

# JUSTICE BEYOND THE INTERNATIONAL CRIMINAL COURT: TOWARDS A REGIONAL FRAMEWORK IN AFRICA

CAYLEY CLIFFORD



JANUARY  
2019

*African perspectives.  
Global insights.*

## **SOUTH AFRICAN INSTITUTE OF INTERNATIONAL AFFAIRS**

The South African Institute of International Affairs (SAIIA) has a long and proud record as South Africa's premier research institute on international issues. It is an independent, non-government think tank whose key strategic objectives are to make effective input into public policy, and to encourage wider and more informed debate on international affairs, with particular emphasis on African issues and concerns. It is both a centre for research excellence and a home for stimulating public engagement. SAIIA's occasional papers present topical, incisive analyses, offering a variety of perspectives on key policy issues in Africa and beyond. Core public policy research themes covered by SAIIA include good governance and democracy; economic policymaking; international security and peace; and new global challenges such as food security, global governance reform and the environment. Please consult our website [www.saiia.org.za](http://www.saiia.org.za) for further information about SAIIA's work.

## **AFRICAN GOVERNANCE AND DIPLOMACY PROGRAMME**

SAIIA's African Governance and Diplomacy programme (AGDP) aims to strengthen governance, stability and accountability in Africa within the framework of global Multi-Stakeholder Initiatives (MSIs). It also seeks to promote peace, security and human rights in Africa by focusing on the role of South Africa and other key countries as peace-builders and norm-setters on the continent.

SAIIA gratefully acknowledges the Swedish International Development Cooperation Agency (Sida) which generously supported this research.

**PROGRAMME HEAD** Steven Gruzd, [steven.gruzd@wits.ac.za](mailto:steven.gruzd@wits.ac.za)

---

© SAIIA JANUARY 2019

All rights are reserved. No part of this publication may be reproduced or utilised in any form by any means, electronic or mechanical, including photocopying and recording, or by any information or storage and retrieval system, without permission in writing from the publisher. Opinions expressed are the responsibility of the individual authors and not of SAIIA.

Please note that all currencies are in US\$ unless otherwise indicated.

Cover image: June 2003 a Union of Congolese Patriots child fighter at a military camp in Bunia, northeastern DRC. Congolese warlord Thomas Lubanga was convicted of using child soldiers in his rebel army and sentenced to 14 years in jail by the ICC in 2012

© ERIC FEFERBERG/AFP/Getty Images

---

## **ABSTRACT**

The last decade has seen a deterioration in the relationship between the International Criminal Court (ICC) and some African states. At the AU, allegations of bias and calls for non-cooperation with the ICC are frequent: the power of the UN Security Council, the application of universal jurisdiction, the question of immunity and the effectiveness of retributive justice are some of the issues being raised. The breakdown in relations has also seen increased efforts to create a regional framework for the delivery of international criminal justice in Africa. Indeed, the experiences of hybrid mechanisms such as the Special Court for Sierra Leone and the Extraordinary African Chambers are proof that, where there is political will, the cause of justice in Africa can be advanced. However, there has been little enthusiasm for similar efforts at a continental level. The ratification rate of protocols that will enable the prosecution of international crimes by an African court, thereby addressing many of the concerns raised by African leaders, has been disappointingly slow. The unacceptable consequence is that serious crimes on the continent continue to go unpunished.

## **ABOUT THE AUTHOR**

Cayley Clifford is a South African Institute for International Affairs Konrad-Adenauer Stiftung Research Scholar. She is currently pursuing an MA in International Relations from the University of the Witwatersrand. This paper is based on research conducted for her MA thesis of the same title.

**ABBREVIATIONS AND ACRONYMS**

AU	African Union
African Court	African Court for Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
BIA	bilateral immunity agreement
CAR	Central African Republic
DRC	Democratic Republic of Congo
ICC	International Criminal Court
P5	Permanent Five Members of the UN Security Council
PSC	Peace and Security Council
R2P	responsibility to protect
UN	United Nations
UNSC	UN Security Council
US	United States

## INTRODUCTION

The International Criminal Court (ICC) began operating on 1 July 2002 with the mandate to prosecute international crimes of genocide, war crimes, crimes against humanity and the crime of aggression. Its creation was based largely on the understanding that some crimes are so grave and their consequences so far reaching that they become the concern of humanity as a whole, and require international efforts for justice.<sup>1</sup> The ICC aims to ‘put an end to impunity for the perpetrators’ of international crimes and notes that it is the ‘responsibility of every state’ to further this goal.<sup>2</sup> These and other principles, contained in the [Rome Statute](#), the court’s primary and founding instrument, guide the ICC’s procedures and policies.

In the wake of mass atrocities such as the Rwandan genocide, and aware of their lack of capacity to adequately respond to them, African states initially welcomed the creation of the ICC. Having experienced a process of democratisation and an improvement in human rights standards that paralleled the court’s establishment, many African states were supportive and actively engaged in the negotiation of the Rome Statute in the 1990s.<sup>3</sup> It was a time of great optimism, as the document had the backing of the majority of states on the continent. Today, Africa is still the largest regional bloc of the court, with 33 signatories.<sup>4</sup>

Africa’s enthusiasm for the ICC continued throughout its formative years. It saw self-referrals from Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR). However, towards the end of the 2000s the increased issuance of warrants of arrest for African officials and the dearth of such warrants for crimes committed outside the continent changed the relationship for the worse. In addition to allegations of bias, the ICC’s pursuit of retributive justice also appeared to clash with Africa’s preference for restorative justice.<sup>5</sup> This generated considerable criticism of the court, largely from Africa but also from India and the US. It has seen some African states, at the encouragement of the AU, attempt to reform the ICC, and, where they have failed, stop cooperating with the

---

1 ICC (International Criminal Court), ‘Rome Statute of the International Criminal Court’, 1998, Preamble, p. 1, [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf), accessed 15 August 2018.

