it can be established that African States have expressed consent, either through ratification (Uganda, the Democratic Republic of the Congo, Central African Republic, Kenya and Mali) or through participation in the decision of the UN Security Council (Darfur/Sudan[24] and Libya[25]) or through a declaration of jurisdiction in favour of the Court (Côte

[20] Six African Judges have been elected to the Court so far, in alphabetical order: Reine Alapini-Gansou (Bénin), Solomy Balungi Bossa (Uganda), Chile Eboe-Osuji (Nigeria), Antoine Kesia-Mbe Mindua (Dem. Rep. of the Congo), Sanji Monageng (Botswana), and Miatta Maria Samba (Sierra Leone).
[21] Fatou Bensouda from 2004 to 2012, and Mame Mandiaye Niang (since 2021).
[22] Fatou Bensouda from 2012 to 2021.
[23] Didier Daniel Preira from 2008 to 2012.
[24] Resolution 1593 (2005) was adopted by 11 positive votes (Argentina, Bénin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, United Kingdom and United Republic of Tanzania) and 4 abstentions (Algeria, Brazil, China and United States of America).
[25] Resolution 1970 (2011) was adopted by 15 positive votes (Bosnia and Herzegovina, Brazil, China, Colombia, France, Gabon, Germany, India, Lebanon, Nigeria, Portugal, Russia, South Africa, United Kingdom and United States of America).

d'Ivoire).[26] Even in the situation of Kenya, which was the most complex, it was Kofi Annan, as the mediator appointed by the African Union, who proposed that the matter could be referred to the Court:[27] in short, the Prosecutor exercised his *proprio motu* power within the framework of a State Party (consent through ratification) upon invitation by an African appointed as mediator by the African Union.

The main issue is that all pending cases were, at some point in time, African and non-African cases only came late on the docket of the Court. At the same time, they remained for very long at a lower stage in the criminal justice process.[28] In addition, from a theoretical perspective and based on the admissibility criteria, it is easy to imagine that Western States Parties would not have situations landing before the Court, even though the current situation about Afghanistan constitutes a counter-argument.[29] However, we will later address this critical issue which has less to do with

[26] See the *Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale* dated 18 April 2003 (https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf).

[27] See the press release of the Office of the Prosecutor on 9 July 2009 to that effect, available online (https://www.icc-cpi.int/news/icc-prosecutor-receives-sealed-envelope-kofi-annan-post-election-violence-kenya).

[28] The first among those situations is Georgia and the authorization was issued in 2016, fourteen years after the Rome Statute entered into force. This is also the only Non-African situation where individuals have been named as accused. See *Situation in Georgia*, ICC-01/15, Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016 (https://www.icc-cpi.int/court-record/icc-01/15-12). Then followed six others:
(i) *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18, referred by a group of States on 27 September 2018;
(ii) *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar*, ICC-01/19, Pre-Trial Chamber II, Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar, 14 November 2019 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF);
(iii) *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Appeals Chamber, Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00828.PDF);
(iv) *Situation in the State of Palestine*, ICC-01/18, Pre-Trial Chamber I, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 5 February 2021 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF);
(v) *Situation in the Republic of the Philippines*, ICC-01/21, Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation pursuant to Article 19(3) of the Statute, 15 September 2021 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_08044.PDF); and
(vi) *Situation in Ukraine*, ICC-01/22, referred by 43 States Parties in March and April 2022. In this situation, Pre-Trial Chamber II issued two arrest warrants on 17 March 2023 against Vladimir Vladimirovich Putin (President of the Russian Federation) and Maria Alekseyevna Lvova-Belova (Commissioner for Children's Rights in the Office of the President of the Russian Federation). See the Press Release dated 17 March 2023 (https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and).

[29] In the situation in Afghanistan, army members of the United States of America might have committed crimes within the jurisdiction of the Court. It is worth noting that the Pre-Trial

the applicable law than the Court's reality and the Prosecutor's strategy.

Unfortunately, this last piece is arguably one of the main justifications behind the perception that has been extensively mediatised, that the Court targets Africa. And we will now analyse this perception further.

3. Perceptions of the relation between the ICC and Africa

Conceptually, Africa is multifaceted without a homogenous perception of the ICC. The African States express a view of the Court which is different from what civil society perceives, which is also different from the perceptions of individual Africans. At the same time, African intergovernmental organisations could develop their own vision. It is therefore essential to be specific as to whose perceptions one is referring to, with the possibility of confusing the view of some African leaders with those of the State's that they are heading.

In the public domain, the view of some African States and/or leaders has been the most heard directly and through the African Union. We will therefore start with that perspective.

It is important to note that the first time any issue was raised was with the Security Council's March 2005 referral of the situation in Darfur, which eventually led to the indictment against a sitting president, Omar Al Bashir. The Government of Sudan embarked on a campaign to challenge the authority of the Court and sought the support of its fellow African States. This was done through the judicial process both at the international and national levels, and through international diplomatic channels such as securing the president's attendance in diplomatic fora on the continent (Chad,[30] Malawi[31] and South Africa,[32] in particular).[33] However, it is worth recalling, as noted earlier, when the Security Council adopted Resolution 1593 (2005), none of the three African States opposed the decision: Bénin and Tanzania supported

Chamber denied the request for authorization, and it was only the Appeals Chamber which granted the request, overruling the lower chamber.

[30] X. Rice, Chad refuses to arrest Omar al-Bashir on genocide charges, *The Guardian*, 22 July 2010 (https://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir).

[31] United Nations, *News*, ICC asks Malawi to explain failure to arrest Sudan's President on visit, 19 October 2011 (https://news.un.org/en/story/2011/10/392102).

[32] M. Simons, South Africa Should Have Arrested Sudan's President, I.C.C. Rules, *The New York Times*, 6 July 2017 (https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html).

[33] T. White, States 'failing to seize Sudan's dictator despite genocide charge', *The Guardian*, 21 October 2018 (https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant).

the resolution, while Algeria abstained. Each African State made an independent and sovereign decision in the process, and its vote remains its own and not of the African States as a whole. However, in our view, such a positive vote made it difficult to affirm that the Security Council, including an African State voting so, was biased against the continent.

Then came the situation in Côte d'Ivoire, where the president who was defeated in the armed conflict later ended up before the Court as an accused. This situation notably raised further concerns because of the circumstances of the transfer of former president Laurent Gbagbo to the Court, bearing in mind the role of the former colonial power, France, with a permanent seat in the Security Council and an interest in having the opponent in power. This convoluted relation increased the criticism that the Court has been instrumentalised against an African leader, and by extension, against Africans.

Then came the situation in Kenya, where the Court indicted the successful duo in the presidential election.[34] Here, it is important to remember that the suspects became president and vice president only after the possible charges before the Court became known.

These three situations led to a discourse about the Court being a tool for Western powers against African leaders. This discourse was widely disseminated in the media and public statements. The most significant statement is the one by the President of Kenya before the extraordinary session of the African Union in Addis Ababa in October 2013. Here are some extensive but selected extracts of his speech:

> "It gives me special pleasure to join your Excellencies at this Special Summit, where we have assembled to reflect on very significant matters relating to the welfare and destiny of our nations and peoples. I thank you for the honour of addressing you today, because as it happens, I crave my brother and sister Excellencies' views on some issues.
>
> We are privileged to lead the nations of a continent on the rise. Africa rests at the centre of global focus as the continent of the future. Although we have been relentlessly exploited in the past, we remain with sufficient resources to invest in a prosperous future.
>
> Whilst we have been divided and incited against one another before, we are now

[34] See the cases within the situation (https://www.icc-cpi.int/kenya), especially *Ruto and Sang* case (ICC-01/09-01/11) and *Kenyatta* case (ICC-01/09-02/11). Both cases were eventually closed without confirming the charges.

united and more peaceful. Even as we grapple with a few regional conflicts, as Africans, we are taking proactive measures to ensure that all our people move together in the journey to prosperity in a peaceful home.

Even though we were dominated and controlled by imperialists and colonial interests in years gone by, we are now proud, independent and sovereign nations and people. We are looking to the future with hope, marching towards the horizon with confidence and working in unity. This is the self evident promise that Africa holds for its people today.

As leaders, we are the heirs of freedom fighters, and our founding fathers. These liberation heroes founded the Organisation of African Unity, which was dedicated to the eradication of ALL FORMS OF COLONIALSM. Towards this end, the OAU defended the interests of independent nations and helped the cause of those that were still colonised.

It sought to prevent member states from being controlled once again by outsider powers. The founding fathers of African Unity were conscious that structural colonialism takes many forms, some blatant and extreme, like apartheid, while others are subtler and deceptively innocuous, like some forms of development assistance. It has been necessary, therefore, for African leaders to constantly watch out against threats to our peoples' sovereignty and unity.