2 *Ibid.*

3 Du Plessis M, Maluwa T & A O’Reilly, ‘Africa and the International Criminal Court’, *The Royal Institute of International Affairs*, 11, 3, 2013, pp. 563–570.

4 In order of their ascension: Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic (CAR), Benin, Mauritius, Democratic Republic of Congo (DRC), Niger, Uganda, Namibia, The Gambia, United Republic of Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Republic of Congo, Liberia, Kenya, Comoros, Chad, Madagascar, Seychelles, Tunisia, Cabo Verde, Côte d’Ivoire. Before the withdrawal of Burundi in October 2017, Africa boasted 34 signatories.

5 Mangena F, ‘Restorative justice’s deep roots in Africa’, *South African Journal of Philosophy*, 34, 1, 2015, pp. 1–12. Retributive justice is based on the punishment of offenders rather than their rehabilitation through reconciliation with victims and the larger community, as advocated for by the restorative justice approach.

court, at the expense of its credibility and effectiveness. The breakdown in relations has also seen renewed efforts to establish an African alternative to the ICC that satisfies the AU's understanding of justice, namely the African Court for Human and Peoples' Rights (African Court), with an expanded mandate. This paper looks at how and why Africa's relationship with the ICC deteriorated, and discusses some of the major criticisms of the court. It then attempts to answer the question of what hope remains for the delivery of international criminal justice in Africa.

### THE ICC, AU AND UN SECURITY COUNCIL: A PROSECUTORIAL TUG OF WAR

With 123 states parties the ICC is 'complementary to national jurisdictions',<sup>6</sup> meaning that prosecution should only occur in cases where domestic courts are unwilling or unable to do so. Member states have the primary responsibility to try their own offenders, failing which the ICC is a potential recourse. The rationale is that the ICC should not undermine sovereignty but reinforce domestic tools of justice.

There are successful examples of its vision for international justice. In 2012 the DRC's Thomas Lubanga Dyilo was convicted by the ICC for enlisting children in the Lord's Resistance Army.<sup>7</sup> This is one of only three convictions to date. In 2014 Germain Katanga, a Congolese national, was convicted for attacks carried out on the civilian population of Ituri, DRC<sup>8</sup> and in 2015 Ahmad al-Faqi al-Mahdi was sentenced to nine years in prison for intentionally directing attacks against religious buildings in Mali.<sup>9</sup> Pending confirmation by the ICC's Appeals Chamber, Jean-Pierre Bemba, former vice president of the DRC, and two co-accused will also be convicted on charges of corruption and bribery during a previous war crimes trial.<sup>10</sup> This low arrest and investigation rate relates to the ICC's dependence on the cooperation of member states. The court has no police force of its own and lacks the institutional capacity to pursue criminal cases, rendering it almost completely reliant on the political will of its signatories. While the ICC can request cooperation legally, through obligations outlined in the Rome Statute, on its own it has no power to make arrests or conduct investigations, limiting the number of cases it can hear without state participation. Furthermore, while Article 87 of the Rome Statute lists repercussions for non-compliance, in reality no state has suffered serious consequences for failing to cooperate with the ICC.

The ICC still enjoys the cooperation of African states such as Côte d'Ivoire, the DRC, Mali, Rwanda and Uganda, which have surrendered wanted persons in their territories.<sup>11</sup>

6 ICC, *op. cit.*, Article 1.

7 *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06, 2012.

8 *The Prosecutor v. Germain Katanga* ICC-01/04-01/07, 2014.

9 *The Prosecutor v. Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15, 2015.

10 *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ICC-01/05-01/13.

11 *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ICC-02/11-01/15, 2015; *The Prosecutor v. Thomas Lubanga Dyilo*, *op. cit.*; *The Prosecutor v. Germain Katanga*, *op. cit.*; *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15; *The Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *op. cit.*

Other states have also expressed their support for the ICC, most sharply at the [2014 Assembly of States Parties](#), where representatives from Botswana, Burkina Faso, the CAR, Ghana, Malawi, Sierra Leone and Zambia affirmed the importance of the court in fighting impunity. During this session the assembly elected its first African president, Justice Minister Sidiki Kaba of Senegal.<sup>12</sup> Amid AU talks of an Africa-wide withdrawal from the ICC, Côte d'Ivoire, Nigeria and Senegal reaffirmed their commitment to the court.<sup>13</sup> Moreover, four African states have referred themselves to the ICC, a point some believe refutes the claim that the ICC is biased against Africa.<sup>14</sup>

In 2009, when the ICC issued a warrant of arrest for Sudanese President Omar al-Bashir, wanted for crimes against humanity, war crimes and crimes of genocide,<sup>15</sup> the AU began to reject the court's jurisdiction. It objected that Sudan was not a signatory to the Rome Statute but had instead been referred to the ICC by the UN Security Council (UNSC), a power granted to the UNSC that has met with fierce opposition. Article 13(b) of the Rome Statute confers upon the UNSC the power to refer a 'situation' to the ICC. With eight or more affirmative votes in the UNSC, even a non-state party may be referred to the court through Chapter VII of the UN Charter, if the council believes the situation is a threat to peace. Conversely, when the ICC is considering an investigation in a state, the UNSC can use its Article 16 power to defer investigation and prosecution for up to one year. The five permanent (P5)<sup>16</sup> members of the UNSC, can, with a single vote, veto decisions to refer or defer ICC investigations.