In our generation, we have honoured our fathers' legacies by guaranteeing that through the African Union, our countries and our people shall achieve greater unity, and that the sovereignty, territorial integrity and independence of our States shall not be trifled with.

More than ever, our destiny is in our hands. Yet at the same time, more than ever, it is imperative for us to be vigilant against the persistent machinations of outsiders who desire to control that destiny. We know what this does to our nations and people: subjugation and suffering.

…

The force of gravity will be compounded and the one going up only loses. The International Criminal Court was mandated to accomplish these objectives by bringing to justice those criminal perpetrators who bear greatest responsibility for crimes.

Looking at the world in the past, at that time and even now, it was clear that there have always been instances of unconscionable impunity and atrocity that demand a concerted international response, and that there are vulnerable, helpless victims of these crimes who require justice as a matter of right. This is

the understanding, and the expectation of most signatories to the Rome Statute.

The most active global powers of the time declined to ratify the Treaty, or withdrew somewhere along the way, citing several compelling grounds. The British foreign secretary Robin Cook said at the time, that the International Criminal Court was not set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States. Had someone other than a Western leader said those fateful words, the word 'impunity' would have been thrown at them with an emphatic alacrity.

An American senator serving on the foreign relations committee echoed the British sentiments and said, "Our concern is that this is a court that is irreparably flawed, that is created with an independent prosecutor, with no checks and balances on his power, answerable to no state institution, and that this court is going to be used for politicized prosecutions."

The understanding of the States which subscribed to the Treaty in good faith was two-fold.

First, that world powers were hesitant to a process that might make them accountable for such spectacularly criminal international adventures as the wars in Iraq, Syria, Libya, Afghanistan and other places, and such hideous enterprises as renditions and torture. Such states did not, therefore, consider such warnings as applicable to pacific and friendly parties.

Secondly, it was the understanding of good-faith subscribers that the ICC would administer and secure justice in a fair, impartial and independent manner and, as an international court, bring accountability to situations and perpetrators everywhere in the world. As well, it was hoped that the ICC would set the highest standards of justice and judicial processes.

…

As has been demonstrated quite thoroughly over the past decade, the good-faith subscribers had fallen prey to their high-mindedness and idealism. I do not need to tell your Excellencies about the nightmare my country in particular, and myself and my Deputy as individuals, have had to endure in making this realisation.

Western powers are the key drivers of the ICC process. They have used prosecutions as ruses and bait to pressure Kenyan leadership into adopting, or renouncing various positions.

Close to 70% of the Court's annual budget is funded by the European Union.

The threat of prosecution usually suffices to have pliant countries execute policies favourable to these countries. Through it, regime-change sleights of hand have been attempted in Africa. A number of them have succeeded. The Office of the Prosecutor made certain categorical pronouncements regarding eligibility for

leadership of candidates in Kenya's last general election. Only a fortnight ago, the Prosecutor proposed undemocratic and unconstitutional adjustments to the Kenyan Presidency.

These interventions go beyond interference in the internal affairs of a sovereign State.

They constitute a fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons. They also dovetail altogether too conveniently with the warnings given to Kenyans just before the last elections: choices have consequences. This chorus was led by the USA, Britain, EU, and certain eminent persons in global affairs. It was a threat made to Kenyans against electing my Government.

My Government's decisive election must be seen as a categorical rebuke by the people of Kenya of those who wished to interfere with our internal affairs and infringe our sovereignty. Now Kenya has undergone numerous problems since its birth as a Republic 50 years ago.

…

When we faced violent disagreements over the 2007 election result, my distinguished predecessor, Mwai Kibaki came to you with a request for help, and you did not stint. You instituted a high-level team of Eminent Persons who came to our assistance. Because of that, we were able to summon the confidence to speak to each other and agree. As a result, we put in place a 4-point plan, which not only put Kenya back on track, but formed the basis of the most rapid political, legal and social reform ever witnessed in our country.

Through it, we successfully mediated the dispute surrounding the 2007 election and pacified the country. A power-sharing coalition was formed with a mandate to undertake far-reaching measures to prevent future violent disputes, entrench the rule of law, prevent abuses of legal power and entrench equity in our body politic while also securing justice for the victims of the post-election violence. We enacted a new, progressive constitution which instituted Devolution of power and resources, strengthened the protection of fundamental rights, and enhanced institutional and political checks and balances. It also provided the legal foundation for the national economic transformation roadmap, Vision 2030.

…

After the successful mediation of the post-election controversy in 2008, there was disagreement over the best way to bring the perpetrators of post-election violence to account and secure justice for the victims. One proposal was to set up a local tribunal to try the cases, while another was to refer the matter to the ICC. The Mediator who had been appointed by your Excellencies referred the matter to the

ICC when the disagreement persisted. On the basis of this referral, the Prosecutor stated that he had launched investigations which, he claimed, established that 6 persons had committed crimes against humanity. According to the Prosecutor, your Excellencies, I fall among those men.

…

From the beginning of the cases, I have fully cooperated with the Court in the earnest expectation that it afforded the best opportunity for me to clear my name. I have attended court whenever required and complied with every requirement made of me in connection with my case. Other Kenyans charged before that court have similarly cooperated fully. The Government has cooperated to the maximum; the Court itself found that Kenya's Government has fully complied in 33 out of 37 instances, and was only prevented from cooperating 100% by legal and constitutional constraints.

After my election, we have continued to fully cooperate. As earlier stated, we see it as the only means to achieve personal vindication, but also to protect our country from prejudice.

As I address your Excellencies, my deputy is sitting - in person - in that Court. Proceedings continue revealing the evidence against us to be reckless figments and fabrications every passing day. I cannot narrate quite accurately the calculated humiliation and stigma the prosecution has inflicted on us at every turn, within and outside the proceedings. It is all consistent with a political agenda, rather than a quest for justice.

For 5 years I have strained to cooperate fully, and have consistently beseeched the Court to expedite the cases.

Yet the gratuitous libel and prejudice I have encountered at the instance of the Prosecution seeks to present me as a fugitive from justice who is guilty as charged. All I have requested as President is to be allowed to execute my constitutional obligations as the forensic side of things is handled by my lawyers.

Even as we maintain our innocence, it has always been my position, shared by my deputy, that the events of 2007 represented the worst embarrassment to us as a nation, and a shock to our self-belief. We almost commenced the rapid descent down the precipitous slope of destruction and anarchy. Its aftermath was similarly an unbearable shame. We are a people who properly take pride in our achievements and our journey as a nation. The fact that over that time we had lost direction, however briefly, was traumatising.

…

We certainly do not bear responsibility at any level for the post-election violence of 2007, but as leaders, we felt it incumbent upon us to bear responsibility for

reconciliation and leadership of peace. Our Government wants to lead Kenya to prosperity founded on national stability and security. Peace is indispensable to this aspiration. Reconciliation, therefore was not merely good politics; it is key to everything we want to achieve as a Government.

…

America and Britain do not have to worry about accountability for international crimes.

Although certain norms of international law are deemed peremptory, this only applies to non-Western states. Otherwise, they are inert. It is this double standard and the overt politicisation of the ICC that should be of concern to us here today. It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation "race-hunting". I find great difficulty adjudging them wrong.

What is the fate of International Justice? I daresay that it has lost support owing to the subversive machinations of its key proponents. Cynicism has no place in justice. Yet it takes no mean amount of selfish and malevolent calculation to mutate a quest for accountability on the basis of truth, into a hunger for dramatic sacrifices to advance geopolitical ends. The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers.

This is the circumstance which today compels us to agree with the reasons US, China, Israel, India and other non-signatory States hold for abstaining from the Rome Treaty. In particular, the very accurate observations of John R Bolton who said, "For numerous reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization that runs contrary to fundamental American precepts and basic constitutional principles of popular sovereignty, checks and balances and national independence."

Our mandate as AU, and as individual African States is to protect our own and each other's independence and sovereignty. The USA and other nations abstained out of fear. Our misgivings are born of bitter experience. Africa is not a third-rate territory of second-class peoples. We are not a project, or experiment of outsiders. It was always impossible for us to uncritically internalise notions of justice implanted through that most unjust of institutions: colonialism. The West sees no irony in preaching justice to a people they have

disenfranchised, exploited, taxed and brutalised."

The speech is critical and pivotal in the discourse of the African States' criticism of the Court. Hence the extensive quote from it. By recalling the ancestors and the fight for independence, President Uhuru Kenyatta suggests that African independence is still at stake. He stated an opinion and pleaded with his fellow Heads of States and Governments to convince them that the ICC is biased against Africa. He was a scapegoat, an innocent victim fighting for what our ancestors had also fought for. Apart from the rhetoric being well written, this speech is far from the truth. Nothing was done for accountability in connection to the post-election violence. Indeed, it is only recently, almost 15 years after the fact, that the first serious prosecution has been initiated.[35] In other words, the ICC was right in seeking justice for the Kenyan victims who were not cared for at the domestic level. Yet, the African Union will adopt the Kenyan President's voice and rhetoric.