The deferral power of the UNSC may be used in a way to ensure fairness in the application of international criminal law, should the council be willing to consider appeals from other states for deferral. However, this has not been the case thus far. When the prosecution made an application to the ICC's Pre-Trial Chamber for a warrant of arrest for al-Bashir in July 2008, the AU's Peace and Security Council (PSC) made an urgent application to the UNSC, requesting that it use its Article 16 power to defer the ICC process for the moment.<sup>17</sup> It regretted the pursuit of the warrant amid ongoing efforts to resolve the conflict in Sudan, in which al-Bashir is a key figure. The application asked that the international community hold back and give Sudan and its counterparts the opportunity to address the situation through their own mechanisms.

---

12 Human Rights Watch, 'ICC: African countries support court – Annual meeting of member countries', 17 December 2014, <https://www.hrw.org/news/2014/12/17/icc-african-countries-support-court>, accessed 18 October 2018.

13 AU, 'Withdrawal Strategy Document', Draft 2, Version 12.01.2017, 2017, [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf), accessed 18 October 2018.

14 The CAR, Mali, Uganda, DRC.

15 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09, 2009; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-95, 2010.

16 China, France, Russia, the UK, the US.

17 AU PSC (Peace and Security Council), 'Communiqué, PSC 87<sup>th</sup> Meeting'. Addis Ababa: AU, 2007.

When no response to the application was received, a second application to the UNSC in September 2008 referenced the steps taken thus far in Sudan's peace process, including the establishment of a panel to investigate allegations and the appointment of a special prosecutor.<sup>18</sup> Although these efforts were ineffective, they did suggest a commitment and attempt by Sudan and the AU to address the situation on their own. Much to the irritation of the AU PSC, a warrant of arrest for al-Bashir was nonetheless issued. That the UNSC did not meaningfully engage with the AU's request, postponing a final decision,<sup>19</sup> was a further source of tension, leading in turn to widespread support of what was already a growing anti-ICC sentiment among several African governments.<sup>20</sup>

It might have been beneficial for the UNSC to defer ICC involvement, as it posed a threat to peace and stability in Sudan. The warrant of arrest instead increased uncertainty in the midst of delicate discussions and negotiations between rebel movements and the National Congress Party, led by al-Bashir.<sup>21</sup>

The UNSC's power to refer cases to the ICC from non-signatories to the Rome Statute is harder to defend. International treaties are predicated on their voluntary nature, accounting for state sovereignty. If a state can still be subjected to the conditions of a treaty it did not sign, its sovereignty is disregarded. The devastation caused by atrocity crimes has, however, led to international recognition of the 'responsibility to protect' (R2P), a global commitment to collectively intervene, through the UNSC, where populations are being abused. The impact of R2P on sovereignty – and its effectiveness thus far – is still debated. In Sudan, the deployment of UN peacekeeping troops has been tolerated, following the AU's admission in 2006 that it could no longer provide protection for civilians on its own.<sup>22</sup>

Further to the controversial referral and deferral power of the UNSC, African states have questioned the refusal of the US, China and Russia (three of the P5) to join the ICC. These states, and others that occupy a non-permanent seat on the council and are not states parties to the Rome Statute, have not subjected themselves to the jurisdiction of the court, yet may refer other states for investigation. They have used their power freely to direct the ICC's operations, especially where its involvement threatened to have a negative impact

18 AU PSC, 'Communiqué, PSC 151<sup>st</sup> Meeting'. New York: AU, 2008.

19 Akande D, Du Plessis M & CC Jalloh, 'An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC', ISS (Institute for Security Studies) Position Paper, 2010, [https://issafrica.s3.amazonaws.com/site/uploads/Position\\_Paper\\_ICC.pdf](https://issafrica.s3.amazonaws.com/site/uploads/Position_Paper_ICC.pdf), accessed 18 October 2018.

20 Later, in 2011, a summons to appear before the court for Kenyan President Uhuru Kenyatta and three co-accused also proved controversial. It was through Kenya's campaigning that the AU's extraordinary session in October 2013 was dedicated almost entirely to the ICC issue, in a bid to drum up opposition to the court.

21 Adar KG, 'The International Criminal Court and the Indictment of President Omar al-Bashir', Policy Brief, 10. Pretoria: Africa Institute of South Africa, 2010.

22 Cohen R, 'The Responsibility to Protect: The Case of Sudan', Brookings, 29 September 2006, <https://www.brookings.edu/on-the-record/the-responsibility-to-protect-the-case-of-sudan/>, accessed 12 September 2018.

on their interests. In 2014, Russia, a state widely implicated in the ongoing Syrian civil war, vetoed the adoption of a draft resolution that would have referred the conflict to the court.<sup>23</sup>

Notifying the UN secretary-general of its intention to withdraw from the ICC in October 2016, the South African government expressed concern over the membership status of the P5, questioning whether the ICC still reflected the principles that guided its creation.<sup>24</sup> As long as the aforementioned three states are not party to the Rome Statute, the credibility of the ICC will continue to be questioned, and hopes of universal membership will not be realised. Moreover, the power conferred on the UNSC complicates any attempt to equate the ICC with *international* justice, given that it is not respected by the world's most powerful countries or applied consistently.

Africa's sharpest critique of the ICC is therefore that international criminal law does not apply to the world's major powers, who act as both 'players and referees', setting the rules of the game but refusing to play by them.<sup>25</sup> In protest at the ICC's perceived bias, in 2017 the AU decided on a strategy for the mass withdrawal of member states from the court.<sup>26</sup> This followed notifications of withdrawal from the ICC by Burundi, The Gambia and South Africa.<sup>27</sup> Explaining its decision to withdraw at the time, the Gambian government noted that 'there are many Western countries, at least 30, that have committed heinous crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war crime or criminal has been indicted'.<sup>28</sup> Under the leadership of President Adama Barrow, the decision to withdraw has since been reversed.

---

Africa's sharpest critique of the ICC is therefore that international criminal law does not apply to the world's major powers

---

## THE AFRICA BIAS, UNIVERSAL JURISDICTION AND JUSTICE v PEACE

The warrant of arrest for al-Bashir meant that African states' obligation to cooperate with the ICC changed from a possibility with no real consequences to a material and serious conflict of interests.<sup>29</sup> Countries visited by al-Bashir found themselves caught between

---

23 UN, 'Referral of Syria to International Criminal Court fails as negative votes prevent Security Council from adopting draft resolution', UN Security Council 7180<sup>th</sup> Meeting, 22 May 2014, <https://www.un.org/press/en/2014/sc11407.doc.htm>, accessed 3 December 2018.

24 South Africa, DIRCO (Department of International Relations and Cooperation), 'Tabling of the Instrument of Withdrawal from the Rome Statute of the International Criminal Court'. Cape Town: DIRCO, 2016.

25 McNamee T, 'The International Criminal Court and Africa. Between Aspiration and Reality: Making International Justice Work Better for Africa', Discussion Paper, 2. Johannesburg: Brenthurst Foundation, 2014.

26 AU, 'Withdrawal Strategy Document', Draft 2, Version 12.01.2017. Addis Ababa: AU, 2017.

27 Burundi has successfully withdrawn and South Africa has rescinded its instrument of withdrawal, following a domestic legal challenge to the decision to leave the ICC.

28 Reuters, 'Gambia announces withdrawal from International Criminal Court', 26 October 2016, <https://www.reuters.com/article/us-gambia-icc-idUSKCN12P335>, accessed 12 September 2018.

29 Du Plessis M, Maluwa T & A O'Reilly, *op. cit.*

their Rome Statute obligations on the one hand and respecting the immunity of heads of state under customary international law on the other. Most chose the latter. For example, Malawi has had to appear before the Assembly of States Parties to the ICC to explain its non-cooperation following its failure to arrest al-Bashir.<sup>30</sup> Similarly, the DRC was summoned to the court's Pre-Trial Chamber.<sup>31</sup>

Since 2009 calls for a mass African withdrawal from the ICC have been increasing. These calls have gained traction at the AU, amid repeated claims that the court is biased against Africa. Ten of the 11 cases currently being investigated by the ICC are in Africa.<sup>32</sup> In addition, the court is conducting preliminary investigations in Afghanistan, Colombia, Gabon, Guinea, Iraq, Nigeria, Palestine, the Philippines, Ukraine and Venezuela. The progress of these cases has been extremely slow. Colombia has been in the preliminary stage since 2004, while investigations in Iraq were closed in 2006 and reopened in 2014, upon receipt of new evidence.<sup>33</sup> Encouragingly, the ICC requested investigation into war crimes and detainee abuse by US soldiers in Afghanistan in 2017. However, the ICC's ability to proceed with a formal case is already in question and faces strong opposition from the US. In September 2018 US National Security Advisor John Bolton called the ICC 'unaccountable' and 'dangerous', saying that probes into US service members were 'unfounded', 'unjustifiable' and would result in financial sanctions against the court and any state that tried to assist it.<sup>34</sup>

The ICC has been slow to defend its case selection, apart from quoting its legal mandate and referencing preliminary investigations outside Africa. In a 2015 statement, Chief Prosecutor Fatou Bensouda said:<sup>35</sup>

Words such as 'biased', 'targeted' and 'politicised' dominate the public and media narrative. But dramatic headlines obscure the truth and distort the public understanding of what we

- 
- 30 ICC (International Criminal Court), 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir', Pre Trial Chamber I, 12 December 2011, [http://www.worldcourts.com/icc/eng/decisions/2011.12.12\\_Prosecutor\\_v\\_Al\\_Bashir.pdf](http://www.worldcourts.com/icc/eng/decisions/2011.12.12_Prosecutor_v_Al_Bashir.pdf), accessed 3 December 2018.
- 31 ICC, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', Pre Trial Chamber II, 9 April 2014, <https://www.icc-cpi.int/pages/record.aspx?uri=1759849>, accessed 3 December 2018.
- 32 Two in the CAR and one each in Burundi, Côte d'Ivoire, DRC, Georgia, Kenya, Libya, Mali, Sudan and Uganda.
- 33 ICC, 'Preliminary Investigation, Iraq/UK', <https://www.icc-cpi.int/iraq>, accessed 12 September 2018.
- 34 Handley P, 'US threatens to arrest ICC judges who probe war crimes', *Mail & Guardian*, 11 September 2018, <https://mg.co.za/article/2018-09-11-us-threatens-to-arrest-icc-judges-who-probe-war-crimes>, accessed 12 September 2018.
- 35 Bensouda F, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The ICC is an independent court that must be supported"', ICC, 24 November 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-24-11-2015>, accessed 12 September 2018.

do ... contrary to the fallacy that the ICC is focused on Africa, our workload is far from exclusive to the Continent. In my Office, we are busy conducting preliminary examinations in Afghanistan, Iraq, Colombia, Palestine and Ukraine, among others. As with everything we do, we are carefully assessing these situations independently and impartially. Let me be clear: I will not hesitate to open investigations in any of these situations to bring perpetrators to justice if our legal criteria allow us to do so.