Indeed, the African Union as an organisation has added its voice to this type of criticism of the Court through several decisions that it issued over the course of several years, starting before the occurrence of the situation in Kenya, with two aims: prevent the effectiveness of the judicial work and lead a normative change. At the same time, all decisions reiterate the organisation's commitment to fighting impunity, even though no meaningful alternative to the international prosecution is put forward, except through the Malabo Protocol[36].

a. Assembly/AU/Dec.221 (XII), February 2009.[37] The decision opens with the expression of concern at issuing an indictment against Omar Al Bashir despite his status as President of

[35] See the news that some police officers have been charged with violence during the post-2007 election. AFP, 28 October 2022 (https://www.africanews.com/2022/10/28/kenya-charges-police-officers-over-2017-post-election-violence//).

[36] The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 27 June 2014 in Malabo, Equatorial Guinea (https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf). Since then, none of the Member States has ratified it while 15 ratifications are needed for it to come into force. Under the leadership of President Kenyatta, Kenya had pledged 1 million dollars for the merged court, but Kenya has not ratified the Protocol so far. For further analysis of the Protocol, see C.C. Jalloh, M. Clarke Kamari, O. Nmehielle Vincent (eds.), *The African Court of Justice and Human and Peoples' Rights in Context. Development and Challenges*, Cambridge University Press, Cambridge, 2019, xxv-1167p. Available online: https://doi.org/10.1017/9781108525343.

[37] See online (https://archives.au.int/bitstream/handle/123456789/1083/Assembly%20AU%20Dec%20221%20%28XII%29%20_E.PDF). Not sure if this footnote should be this way.

Sudan (paragraph 1) and then links such occurrence with the risk to the peace process (paragraph 2). Yet, the decision condemns the human rights violations in Darfur while calling for the arrest and prosecution of those involved (paragraph 7). These types of sentiments disappear from all later decisions when the Kenyan leadership joins efforts with Sudan.

b. Assembly/AU/Dec.245(XIII), July 2009.[38] From the outset, the decision was clear about Omar Al Bashir's support, expressing "its deep concern" at the indictment issued against the Sudanese President (paragraph 2). Such a political statement shows a level of disregard for the legal process and the interest of the victims that contradict the commitment to fighting impunity. The decision continues with the allegation that such an indictment negatively affects the peace process without any evidence. Today, we are still looking for evidence supporting such an assertion, while the coup against Al Bashir in April 2019 has not led to any deeper collapse of the peace process. Finally, this decision also reveals the failure of African diplomacy at the United Nations with the unsuccessful lobbying at the Security Council. And it is worth questioning the ability of African diplomats at the United Nations to rally other countries around their interests for success.

c. Assembly/AU/Dec.270(XIV), February 2010.[39] The decision acknowledges the filing of the proposed amendment to Article 16 of the Rome Statute by South Africa on behalf of the African Group. However, this must be linked to what has been stated earlier about the ability of African diplomats to secure support for their proposal because this proposal has yet to be successful to materialise itself into the legal framework. The decision also put forward the idea of immunity for officials of States which are not a party to the Rome Statute, an issue that is again directly linked to Omar Al Bashir.

[38] See online (https://archives.au.int/bitstream/handle/123456789/1112/Assembly%20AU%20Dec%20245%20%28XIII%29%20_E.pdf).

[39] See online (https://archives.au.int/bitstream/handle/123456789/1145/Assembly%20AU%20Dec%20270%20(XIV)%20_E.PDF).

d. Assembly/AU/Dec.296 (XV), July 2010.[40] The concrete and notable aspect of this decision is the refusal to allow the opening of the liaison office by the ICC in Addis Ababa (paragraph 8). However, such an office would be an opportunity to engage with the Court more effectively, and one would have thought that it was in the interest of the AU that such an office was established. As an anecdote, Paragraph 9 deserves to be quoted where the Assembly "expresses [its] concern over the conduct of the ICC Prosecutor, Mr Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of Sudan and other situations in Africa."

e. Assembly/AU/Dec.334(XVI), January 2011.[41] Unsurprisingly, the decision lends support to African States which have granted entry to Omar Al Bashir, despite their obligations to the ICC, namely Chad and Kenya (paragraph 5). The decision has also brought in the Kenyan interest with the support for the request for deferral (paragraph 6). This request further proves how African diplomacy failed to reach its stated goal.

f. Assembly/AU/Dec. 397(XVIII), January 2012.[42] The decision reiterates the support of the organisation to States that welcomed Omar Al Bashir, adding Djibouti and Malawi to the list (paragraph 7). Interestingly, the decision produces evidence of the need for more discipline of Member States to comply with the decisions adopted. In this case, it was about the endorsement of a candidate for election as a judge at the ICC, when the Member States did not support the endorsed candidate (paragraph 9). This supports the argument that the decisions adopted by the AU do not always match the interest or the policies of the Member States. Finally, the decision mandates the Commission to seek an advisory opinion from the International Court of Justice (ICJ) (paragraph 10).

[40] See online (https://archives.au.int/bitstream/handle/123456789/1178/Assembly%20AU%20Dec%20296%20%28XV%29%20_E.pdf). Not sure about these three footnotes, is it enough to just say see online without specifying.
[41] See online (https://archives.au.int/bitstream/handle/123456789/1230/Assembly%20AU%20Dec%20334%20%28XVI%29%20_E.pdf).
[42] See online (https://archives.au.int/bitstream/handle/123456789/1308/Assembly%20AU%20Dec%20397%20%28XVIII%29%20_E.pdf).

However, the AU has no authority to seek an advisory opinion, but Member States do through the General Assembly.[43] This means that the African Member States of the United Nations need to succeed in convincing a majority that the question is worth putting to the Court. Until now, there has been no progress on that request.

g. Ext/Assembly/AU/Dec.1, Extraordinary Session of the Assembly of the African Union, 12 October 2013.[44] The rhetoric is interesting here because a new argument is brought in support of the Kenyan strategy at deflating the ICC prosecution. In paragraph 6, the decision refers to Kenya as a frontline in the fight against terrorism, claiming the prosecution can only be a distraction from such a struggle for its survival. This comes just two to three weeks after the Westgate Mall terrorist attack on 21 September 2013. Then the decision also brought up the relationship between peace and justice, stating that the prosecution could jeopardise the national reconciliation process (paragraph 7). In paragraph 10, a series of specific measures related to the prosecution of Uhuru Kenyatta and William Ruto follows. It is sufficient to question the ability of the organisation to enforce any of those decisions. In the author's view, this series of measures satisfies the rhetorical aim of the Kenyan leadership but was not intended to be implemented. In that same series, the Assembly also decided to pursue the plan to grant criminal jurisdiction to the African Court leading to the Malabo Protocol.

h. Assembly/AU/Dec.493(XXII), January 2014.[45] Paragraph 12 again displays the lack of discipline in complying with the decisions of the continental body. But, more importantly, the Assembly links its decision to extend the jurisdiction of the African Court of Justice and Human Rights to the prosecution of international crimes (paragraph 13). In

[43] See Article 96 of the United Nations Charter. It reads as follows:
Article 96
1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

[44] See online (https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf).

[45] See online (https://archives.au.int/bitstream/handle/123456789/414/Assembly%20AU%20Dec%20493%20%28XXII%29%20_E.pdf).

other words, the extension of the jurisdiction is an alternative to the prosecution before the ICC. Which should be of concern because how independent would a regional court be vis-à-vis its parent political bodies adopting decisions such as those analysed here? This idea led to the Malabo Protocol.

i. Assembly/AU/Dec.616 (XXVII), July 2016.[46] In this decision, several developments are of interest. First, in paragraph 3, the Assembly *welcomes* the dismissal of the case against the vice president of Kenya, in total disregard for the victims. It is worth recalling that the fate of the witnesses has been critical, with some killed and others scared enough to recant their testimony. There seems to be hypocrisy with the peers of the Kenyan leaders agreeing to a statement, even though it does not match the reality. Then, in paragraph 5, the Assembly provides a roadmap for the then forthcoming session of the ICC ASP meeting. Still, it is difficult to assess whether African States followed those directions. Indeed, suggestions related to the strategies for arrest were designed and discussed. Still, this decision of the African Union Assembly does not seem to have any perceptible impact, which should have been recorded in the *Report of the Bureau on Cooperation* submitted three years later.[47]

The above decisions are further reinforced by statements of officials in the same vein. For illustration, here are three such statements.