In the meantime, commentators such as Kamari Clarke and Adam Branch are coming to their own conclusions – namely that the work of the ICC is so restricted by the UNSC that Africa remains the only continent in which it can carry out its objectives. This does not mean that the ICC is biased or that it is purposefully targeting Africa. Rather, the ICC has been unable to prosecute and investigate in states that are shielded by the diplomatic might of the P5 and is thus limited to Africa, where objections to its involvement are less consequential. In a brazen characterisation of the situation, former British foreign secretary Robin Cook remarked, ‘If I may say so, this is not a court set up to bring to book Prime Ministers of the UK or Presidents of the US.’<sup>36</sup>

Another issue of concern for some African leaders is the application of the principle of universal jurisdiction. Although proposals that the principle should apply to state referrals were rejected during negotiations for the ICC, should the UNSC refer a situation under Article 13(b) the court is accorded jurisdiction over an offender, regardless of where the offence took place, by whom it was committed or whether the state concerned has ratified the Rome Statute. Universal jurisdiction is still debated both in theory and practice under international law, because of its perceived disregard for sovereignty. Sovereignty is a cornerstone of the international order, and for good reason. In the absence of a higher central authority to control the interactions of states, respect for sovereignty creates stability.<sup>37</sup> It stems from respect for the rights of other states to establish their own way of life, free from international interference. However, this argument weakens in the face of obvious abuses of human rights, where intervention is considered justifiable through, for example, the R2P. Moreover, crimes such as genocide, which produce refugee flows and can constitute a risk to national security, cannot be viewed strictly as domestic issues. Thus, some states have incorporated the concept of universal jurisdiction into domestic law, on the understanding that certain crimes are so grave that they affect humanity as a whole and require international efforts for justice.

As early as 2008 the AU Commission issued a report on the abuse of the application of universal jurisdiction by non-African states. The report noted that indictments against African leaders had a destabilising effect and could negatively impact their ability to conduct international relations, especially where peace processes were ongoing.<sup>38</sup> The

---

The work of the ICC is so restricted by the UNSC that Africa remains the only continent in which it can carry out its objectives

---

36 *New African*, ‘The politics of international criminal law’, 3 January 2012, <https://newafricanmagazine.com/current-affairs/the-politics-of-international-criminal-law/>, accessed 16 August 2018.

37 Doyle M, *Liberalism and Foreign Policy: Foreign Policy*, 2<sup>nd</sup> edition. London: Oxford University Press, 2008.

38 AU, ‘Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction’, Doc. Assembly/AU/Dec. 199(XI), adopted by the AU Assembly at its 11<sup>th</sup>

report requested that any summonses issued to heads of state to appear before a court in another country be subject to the approval or consent of that head of state, with respect for diplomatic immunity. This followed the arrest of former Rwandan chief of protocol to the president, Rose Kabuye, in Germany, in connection with the 1994 genocide. President Paul Kagame opposed the arrest, calling it a violation of Rwanda's sovereignty.<sup>39</sup>

A further technical objection relates to the challenge in applying the principle universally. Different states have varying domestic legislation dealing with universal jurisdiction. In the absence of standard rules, its application becomes problematic.<sup>40</sup> In South Africa, for example, the Implementation of the Rome Statute Act removes immunity from prosecution and directly contradicts amnesty laws as dictated in the Diplomatic Privileges and Immunities Act.<sup>41</sup> Similar acts are common in most states, allowing for the immunity of diplomatic leaders so that the practice of international relations goes unhindered.

Related to reservations about universal jurisdiction are arguments about peace and justice. The correct sequencing of the two has occupied debates on international criminal law for some time. The ICC – and the theory of international law that guides it – advocates for justice before peace.<sup>42</sup> It does not believe in immunity for perpetrators and equates justice with the use of legal tools such as court trials. The court does not deny the importance of peace efforts but sees justice as a prerequisite for true and lasting harmony. Bensouda writes: 'History has taught us that peace achieved by ignoring justice is short-lived.'<sup>43</sup> The histories of many African states that fall back into conflict even after extensive peace processes support her claim.

Although Africa has traditionally favoured peace efforts over justice, it has embraced the rejection of impunity

Although Africa has traditionally favoured peace efforts over justice, it has embraced the rejection of impunity. This is evident in the constitutions of countries such as Kenya, in which no immunity for crimes committed against humanity exists. At the same time, state policies in many African states are still in a formative stage, and assigning criminal responsibility for crimes committed during civil war, conflict or political contestation is

---

ordinary session held at Sharm-el-Sheik, Egypt, 30 June – 1 July 2008, [https://au.int/sites/default/files/decisions/9558-assembly\\_en\\_30\\_june\\_1\\_july\\_2008\\_auc\\_eleventh\\_ordinary\\_session\\_decisions\\_declarations\\_tribute\\_resolution.pdf](https://au.int/sites/default/files/decisions/9558-assembly_en_30_june_1_july_2008_auc_eleventh_ordinary_session_decisions_declarations_tribute_resolution.pdf), accessed 3 December 2018.

39 Kimball J, 'Rwanda asks German envoy to leave in growing row', *Mail & Guardian*, 12 November 2008, <https://mg.co.za/article/2008-11-12-rwanda-asks-german-envoy-to-leave-in-growing-row>, accessed 18 October 2018.

40 Apiko P & F Aggad, 'The International Criminal Court, Africa and the African Union: What Way Forward?', Discussion Paper, 201. Maastricht: ECDPM (European Centre for Development Policy Management), 2016.

41 South Africa, Diplomatic Privileges and Immunities Act 2001 (Act 37 of 2001), Article 4.

42 Kersten M, 'ICC prosecutor enters the "peace versus justice" sweepstakes', *Justice in Conflict*, 2 April 2013, <https://justiceinconflict.org/2013/04/02/icc-prosecutor-enters-the-peace-versus-justice-sweepstakes/>, accessed 12 September 2018.

43 Bensouda F, 'International justice and diplomacy', *The New York Times*, 19 March 2013, <https://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html>, accessed 19 August 2018.

not straightforward.<sup>44</sup> Africa's history, which admittedly includes a high number of atrocity crimes, has demonstrated how, through the passage of time and peace efforts, enemies have turned into allies and that indictable parties can have followers. It may be helpful for the ICC, whatever the crime and its severity, to recognise the principal claims of conflict and the larger social and moral implications of its work.

The result of this history is the prioritisation of peace over immediate justice by African leaders. While not dismissing the need for justice, some believe temporal immunity should be granted to state officials or rebel leaders to ensure their participation in peace negotiations. Often, leaders indicted by the ICC are intricately involved in a conflict and attempts at its resolution.<sup>45</sup> Such is the case with al-Bashir in Sudan. In its instrument of withdrawal, the South African government said that it found its obligations with regard to the peaceful resolution of conflicts were inconsistent with the interpretation of justice given by the ICC in the Rome Statute.<sup>46</sup> It referenced its involvement in several peacekeeping missions in Africa, particularly Sudan, on a unilateral and bilateral basis. It also reiterated that international law could not be exercised in an unrealistic way that strove exclusively for justice at the expense of peace, security and stability. Peace efforts may be hampered by Rome Statute obligations, which clash directly with the principle of immunity, a long-standing tradition in international relations without which the global order could not function.

AU calls for immunity have been interpreted as the protection of criminal African leaders. However, the context in which this call has emerged is significant and reveals the deeper origins of violence and accountability on the continent, which are not remedied by prosecution but rather through efforts at peace and reconciliation. The AU Assembly, as a political body, will naturally opt for a political solution, stressing peacemaking and compromise. The mandate of the ICC, as a legal body, does not fit into this and perhaps rightfully so. The ICC and other courts aim to protect the world's citizens from the most serious crimes; they do not exist to appease governments.<sup>47</sup> At the same time, the ICC should recognise that it is operating in a political arena in which non-judicial demands question its status and purpose.<sup>48</sup> Discussions around the improvement of international criminal law cannot take place outside questions of economic inequality, unilateralism and great power politics, all of which characterise the global governance debate.<sup>49</sup>

---

44 McNamee T, *op. cit.*

45 Murithi T, *op. cit.*

46 South Africa, DIRCO, 'South Africa's withdrawal from the Rome Statute of the International Criminal Court', [http://www.dirco.gov.za/milan\\_italy/newsandevents/rome\\_statute.pdf](http://www.dirco.gov.za/milan_italy/newsandevents/rome_statute.pdf), accessed 19 August 2018.

47 McNamee T, *op. cit.*

48 Niang A, 'International Criminal Court politricks', *Africa is a Country*, 14 February 2017, <http://africasacountry.com/2017/02/international-criminal-court-politricks/>, accessed 19 August 2018.

49 Hofmann C, *Learning in Modern International Society: On the Cognitive Problem Solving Abilities of Political Actors*. Wiesbaden: Springer VS (Verlag für Sozialwissenschaften), 2008, pp. 73–100.

Proponents of the peace argument have also questioned whether the ICC's work has resulted in justice for victims of mass crimes.<sup>50</sup> They argue that reconciliatory processes conducted within countries are more effective in bringing justice closer to the people. If there is no political resolve to bring about sincere change, the prosecutorial process begins to mean something materially less. For example, the 2012 conviction of eastern DRC militia leader Lubanga has meant little to the armed rebel groups whose criminal actions continue unabated.<sup>51</sup> As peace, security and reconciliation expert Tim Murithi points out,<sup>52</sup>

the argument that ICC prosecutions will bring about change on the ground and 'put an end to impunity', as boldly stated by the Preamble of the Rome Statute, will begin to ring hollow to the victims on the ground, unless a credible political process accompanies the prosecutorial strategy.

Criticisms of the ICC, levelled by African states, frequently appear in the media. However, since its establishment other states have expressed similar reservations about the functions and independence of the court. The US, for example, opposed the ICC from the beginning. The Rome Statute was signed under President Bill Clinton but, facing strong resistance from Congress, was not ratified. Members of Congress were wary of the lack of checks and balances on the authority of the court, given that it is not answerable to any organisation and does not employ the jury system.<sup>53</sup> Under President George W Bush the court received even less support. In 2002 the [American Service-Members' Protection Act](#) was passed, effectively allowing US troops to come to the aid of any American citizen on trial in the court. Bush's administration also saw the signing of several bilateral immunity agreements (BIAs) with ICC member states. The agreements provided that neither state would surrender citizens of the other party to the ICC unless the parties had agreed to do so in advance. ICC member states that did not sign BIAs with the US were threatened with foreign aid cuts, a decision that cost South Africa approximately \$8.1 million in the 2004/5 fiscal year.<sup>54</sup>

---

50 See Branch A, 'International justice, local injustice', *Dissent Magazine*, 51, 2004, pp. 22–26; Clarke KM, 'Refiguring the perpetrator: Culpability, history and international criminal law's impunity gap', *The International Journal of Human Rights*, 19, 2015, pp. 592–614; Grovogui SN, 'Intricate entanglement: The International Criminal Court and the pursuit of peace, reconciliation and justice in Libya, Guinea, and Mali', *Africa Development*, 2, 2015, pp. 99–122.

51 Human Rights Watch, *Democratic Republic of Congo*, World Report. New York: Human Rights Watch, 2017.

52 Murithi T, *op. cit.*

53 Hoile D, 'Is the ICC fit for purpose?', *New African Magazine*, 1 March 2012, <http://newafricanmagazine.com/is-the-icc-fit-for-purpose/>, accessed 20 August 2018.

54 Boehme F, 'South Africa and the Great Escape: Regional Politics and Compliance with the Rome Statute', Paper presented at International Studies Association Human Rights Conference, New York, 15 June 2016.

India, while enthusiastic about the idea of an international court, also found the structure of the ICC wanting. Explaining its decision not to join, leader of the Indian Delegation to the Rome Conference Dilip Lahiri remarked:<sup>55</sup>

We have always had in mind a court that would deal with exceptional situations where state machinery had collapsed, or where the judicial system was either so flawed, inadequate or non-existent that justice had to be meted out through an international court because redress was not available within the country. That however, has not happened.

The Indian government was unsatisfied with the power of the UNSC to bind non-states parties to the Rome Statute; a clause it said violated a fundamental principle of international law and rendered the Rome Statute subordinate to the UNSC, increasing the likelihood of politicised prosecutions.