First, Dr Nkosazana Dlamini Zuma, the former Chairperson of the African Union Commission, made the following welcoming remarks on 12 October 2013 at the extraordinary session dedicated to the relation with the ICC (extracts):

> "The violence that erupted in Kenya after the elections in 2007 deeply saddened our continent.
>
> In the spirit and letter of non-indifference, the African Union intervened through the Eminent Persons panel to assist Kenya to bring together all stakeholders to find common ground, and to set it on the path where the people of Kenya could begin to

[46] See online (https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf). Same as above.

[47] ICC Doc. No. ICC-ASP/18/17, 29 November 2019. See particularly paragraphs 14-18.

address the underlying causes of these tragic events.

Following the National Accord that resulted from Kenya's National Dialogue and Reconciliation Process, the country made progress in transforming its police and judiciary, promoting peaceful resolution of conflicts amongst local communities, and introduced a new Constitution that allows greater inclusion in the context of Kenya's diversity. Both President Kenyatta and Vice President Ruto, along with the leadership from all sectors of Kenyan society, played a critical role in bringing together contending groups to find common ground.

In addition, based on the reports presented to the 15th Extraordinary Executive Council by the Kenyan delegation, work is ongoing on investigations and prosecutions of the 2007/2008 post-elections violence and on resettlement of the thousands of Kenyans displaced by the violence.

The peaceful elections that Kenya held in March 2013, with high participation of the populace and the commitment by all parties to resolve disputes through the legal system, is testimony that the country has indeed come a long way since the tragic events of 2007/2008.

There is no question that much more needs to be done to consolidate reconciliation, inclusion, human rights and social justice in Kenya, but we are of the view that the country is on the right track.

…

The security situation in Kenya remains fragile, as seen in some parts where instability is of ongoing concern, and as experienced with the recent terrorist attack in Nairobi.

We should therefore not allow Kenya to slide back for any reason and the AU is keen to see stability and an improved security situation in Kenya.

This requires the undivided attention of its leadership, to consolidate and create conditions for lasting peace, security and reconciliation. Given the challenges remaining in the country outlined above and the security threats it continues to face, the elected leadership of Kenya must be allowed to serve their term as mandated by the people of the country.

They must be allowed to lead the country in the consolidation of peace, reconciliation, reconstruction, democracy and development as per the will of the Kenyan people, expressed in elections in March this year.

As a Member State, Kenya plays an important role in the promotion of peace and security on the continent in general, and in the Horn of Africa in particular.

…

Kenya, as a State Party to the Rome Statutes, throughout this difficult period has also in word and deed expressed its willingness to cooperate with the International Criminal Court (ICC), even after the elections of President Uhuru Kenyatta and Vice President William Ruto to office.

This is despite national and international customary laws, including in many Western countries, which guarantee sitting Heads of State and Government immunity from prosecution during their tenure of office, more especially when they are democratically elected.

Excellencies, communication between the ICC and the AU has been ongoing. Since the May Summit, we send two letters co-signed by the Chairpersons of the AU and the AU Commission to the ICC, an AU delegation led by the Chairperson of the Executive Council met the President and Prosecutor of the Court in The Hague and the Chairperson of the Commission met the ICC Prosecutor earlier this week.

We would therefore like the United Nations Security Council and the ICC to work with us to ensure that the process of stability, reconciliation, security and peace in Kenya is consolidated.

The UN Security Council and the ICC should work with us to enable the elected leadership of Kenya to fulfil their constitutional obligations, by urgently considering deferment of the ICC proceedings against the President and Vice President of Kenya, in accordance with Article 16 of the Rome Statutes.

This will also allow the leadership of Kenya to ensure that the country does not slide back into violence and instability.

In our view, this will further give the State Parties time and space to place matters that are of concern to Africa on the agenda of the coming Assembly of State Parties to the Rome Statutes, and to discuss the approach and role of the ICC dispassionately and calmly.

It is critical that we remain within the legal framework of the Rome Statutes.

…

The Assembly decision in May this year also undertook to "seek ways of strengthening African mechanisms to deal with African challenges and problems." Although more needs to be done, we are recording progress in implementing the African Peace and Security Architecture (APSA) and the African Governance Architecture, at national and continental levels.

We should however do more to strengthen the integrity and capacity of our national and continental Judicial system, including the African Court on Human and People's Rights, so that the ICC indeed becomes the court of last instance, as intended in the Rome Statutes

and in pursuit of African people's demand for justice, reconciliation and respect of their human rights and dignity.

Finally, as we mourn the senseless deaths of Africans who perished off the coast of the Lampedusa Island, and countless other similar deaths, we must scale up our investment in Africa's young men and women, so that they do not have to face such perilous journeys, leaving our shores in search of illusive green pastures.

The chairperson detailed the ideas in the decisions in plain language, focusing on Kenya. However, she also reiterated her commitment to the fight against impunity and international justice. The authors' only criticism of the substance of this other rhetoric is that misleading legal statement about immunities from prosecution for sitting heads of State and government. "

The second relevant statement was made by Mr Hailemariam Desalegn, Prime Minister of Ethiopia, at the opening of the same extraordinary session in October 2013 (extracts):

"It is indeed a pleasure to welcome you all to Addis Ababa for the Extraordinary Summit of Heads of State and Government of the African Union. I wish to acknowledge that your presence today demonstrates your commitment to deliberate on an important issue, which has been a matter of utmost concern not only for some of our member States but also for the whole of Africa.

Our Ministers met yesterday to prepare the ground work for our meeting and I hope their recommendations will facilitate our discussion on Africa's relations with the International Criminal Court (ICC). They have also elected a new Commissioner for Peace and Security to replace Ambassador Ramtane Lamamra, who was recently appointed as Foreign Minister of Algeria.

…

I wish to note that 34 member States of our Union joined the ICC perhaps fully convinced that the organization would promote the cause of Justice with a sense of impartiality and fairness. The practice so far however, leaves so much to be desired.

On a number of occasions, we have dealt with the issue of the ICC and expressed our serious concern over the manner in which the ICC has been responding to Africa's considerations. The double standard that both the United Nations Security Council (UNSC) and the ICC have displayed with regards to the AU's request for deferral for persecution in a number of cases, has been particularly worrisome. While similar requests by other entities were positively received, even under very controversial circumstances, neither the ICC nor the

UNSC have heeded the repeated requests that we have made on a number of cases relating to Africa over the last seven years. It is indeed very unfortunate that the Court has continued to operate in complete disregard of the concerns that we have expressed.

The trend however, is no doubt worrisome and the unfair treatment that we have been subjected to by the ICC is completely unacceptable. Once again, I would like to note that Africa has and never will support impunity of leaders who wilfully murder their own people. It is regrettable that the numerous proposals that we have presented within the framework of the Rome Statute to address these issues have been totally ignored.

Past experiences in our continent and elsewhere amply demonstrate the need to balance justice and reconciliation in complex conflict situations. It is in light of this fact that we have been insisting on the importance of finding home grown solutions to some of the intractable conflicts in our continent.

…

With regard to the Sudan, President Omar Hassan Al-Bashir has been demonstrating the necessary political leadership and commitment to resolve the Darfur issue and address outstanding issues with South Sudan. The African Union, through the High Level Panel, has also been assisting Sudan in overcoming its difficulties and notable achievements have been made in this regard. The Peace and Security Council has empowered the High Level Panel to engage Sudan on the issue of democratic transformation as the country prepares to hold its general elections in 2015. In this context, it is indeed very important that the international community gives a chance to these processes and not be seen in any way to undermine them.

On the other hand, Kenya has come a long way in terms of addressing the post-2007 election violence. The adoption of the new Constitution, the reform of the Judiciary and the holding of successful legislative and presidential elections have certainly opened a new chapter in the country's political dispensation. More importantly, the satisfactory measures taken to reform the criminal justice system in Kenya were also meant to dispel the fears of some in the international community that they might not be as impartial as ICC would have seen it necessary. This is of course what the principle of complementarity requires.

President Uhuru Kenyatta and Deputy President William Ruto have played a critical role in reconciling the different communities and creating a peaceful condition for the smooth conduct of the elections. They have also been taking

> practical measures to assist those who were affected by the post-election violence and restore their normal life.
>
> It is in recognition of these encouraging developments that we have been requesting for the reconciliation process to be given a chance. But the ICC's response flies full in the face of these realities. There is no reason why the ICC finds it difficult to accept this legitimate request. Ultimately, what we all aspire to see is for Kenyans to reconcile and live in peace and harmony. But then again, this is not just about Kenya but definitely about the entire Africa.
>
> …
>
> Finally, it should be underscored that our goal is not and should not be a crusade against the ICC, but a solemn call for the organization to take Africa's concerns seriously. I hope during this extraordinary session we will be able to thoroughly deliberate on how best we could move forward on these issues which have far reaching significance in our collective efforts to promote peace and security in Africa."

The last statement came from Dr Tedros Adhanom Ghebreyesus, then Minister for Foreign Affairs of Ethiopia, now Director General of the World Health Organization. Ethiopia was chairing the organisation that year and hosted the gathering in October 2013. In his closing remarks for the meeting of the Ministers, Dr Ghebreyesus said:

> "We have indeed thoroughly deliberated on the issue of Africa's relationship with the International Court (ICC) based on the progress report submitted by the Commission on the implementation of the decision adopted by the 21st ordinary session of the Assembly on the International Jurisdiction, International Justice and the international criminal court (ICC).
>
> In this regard, we have reviewed this relationship with a view to addressing the challenges that we have encountered in our engagement with the ICC. We took the opportunity to once again reiterate our unflinching commitment to fight impunity, promote democracy and human rights, the rule of law and good governance in our continent.
>
> However, we have rejected the double standard that the ICC is applying in dispensing international justice. In this context, we have once again clearly and unambiguously expressed our serious disappointment against the ICC and its selective approach vis a vis Africa. Particularly, we are deeply troubled by the fact that a sitting Head of State and his Deputy are for the first time being tried in an international court, which infringes on the sovereignty of Kenya and undermines the progress achieved thus far in the

country's reconciliation and reform process.

Therefore, we have underscored that sitting Heads of State and Government should not be prosecuted while in office and we have resolved to speak with one voice to make sure that our concerns are heard loud and clear. In doing so, we have made it abundantly clear that this issue is not only Kenya's concern. It is indeed a serious issue for all of us in the continent with far reaching implications.

We have concluded our discussion on this important issue in a consensual manner and I am pleased that we came out with a united voice to push forward our case. One of the recommendations that we have made is to set up a Contact Group of the Executive Council to be led by myself and composed of five members from each region to undertake consultation with members of the UNSC in particular the Permanent Five. The objective of this Contact Group is to engage with members of the UNSC on concerns of the African Union in its relations with the ICC including the request for deferral of proceedings against the President and Deputy President of Kenya as well as the President of the Sudan in conformity with Article 16 of the Rome Statute. In implementing this and other recommendations, I believe it is very important that we remain united so as to achieve the desired result and not leave any room for manipulation. Some media reported earlier today that we are divided but we have seen no sign of any of that. We are not divided and we will not be divided. Unity is the only option."

The consistency in the discourse associated with a set of decisions is impressive. However, there is also a lack of commitment by the Member States on the way forward.[48] For instance, the mediatised attempt to massively withdraw from the Rome Statute has yet to materialise.[49] Indeed, only Burundi withdrew, while the Gambia and South Africa only attempted to withdraw (see

[48] H. Sipalla, State Defiance, "Treaty Withdrawals and the Resurgence of African Sovereign Equality Claims: Historicising the 2016 AU-ICC Collective Withdrawal Strategy", in H.J. van der Merwe and G. Kemp (eds.), *International Criminal Justice in Africa, 2016*, Strathmore University Press & Konrad Adenauer Stiftung, Nairobi, 2017, pp. 61-99. The full book is available online (https://www.kas.de/c/document_library/get_file?uuid=48c88829-e9c3-716a-7da5-e391eff64499&groupId=252038). See also E. Keppler, Managing Setbacks for the International Criminal Court in Africa, *Journal of African Law* 56 (2012) 1, pp. 1-14.

[49] BBC, "African Union backs mass withdrawal from ICC," 1 February 2017, available online (https://www.bbc.com/news/world-africa-38826073); G.G. Jarvi, "African Union Leaders Back Leaving ICC," *Jurist*, 1 February 2017, available online (https://www.jurist.org/news/2017/02/african-union-leaders-back-leaving-icc/); and Library of Congress, "African Union: Resolution Urges States to Leave ICC," 10 February 2017 (https://www.loc.gov/item/global-legal-monitor/2017-02-10/african-union-resolution-urges-states-to-leave-icc/).

Appendix 1). In South Africa's case, the policy change has gone further with the ruling party, the ANC, having adopted a resolution to contribute to the reform at the ICC through the ASP.[50]

In the same vein, the move to adopt the Malabo Protocol did not materialise in wide ratification so far, and it is fair to question whether this instrument will enter into force soon.[51] And, at odds with this position of the African States, the African civil society has expressed a more balanced perception.

Indeed, and in contrast to the more critical African government views, African civil society organisations have consistently shown a higher level of support for all accountability avenues, including the ICC. Some specific examples, back then and today, could be cited as evidence of the complexity of identifying an African view since the views of African civil society are also relevant and legitimate.

On 25 January 2011, a group of 58 civil society organisations made a statement supporting the ICC, in response to the campaign by the Government of Kenya to seek support from other African States.[52] These extracts of the statement are pertinent for quoting:

> "It is in this regard therefore that we, the undersigned civil society organizations, urge the Kenyan government and parliament to reaffirm their support for the ICC and put a stop to any attempts to undermine the Rome Statute system and the ICC's Kenya investigation, including through withdrawal or seeking deferral. We also urge the Kenyan government-in particular the President and the Prime Minister to clarify its position with regard to the Rome Statute more broadly, and its

[50] See T. Gota, "ANC Backtracks on Decision to Withdraw from ICC," *EWN*, 8 January 2023 (https://ewn.co.za/2023/01/08/anc-backtracks-on-decision-to-withdraw-from-icc/amp). For a background on the withdrawal, see G. Kemp, "South Africa's (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes against Humanity, War Crimes and Genocide under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations," *Washington University Global Studies Law Review* 16 (2017) 3, pp. 411-438, available online (https://journals.library.wustl.edu/globalstudies/article/55/galley/16894/view/).

[51] As we are finalizing this paper in February 2023, we checked and there was still no ratification on the website of the African Union (https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf).

[52] See Human Rights Watch, Kenya: Civil Society Organizations Call for Support for the International Criminal Court. Statement by African Civil Society Organizations and International Organization with a Presence in Africa, 25 January 2011 (https://www.hrw.org/news/2011/01/25/kenya-civil-society-organizations-call-support-international-criminal-court). See also on the website of the International Centre for Transitional Justice (https://www.ictj.org/news/kenyaafrican-union-reaffirm-support-icc).

obligations to cooperate with the ICC in the cases currently before the court.

Kenya's withdrawal from the Rome Statute would mark a severe break with its commitment to the fight against impunity. In ratifying the Rome Statute in 2005, Kenya-along with the ICC's 113 other member countries-dedicated itself to the defense of victims' rights and to bringing to justice perpetrators of the most serious crimes. Withdrawal now would signal the intention to side with the perpetrators of Kenya's post-election violence rather than its victims.

The Kenyan government should note that withdrawal from the Rome Statute would not suspend ongoing ICC investigations or judicial proceedings that commenced prior to the date of withdrawal, and that, in any event, Kenya would remain required to cooperate with the ICC on obligations that arose while Kenya was a state party to the court.

As a court of last resort, the ICC places the primary obligation on national authorities to carry out prosecutions. Should Kenya decide to pursue national trials involving those individuals against whom ICC summonses may be issued, it could challenge the court's jurisdiction over these specific cases under article 19 of the Rome Statute. For a case to be found inadmissible, national proceedings must encompass both the person and the conduct that is the subject of the case before the ICC. This process does not require withdrawal from the Rome Statute.

Similarly, the Kenyan government must be reminded that conducting national trials is not a basis for a UN Security Council deferral of the ICC's investigation under article 16 of the Rome Statute. An article 16 deferral is intended only in exceptional cases to maintain or restore international peace and security. It is unlikely that ICC investigations in Kenya are detrimental to international peace and security. Moreover, it should be noted that impunity for past cycles of post-election violence in Kenya is widely believed to have contributed significantly to the 2007-08 violence and instability.

African governments, together with civil society, played an active role in establishing the court. We therefore call on our governments to stand firm in their support for the ICC, and reject steps which would undermine the court at the upcoming AU summit. Instead, African ICC states parties should build on important achievements to date and continue to advance justice for victims of human rights violations, including victims in Kenya. The AU's Constitutive Act, in article 4, calls for, among other things, the rejection of impunity. The ICC is an integral component of this effort."

In 2014, a similar *ad hoc* coalition of civil society organisations submitted recommendations to the ICC ASP session to challenge the campaign led by Kenya with the support of the African Union as shown before in the decisions and the proposed amendments.[53] In the statement of the coalition, this call to African States is made:

The backlash against the ICC by some African leaders in recent years calls for a deeper understanding and appreciation of the principle of complementarity, which dictates that the ICC is a court of last resort.