These criticisms have not convinced states such as Botswana, Nigeria and Senegal, which remain committed to the ICC and insist that the solution does not lie in withdrawal but in continued cooperation and possible reform. The ICC question has divided members of the AU, with some believing the court to be a cornerstone of justice and others refuting its neo-colonial jurisdiction. Preoccupied with efforts for greater economic integration, there has been little clarity on the way forward at the AU.

## WHAT HOPE FOR INTERNATIONAL CRIMINAL JUSTICE IN AFRICA?

Some African member states' disillusionment with the ICC has led to greater recognition of the need for strengthened African judicial systems. Following the imposition of colonialism and the advent of African independence, non-interference in the internal affairs of states was emphasised.<sup>56</sup> However, upon adoption of the Constitutive Act of the AU, the African agenda grew to include ideals of economic integration, social development and, most importantly, the promotion of democracy and human rights.<sup>57</sup> This required the creation of an environment favourable to a rights culture. Indeed, a greater appreciation of democratic ideals in Africa has seen the development of human rights and regional tools for justice.

The granting of immunity is naturally controversial among proponents of the justice argument. But is there an appropriate alternative to addressing international crimes in

---

The ICC question has divided members of the AU, with some believing the court to be a cornerstone of justice and others refuting its neo-colonial jurisdiction

---

---

55 Legal Tools, 'Explanation of Vote by Mr Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Court', 17 July 1998, <https://www.legal-tools.org/doc/9f86d4/pdf/>, accessed 20 August 2018.

56 OAU (Organization of African Unity), 'Organisation of African Unity Charter'. Addis Ababa: OAU, 1963, Article III, 'Principles'.

57 Siwingwa E, 'Whither international criminal justice in Africa', in Van der Merwe HJ & G Kemp (eds), *International Criminal Justice in Africa*. Nairobi: Strathmore University Press, 2016.

The ever-changing system of international criminal justice entails more than just the ICC

Africa that could satisfy the demands of both sides? The answer, some have argued,<sup>58</sup> lies in regional or hybrid courts. Hybrid and regional courts are mixed in composition and jurisdiction, encompassing both national and international aspects of law.<sup>59</sup> Thus, they work to strengthen the system of complementarity that should characterise international efforts for criminal justice. When considering these courts, it should be acknowledged that the ever-changing system of international criminal justice entails more than just the ICC. Over time, developments in this school of thought have demonstrated that while the ICC is one of the most prominent symbols of international criminal justice, it should be seen as part of a collective effort.<sup>60</sup> The ICC, as a court of last resort, has little objection to the operation of hybrid and regional courts. It should seek to complement domestic and regional efforts for both peace and justice as the rightful drivers in prosecuting crimes within Africa. In a 2016 interview Bensouda addressed this, saying that proposals for an African court were not a ‘slap in the face’ as had been suggested: ‘In fact, [the] ICC is a court of last resort. We will be encouraged by national jurisdictions taking up their responsibility to investigate and prosecute these crimes.’<sup>61</sup>

The African Court came into force in June 2004 and remains the AU’s only functioning court. It has jurisdiction over all cases submitted to it regarding the interpretation and application of the [African Charter on Human and Peoples’ Rights](#) and other relevant human rights instruments that have been ratified by member states. Although the court’s first two years of operation were marred by administrative and operational issues, it has since had some successes. Since the adoption of its final rules in 2010, the court has received 180 applications.<sup>62</sup> One of the most celebrated cases has been the binding ruling against Libya in 2011 for human rights violations; the result of an application brought by the African Commission on Human and Peoples’ Rights.<sup>63</sup> Moreover, at the time of writing eight African states had made the move to recognise the competence of the court to receive cases from non-governmental organisations and individuals.<sup>64</sup>

58 See Apiko P & F Aggad, *op. cit.*; Asaala EO, ‘The African Court of Justice and Human Rights: An opportunity for international criminal justice?’, in Van der Merwe B (ed.), *International Criminal Justice in Africa: Challenges and Opportunities*. Nairobi: KAS (Konrad Adenauer Stiftung), 2014, pp. 7–32.

59 OHCHR (Office of the UN High Commissioner for Human Rights), ‘Rule of Law Tools for Post-Conflict States: Maximising the Legacy of Hybrid Courts’, 2008, p. v, <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf>, accessed 20 August 2018.

60 Kemp G, ‘Taking stock of international criminal justice in Africa: Three inventories considered’, in Van der Merwe B (ed.), *op. cit.*, pp. 7–32.

61 Schmitt C, ‘13 years, 1 billion dollars, 2 convictions: Is the International Criminal Court worth it?’, DW, 27 January 2016, <https://www.dw.com/en/13-years-1-billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069>, accessed 14 September 2018.

62 African Court on Human and Peoples’ Rights, ‘Contentious matters’, <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#statistical-summary>, accessed 20 August 2010.

63 *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya*, 004/2011.

64 African Court on Human and Peoples’ Rights, <http://en.african-court.org/>, accessed 20 August 2018.

However, the court, like all AU institutions, faces funding issues. This is problematic in terms of perceptions of efficiency and the credibility of trials that do not benefit from sufficient investigation. Cases brought before the court either take too long owing to financial constraints or are dismissed because the court does not have jurisdiction over them. The unacceptable consequence is that serious human rights abuses on the continent continue to go unaddressed. It is partly because of these constraints that the AU tabled a protocol in 2008 to merge the African Court with the African Court of Justice (the creation of which was put on hold pending the union) as a single court that would save costs and address issues of international law, human rights law and, later (through the Malabo Protocol of 2014), international criminal law.