Domestic courts have primary jurisdiction and the ICC's Rome Statute reflects the vision of domestic courts that should be willing and able to ensure justice. However, national jurisdictions must be equipped with the tools that will allow them to act. The domestication of Rome Statute is central to empowering African courts to handle egregious crimes perpetrated in their territories. Yet, only a handful of African states have adopted legislation that domesticates ICC crimes—as of last count, these were Burkina Faso, the Central African Republic, Kenya, Mauritius, Senegal, South Africa, and Uganda. We call upon all African states to domesticate the Rome Statute and develop capacity for dealing with international crimes at the national level.

Universal jurisdiction in an African context is also proving to be a useful tool, as reflected by the important work of the Extraordinary African Chambers and the recent decision of South Africa's Constitutional Court on domestic authorities pursuing cases involving serious crimes committed outside South Africa. Legislation domesticating the Rome Statute can be tailored to suit each national jurisdiction and to include a reasonable form of universal jurisdiction.

The Southern Africa Litigation Centre is an organisation based in Johannesburg, South Africa. It organised a conference in June 2014 about the strategic action of civil society organisations concerning accountability in Africa.[54] The various

[53] Human Rights Watch, Recommendations by African civil society groups and international organisations with a presence in Africa for the International Criminal Court's Assembly of States Parties 13th Session from December 8-17, 2014, 17 December 2014 (https://www.hrw.org/news/2014/12/17/recommendations-african-civil-society-groups-and-international-organisations).

[54] Southern Africa Litigation Centre, International Criminal Justice: Regional Advocacy Conference Report, Civil Society in Action: Pursuing Domestic Accountability for International Crimes, 2014, 94p. (https://www.nytimes.com/2022/09/28/world/africa/guinea-2009-massacre-trial.html).

presentations made at the conference are the best testimony to the commitment of civil society to fight impunity for international crimes, including litigating the enforcement of ICC warrants of arrest.

In July 2015, some 101 civil society organisations in Africa issued a statement in connection to the visit of Omar Al Bashir to South Africa, and the country's failure to arrest him, despite the warrants of arrest.[55] That statement reads in part as follows:

> "President al-Bashir, charged with genocide, war crimes and crimes against humanity in connection with the conflict in Darfur was in South Africa from 13-15 June for an African Union Summit. South Africa was under a clear obligation to arrest him pursuant to two warrants of arrest issued against him by the International Criminal Court (ICC) on 4 March 2009 (for war crimes and crimes against humanity) and on 12 July 2010 (for genocide).
>
> South Africa is a party to the Rome Statute of the International Criminal Court. Pursuant to the terms of that treaty mandating international cooperation and assistance with the ICC, South Africa was required to facilitate the arrest and surrender of President al-Bashir to The Hague in the Netherlands, the seat of the International Criminal Court. In addition, South Africa's domestication of the Rome Statute of the ICC makes the government's failure to arrest President Omar al-Bashir a contravention of domestic law as well.
>
> …
>
> We noted with deep concern reports that rather than arresting President al-Bashir, South African officials apparently allowed him to leave the country in direct defiance of the order by the Pretoria High Court. The actions pose serious consequences for the independence of the judiciary in South Africa and demonstrate a flagrant lack of respect for the rule of law and the rights of Darfur's victims to have access to justice.
>
> …
>
> We call on the courts of South Africa to establish accountability and on the government to undertake an independent investigation into the circumstances that allowed for the departure of President al-Bashir in defiance of the Pretoria Court order and international arrest warrant and for full cooperation with the Court's own inquiry on the matter. Those responsible must be brought to prompt justice, including for contempt of court. We also call on the Assembly of States Parties of

[55] MFWA, Civil Society Declaration on Sudanese President Omar al-Bashir's visit to South Africa without Arrest, 3 July 2015 (https://www.mfwa.org/civil-society-declaration-on-sudanese-president-omar-al-bashirs-visit-to-south-africa-without-arrest/).

the ICC to take appropriate action to address non-compliance by South Africa and other States who breach their obligations of cooperation and assistance under the ICC Statute. We call on the United Nations Security Council which was briefed by the ICC Prosecutor on the situation in Darfur on 29 June to strongly reaffirm the obligation of States parties to duly cooperate with the ICC. Members of the Security Council, who referred Darfur to the ICC, have a special responsibility to fully support and facilitate the prosecutor's continued work.

We also call on governments and political parties alike to respect the space afforded to civil society organisations, pursuant to the South African Constitution, to litigate in the interests of the public. Matters of justice and accountability are pursued in the interests of the public, and civil society organisations have a mandate that warrants action when government authorities act in contravention of constitutionally protected values. Access to justice is a constitutionally enshrined right that all are entitled to utilise."

The Institute for Human Rights and Development in Africa is an organisation based in Banjul, Gambia, following human rights issues on the continent closely with a strong litigation practice before the African Commission on Human and Peoples' Rights. On 28 April 2018, before that body, the Institute made a statement in support of accountability for the massacre at a stadium in Conakry, Guinea, on 28 September 2009.[56] After recalling various avenues for accountability, the Institute concluded by seeking the support of the African Commission for "a fair, equitable and inclusive trial in Guinea".[57] The commitment of civil society is the driving force that led to the trial in Conakry, which started in September 2022.[58] More recently, following the arrest in Sudan of Omar Al Bashir, a group of civil society organisations issued an advocacy letter requesting the transfer of all accused to the ICC, showing their continuous support for the Court.[59]

Civil society organisations have, therefore, consistently supported the work of the ICC as one of the avenues for

[56] See statement online (https://www.ihrda.org/2018/04/statement-of-ihrda-on-the-september-28-case-in-guinea-at-the-62nd-ordinary-session-of-the-achpr/). Add in source with information on the massacre.
[57] See statement online (https://www.ihrda.org/2018/04/statement-of-ihrda-on-the-september-28-case-in-guinea-at-the-62nd-ordinary-session-of-the-achpr/).
[58] Human Rights Watch, 22 September 2022, Guinea: Landmark Trial for 2009 Massacre (https://www.hrw.org/news/2022/09/22/guinea-landmark-trial-2009-massacre).
[59] See : Advocacy Letter, 26 August 2021, Sudan: Group Call for Transfer of Suspects to ICC Custody (https://freedomhouse.org/article/sudan-groups-call-transfer-suspects-icc-custody).

accountability for the international crimes committed on the continent. As a result, one must reassess any statement about an African negative perception of the ICC. And, for lack of evidence, one must assume that African peoples share the views of the activists through civil society organisations. Indeed, and to further such an assumption, there was a survey in Kenya specifically, and there appeared to be strong support for the ICC,[60] despite the political dynamic led by the Head of State, Uhuru Kenyatta.

In conclusion, there is a discourse among African States officials about the Court being biased against Africa, while among civil society, the perception is firmly for accountability by all means, including the Court. This does not mean there is nothing to change at the Court because that would be a different perspective and inquiry. We will, therefore, now consider how the African concerns could be considered in the ICC review process.

4. African Concerns in the Review Process

From the perceptions of the Court in its relationship with Africa as described above, there are two sets of issues with the Court: some of a legal nature, others of a functional/operational nature. The author believes that the review process could never have addressed the first set because of its scope and mandate, but only the second set. It is therefore a misplaced expectation if one hopes a review would address the legal issues: the African diplomats ought to develop a better strategy on the second set of issues. We will discuss the legal issues and suggest avenues for addressing what seems to be of interest to the African States. From our analysis, three main points are at stake: the immunity of sitting Heads of State, universal jurisdiction, and complementarity. All three are of a legal nature, while the third one also has an operational component.

On the first one, immunity for Heads of State, and as argued elsewhere,[61] it is difficult to see any customary norms in this regard for the simple reason that international criminal courts or tribunals are only a recent practice in the

[60] See B. Lekalake and S. Buchanan-Clarke, "Support for the International Criminal Court in Africa: Evidence from Kenya," Afrobarometer, *Policy Paper* No. 23, 14 August 2015 (https://www.afrobarometer.org/publication/pp23-support-international-criminal-court-africa-evidence-kenya/).

[61] S.R. Adjovi, Immunities in International Criminal Law. The Challenges from Africa, ICJ-Kenya, Discussion Paper, May 2015 (https://icj-kenya.org/news/sdm_downloads/discussion-paper-immunities-in-international-criminal-law-the-challenges-from-africa/).

international arena. The existing customary norms granting immunity to some State officials only concern the bilateral relationship between two States, not between a State (or two States) and an international court.[62] Therefore, it is a legal issue open for constructive and progressive development, especially when it applies to situations referred by the Security Council, which concern a non-State Party. The African States need to develop their position in that regard and lobby at the General Assembly for the study of immunity for sitting Heads of State in international criminal tribunals by the International Law Commission (ILC). But were this to be successful and the topic taken up by the ICL, the African States would need to maintain their engagement so that their perspective is considered in the process. It is not impossible that the outcome would be a norm in support of some African States' (foreseen) position that the current practice of universal jurisdiction is beyond what would be legally acceptable to the majority of States.

The African States have already created a precedent in this regard with the Malabo Protocol, where there is such an immunity. However, it is interesting to note that this protocol was developed as an alternative to the ICC, but, ironically, with that immunity provision, the ICC will remain the only international option for criminal accountability of State Officials who would benefit from immunity before domestic and regional courts. In other words, African States have developed a norm that leads to a result contrary to their aim: shielding sitting Heads of State and Government from international prosecution and offering an African avenue for international criminal prosecution.

On the second issue, universal jurisdiction, African States have already embarked on the journey of the progressive development of the normative framework since Tanzania brought the question before the United Nations General Assembly.[63] The matter is currently on the agenda of its Sixth

[62] Seized of the matter, two courts in Africa have concluded that the President of Sudan does not enjoy any immunities vis-à-vis of the ICC. See (1) South Africa, Supreme Court of Appeal , *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016), available online (http://www.saflii.org/za/cases/ZASCA/2016/17.html); and Kenya, Court of Appeal at Nairobi, Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Consolidated), Attorney General v Kenya Section of International Commission of Jurists, 16 February 2018 [2018] eKLR (http://kenyalaw.org/caselaw/cases/view/148746/).

[63] U.N. Doc. A/63/237/Rev.1 Request for the inclusion of an additional item in the agenda of the sixty-third session. The scope and application of the principle of universal jurisdiction. Letter dated 29 June 2009 from the Permanent

Commission.[64] However, there is little to no progress, and the issue has been pending for over 10 years.[65] That is where the continuous and constructive engagement of the African States would play a role. Again, the diplomats must do their work, meeting and engaging with other States to reach a consensus for progress.[66]

In addition, the African States have two other avenues at their disposal. They need to adjust their legal frameworks to their perception of the law, especially developing their own version of universal jurisdiction and allowing its effectiveness before their judiciary. To our knowledge, no such strategy has been developed by any African State, except eventually Rwanda when it enshrined universal jurisdiction for international crimes, including genocide, in its penal code.[67] However, in addition to such a double

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Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General (www.undocs.org/A/63/237/Rev.1).

[64] See the latest resolution by the General Assembly (A/RES/77/111) deciding that the Sixth Committee shall continue the consideration of the matter. See also the report from the Sixth Committee, U.N. Doc. A/77/423 (www.undocs.org/A/77/423).

[65] Indeed, the summary of work on the website of the Sixth Committee of the United Nations General Assembly (https://www.un.org/en/ga/sixth/77/universal_jurisdiction.shtml) states as follows: "On the future consideration of the agenda item, while several delegations supported continued discussions within the Sixth Committee and its Working Group, others stated that the discussions within the Sixth Committee were at an impasse, noting the lack of progress. Delegations shared diverging views on the decision taken by the International Law Commission to include the topic "Universal criminal jurisdiction" in its long-term programme of work. While some delegations favoured consideration of the legal aspects of the topic by the Commission, other delegations reiterated their view that it would be premature and counterproductive at this stage for the Commission to undertake such a study. Several delegations suggested to revitalize the work of the Sixth Committee through the issuance of a report of the Secretary-General which would review previous reports on the subject, identifying challenges, and points of concordance and divergence, as to its scope and application."

[66] See among others: O. Kaaba, The Application of Universal Jurisdiction in Africa, *in* J. Sarkin and E. Siang'andu (eds.), *Africa's Role and Contribution to International Criminal Justice*, Intersentia, 2020, pp. 137-154 (doi:10.1017/9781839700880.006) and C.C. Jalloh, Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction, *Criminal Law Forum* 21 (2010) 1, pp. 1-65, University of Pittsburgh Legal Studies Research Paper No. 2009-38, Florida International University Legal Studies Research Paper No. 17-28, Available online (SSRN: https://ssrn.com/abstract=1526622).

[67] See Article 14 of the Rwandan Penal Code which reads as follows (https://www.police.gov.rw/fileadmin/templates/images/NEWS_2020/New_Penal_code.pdf):

"Article 14: International crime and transnational crime

An international crime is a crime classified as such under international law.

International crimes are the following:

1. the crime of genocide;
2. the crime against humanity;
3. war crimes.

A transnational crime means a crime, one of whose constituent elements is accomplished outside Rwanda's borders.

Any person, whether a Rwandan or foreign citizen, a national or foreign nongovernmental organization or association, that commits, inside or outside the territory of Rwanda, an international crime or transnational crime may, if apprehended on the territory of Rwanda, be punished in accordance with the Rwandan law."

strategy, African States must also ensure that their domestic system does not allow impunity for international crimes. This last aspect would also play a role in the complementarity debate with the ICC.

This brings us to the third and last issue, the principle of complementarity. Here, we have a novel legal issue: the development of regional criminal jurisdiction, as the current legal framework does not consider the possible complementarity between a regional court or tribunal and the ICC. Without making the issue sound simple, no theoretical obstacle exists to such a perspective. Still, it cannot be safely argued that the negotiators of the Rome Statute had envisaged that possibility and that the current rules apply because, at the time of the negotiations, the issue did not form part of the discussions. Again, there is a possible gain for African States in this regard, and they must lobby their peers in the ICC ASP for a statement in that regard, including an amendment to the Rome Statute to provide the conditions for such complementarity if the consensus requires any change to the current set of provisions.

However, the complementarity issue has a practical component: domesticating the Rome Statute and seeking the necessary support for the domestic judiciary to master the legal framework for operationalisation. This is where the African States can translate their commitment against impunity into action. And the African Union Commission should certainly assist the States in that regard, for instance, in developing a model law for domestication. It could also liaise with the ICC to organise training jointly for law enforcement in the African States. Several stakeholders are already doing so, and it would be worth continuing, focusing on specific areas of need, on a case-by-case basis, in conjunction with the ICC. Such a constructive relationship would undoubtedly have another benefit: developing a common understanding while building capacities on the continent to effectively hold individuals and corporations accountable for human rights violations.

5. Conclusion

In conclusion, the African States have grounds for debate on the legal norms and would be able to make progress if they develop the appropriate strategy for the aim they agree on. This would require substantive work and dedication to lobbying with other States to reach a consensus on critical aspects that would be reflected in the outcome, whether within the Assembly of States Parties or through

the United Nations General Assembly. Even within their own organisations, African States could succeed in agreeing on decisions that they are ready to enforce. It is only at that cost that the progress they seem to advocate for would hold any future.

The Independent Expert Review established by the ICC ASP, in its report, did not do any justice to those African concerns because it failed to consider the issues raised earlier as deriving from the views of African stakeholders. But one must admit that the lack of clarity on the side of the African States does not help. However, such a failure at this stage does not jeopardise the future. It will just take longer to get the legal framework settled.

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Appendix on African States and the Rome Statute

A. 33 African States are party to the Rome Statute:

1. Benin signed on 24 Sep 1999 and ratified on 22 Jan 2002.
2. Botswana signed on 8 Sep 2000 and ratified on 8 Sep 2000.
3. Burkina Faso signed on 30 Nov 1998 and ratified on 16 Apr 2004.
4. Cabo Verde signed on 28 Dec 2000 and ratified on 10 Oct 2011.

   24 January 2012: With regard to article 87 (2) of the Rome Statute, Cape Verde declares that all requests for cooperation and any other supporting documents that it receives from the Court shall be transmitted through diplomatic channels via its Embassy in Brussels, preferably in Portuguese or translated in this language.

5. Central African Republic signed on 7 Dec 1999 and ratified on 3 Oct 2001.
6. Chad signed on 20 Oct 1999 and ratified on 1 Nov 2006.

   14 December 2010: The Government of the Republic of Chad maintains the diplomatic channel for communications and French as the working language in accordance with article 87 paragraphs 1 (a) and 2 of the Rome Statute.

7. Comoros signed on 22 Sep 2000 and ratified on 18 Aug 2006.
8. Congo signed on 17 Jul 1998 and ratified on 3 May 2004.
9. Côte d'Ivoire signed on 30 Nov 1998 and ratified on 15 Feb 2013.

   There is a note on Côte d'Ivoire. However, this note was missing from the UN Treaty website as of 15 December 2022.

10. Democratic Republic of the Congo signed on 8 Sep 2000 and ratified on 11 Apr 2002.

    "Pursuant to article 87, paragraph 1 (a) of the Rome Statute of the International Criminal Court, requests for cooperation issued by the Court shall be transmitted to the Government Procurator's Office of the Democratic Republic of the Congo. For any request for cooperation within the meaning of article 87, paragraph 1 (a) of the Statute, French shall be the official language."

11. Djibouti signed on 7 Oct 1998 and ratified on 5 Nov 2002.
12. Gabon signed on 22 Dec 1998 and ratified on 20 Sep 2000.
13. Gambia did not attend the Rome Conference (See U.N. Doc. A/CONF.183/13(Vol.I), p. 74), but signed on 4 Dec 1998 and ratified on 28 Jun 2002.

    In accordance with article 127 (1) of the Rome Statute of the International Criminal Court, on 10 Nov 2016, the Government of Gambia notified the Secretary-General of its decision to withdraw from the Rome Statute of the International Criminal Court (See C.N.862.2016.TREATIES-XVIII.10).
    On 10 February 2017, the Government of The Gambia notified the Secretary-General of its decision to rescind its notification of withdrawal from the Rome Statute deposited with the Secretary-General on 10 November 2016. (See C.N.62.2017.TREATIES-XVIII.10 of 16 February 2017).

14. Ghana signed on 18 Jul 1998 and ratified on 20 Dec 1999.
15. Guinea signed on 7 Sep 2000 and ratified on 14 Jul 2003.
16. Kenya signed on 11 Aug 1999 and ratified on 15 Mar 2005.

17. Lesotho signed on 30 Nov 1998 and ratified on 6 Sep 2000.

    17 March 2004: "Pursuant to Article 87 paragraph 1 (a) and 2 of the Rome Statute establishing the International Criminal Court, with regard to the Kingdom of Lesotho, requests for cooperation and any documents supporting such requests shall be transmitted through the diplomatic channel, that is, the Ministry of Foreign Affairs of the Kingdom of Lesotho, and such communication be in the English language."

18. Liberia signed on 17 Jul 1998 and ratified on 22 Sep 2004.
19. Madagascar signed on 18 Jul 1998 and ratified on 14 Mar 2008.
20. Malawi signed on 2 Mar 1999 and ratified on 19 Sep 2002.
21. Mali signed on 17 Jul 1998 and ratified on 16 Aug 2000.

    21 May 2004: Pursuant to article 87, paragraphs 1 (a) and 2 of the Rome Statute, relating to the designation of channels of communication between States parties and the Court and to the language to be used in requests for cooperation, the Permanent Mission of Mali to the United Nations has the honour to inform the Secretariat that the Government of Mali wishes such requests to be addressed to it in French, the official language, through the diplomatic channel.

22. Mauritius signed on 11 Nov 1998 and ratified on 5 Mar 2002.
23. Namibia signed on 27 Oct 1998 and ratified on 25 Jun 2002.
24. Niger signed on 17 Jul 1998 and ratified on 11 Apr 2002.
25. Nigeria signed on 1 Jun 2000 and ratified on 27 Sep 2001.
26. Senegal signed on 18 Jul 1998 and ratified on 2 Feb 1999.
27. Seychelles signed on 28 Dec 2000 and ratified on 10 Aug 2010.
28. Sierra Leone signed on 17 Oct 1998 and ratified on 15 Sep 2000.

    30 April 2004: ".....the Permanent Mission of Sierra Leone to the United Nations remains the main channel of communication between Sierra Leone as a State Party and the Court, the language of communication is English."

29. South Africa signed on 17 Jul 1998 and ratified on 27 Nov 2000.

    In accordance with article 127 (1) of the Rome Statute of the International Criminal Court, on 19 Oct 201, the Government of South Africa notified the Secretary-General of its decision to withdraw from the Rome Statute of the International Criminal Court (See C.N.786.2016.TREATIES-XVIII.10).
    However, on 7 March 2017, the Government of South Africa notified the Secretary-General of the revocation of its notification of withdrawal from the Rome Statute deposited with the Secretary-General on 19 October 2016. (See C.N.121.2017.TREATIES-XVIII.10).

30. Tunisia did not sign before acceding on 24 Jun 2011.
31. Uganda signed on 17 Mar 1999 and ratified on 14 Jun 2002.
32. United Republic of Tanzania signed on 29 Dec 2000 and ratified on 20 Aug 2002.
33. Zambia signed on 17 Jul 1998 and ratified on 13 Nov 2002.

B. 1 single African State withdrew from the Rome Statute

1. Burundi signed on 13 Jan 1999 and ratified on 21 Sep 2004.

   In accordance with article 127 (1) of the Rome Statute of the International Criminal Court, on 27 Oct 2016, the Government of Burundi notified the Secretary-General of

its decision to withdraw from the Rome Statute of the International Criminal Court (See C.N.805.2016.TREATIES-XVIII.10).

This withdrawal became effective on 27 Oct 2017.

C. 21 African States are not party to the Rome Statute:

1. Algeria signed on 28 Dec 2000.
2. Angola signed on 7 Oct 1998.
3. Cameroon signed on 17 Jul 1998.
4. Egypt only signed on 26 Dec 2000.

Declarations:

...

2. The Arab Republic of Egypt affirms the importance of the Statute being interpreted and applied in conformity with the general principles and fundamental rights which are universally recognized and accepted by the whole international community and with the principles, purposes and provisions of the Charter of the United Nations and the general principles and rules of international law and international humanitarian law. It further declares that it shall interpret and apply the references that appear in the Statute of the Court to the two terms fundamental rights and international standards on the understanding that such references are to the fundamental rights and internationally recognized norms and standards which are accepted by the international community as a whole.

3. The Arab Republic of Egypt declares that its understanding of the conditions, measures and rules which appear in the introductory paragraph of article 7 of the Statute of the Court is that they shall apply to all the acts specified in that article.

4. The Arab Republic of Egypt declares that its understanding of article 8 of the Statute of the Court shall be as follows:

(a) The provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2 (b) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which are indiscriminate in nature and cause unnecessary damage, in contravention of international humanitarian law.

(b) The military objectives referred to in article 8, paragraph 2 (b) of the Statute must be defined in the light of the principles, rules and provisions of international humanitarian law. Civilian objects must be defined and dealt with in accordance with the provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) and, in particular, article 52 thereof. In case of doubt, the object shall be considered to be a civilian.

(c) The Arab Republic of Egypt affirms that the term "the concrete and direct overall military advantage anticipated" used in article 8, paragraph 2 (b) (iv), must be interpreted in the light of the relevant provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I). The term must also be interpreted as referring to the advantage anticipated by the perpetrator at the time when the crime was committed. No justification may be adduced for the nature of any crime which may cause incidental damage in violation of the law applicable in armed conflicts. The overall military advantage must not be used as a basis on which to justify the ultimate goal of the war or any other strategic goals. The advantage anticipated must be proportionate to the damage inflicted.

(d) Article 8, paragraph 2 (b) (xvii) and (xviii) of the Statute shall be applicable to all types of emissions which are indiscriminate in their effects and the weapons used to deliver them, including emissions resulting from the use of nuclear weapons.

5. The Arab Republic of Egypt declares that the principle of the non-retroactivity of the jurisdiction of the Court, pursuant to articles 11 and 24 of the Statute, shall not invalidate the well-established principle that no war crime shall be barred from prosecution due to the statute of limitations and no war criminal shall escape justice or escape prosecution in other legal jurisdictions.

Notifications made under article 87 (1) and (2)

Pursuant to article 87, paragraphs 1 and 2, the Arab Republic of Egypt declares that the Ministry of Justice shall be the party responsible for dealing with requests for cooperation with the Court. Such requests shall be transmitted through the diplomatic channel. Requests for cooperation and any documents supporting the request shall be in the Arabic language, being the official language of the State, and shall be accompanied by a translation into English being one of the working languages of the Court.

5. Equatorial Guinea did not even attend the Rome Conference (See U.N. Doc. A/CONF.183/13(Vol.I), p. 74).
6. Eritrea signed on 7 Oct 1998.
7. Ethiopia did not even sign.
8. Guinea-Bissau only signed on 12 Sep 2000.
9. Libya did not even sign.
10. Mauritania did not even sign.
11. Morocco only signed on 8 Sep 2000.
12. Mozambique only signed on 28 Dec 2000.
13. Rwanda did not even sign.
14. Sahrawi Arab Democratic Republic could not attend the Rome Conference because it is not a recognized State within the framework of the United Nations.
15. Sao Tome and Principe only signed on 28 Dec 2000.
16. Somalia did not even attend the Rome Conference (See U.N. Doc. A/CONF.183/13(Vol.I), p. 75).
17. South Sudan did not sign because it did not exist at the time.
18. Sudan only signed on 8 Sep 2000.

    In a communication received on 26 August 2008, the Government of Sudan informed the Secretary-General of the following:
    "....., Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000."

19. Swaziland did not even sign.
20. Togo did not even sign.
21. Zimbabwe signed on 17 Jul 1998.

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