The 2008 protocol to merge the African Court and the African Court of Justice into the African Court of Justice and Human Rights (ACJHR) proposed the creation of two chambers: one dealing with interstate disputes and general affairs and the other with human rights. Upon ratification by 15 states, this new court will have jurisdiction to adjudicate interstate disputes, human rights violations and serious crimes committed by individuals and corporations on the African continent.

In 2009, recognising the need for an international crimes division, heads of state began assessing the possibility of extending the jurisdiction of the ACJHR to try international crimes in a third chamber. The result was the [Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights](#) (Malabo Protocol), officially adopted at the 2014 AU summit in Malabo, Equatorial Guinea.

The Malabo Protocol, upon ratification by 15 member states of the AU, will give the ACJHR jurisdiction over a list of crimes longer than that of the ICC. In addition to the four core international crimes, Article 28 of the Malabo Protocol lists 10 crimes thought to be prevalent in Africa: unconstitutional change of government, piracy, terrorism, mercenary activity, corruption, money laundering, trafficking in persons, drugs and hazardous waste, and the illicit exploitation of natural resources. These crimes are too complex and political for national courts to address yet not serious enough to be included in the ICC's mandate. Their inclusion in the Malabo Protocol provides an opportunity to tackle concerns notorious in Africa.<sup>65</sup>

However, both the Merger and Malabo protocols have shortcomings that, together with questions of funding, have resulted in slow ratification. Thus far, 31 African countries have signed the protocol merging the African Court with the African Court of Justice, but only six have ratified it. The Malabo Protocol has 11 signatures and no ratifications.<sup>66</sup>

---

65 Du Plessis M, 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders', Paper, 278. Pretoria: ISS, 2014.

66 AU, 'Protocol on the Statute of the African Court of Justice and Human Rights', [https://au.int/sites/default/files/treaties/7792-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_3.pdf](https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf), accessed 3 December 2018; AU, 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights', [https://au.int/sites/default/files/treaties/7804-sl-protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_5.pdf](https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf), accessed 20 August 2018.

The idea to establish an African court is not new, with discussions dating back to the 1970s.<sup>67</sup> However, interest in and encouragement of an African court have undoubtedly increased since the breakdown in relations between the AU and the ICC.<sup>68</sup> Some critics question the timing and true intention of the African Court, believing it to be a front for the protection of African leaders. In response to this, the AU has an obligation to clarify that the ACJHR is not an attempt to shield those in power from the jurisdiction of the ICC and will operate on a system of complementarity.

Article 46A of the Malabo Protocol grants immunity to sitting African heads of state, a provision which, while responding to African arguments on peace efforts and the sequencing of legal processes, elicits concerns from critics who believe it may motivate African leaders to hold on to power.<sup>69</sup> Moreover, the granting of immunity may be contrary to the very reason for the existence of courts – to uphold the rule of law by ensuring that no one, not even a state official, is above it. However, the immunity lasts only for the duration of the official's tenure in office. When the official exits office, Article 46A will no longer apply. Furthermore, the provision of immunity cannot stop a sitting head of state from being investigated or being called as a witness before the court.<sup>70</sup>

Despite its merits, the ACJHR is already facing several challenges, chief among them the question of finance. AU organs are underfunded, with well over half of the AU's budget coming from international partners. International criminal trials have an estimated cost of \$10–15 million each.<sup>71</sup> Considering that the AU's 2017 budget was \$435 million, with only \$10,315,284 being allocated to the African Court, there are serious doubts as to whether the AU's current budget can support the establishment and operation of another court, especially of this size.<sup>72</sup> One of Kagame's ambitious AU reforms includes the financing of the body by member states through a 0.2% levy on all eligible goods coming into Africa. Although some states are already collecting this levy, it is still too early to tell what the impact of the reform on the African Court will be. The hope is that more funds will be directed to the court under Kagame, who has been an outspoken critic of the ICC since its establishment.<sup>73</sup>

67 AfriCOG (African Centre for Open Governance), 'Seeking Justice or Shielding Suspects? An Analysis of the Malabo Protocol on the African Court'. Nairobi: AfriCOG, 2016.

68 *Ibid.*

69 Abraham G, 'Africa's Evolving Continental Court Structures: At the Crossroads?', SAIIA (South African Institute of International Affairs) Occasional Paper, 209, 2014, <http://www.saiaa.org.za/occasional-papers/669-africa-s-evolving-continental-court-structure-at-the-crossroads/file>, accessed 20 August 2018.

70 AfriCOG, *op. cit.*

71 *Ibid.*

72 AU, 'Mid-Term Activity Report on the African Court on Human and Peoples' Rights'. Addis Ababa: AU, 2017.

73 Billah M, 'Why Rwandan president Kagame criticizes ICC?', *The Geostrategists*, 1 May 2018, <https://geostrategists.com/why-rwandan-president-kagame-criticizes-icc/>, accessed 20 August 2018.

The combination of international law, human rights law and international criminal law under the jurisdiction of a single court is unprecedented in judicial history and raises several substantive and procedural concerns. In addressing these concerns, it may be helpful to apply strict procedural definitions to the 10 additional crimes of the third chamber. While their inclusion is a triumph for Africa, their bounds are at present too broad.

Moreover, there is confusion around the operation of the ACJHR alongside the ICC, an issue that has been left unaddressed in the Malabo Protocol. The existence of two courts that have the same mandate will undoubtedly create complications for those African states that wish to remain members of the ICC.<sup>74</sup> A failure to address the overlap and possible discrepancies can only result in further division in Africa regarding international criminal justice. International law knows no hierarchy, calling into question the primacy of one court over another.<sup>75</sup> Although the creation of an African court has several implications for the ICC, the principle of complementarity as included in the Rome Statute supports the idea of a regional court.

The ACJHR faces several obstacles that will likely take time to overcome. Concerns around funding, the provision of immunity, and the court's operation alongside the ICC remain central. However, to plainly rebuke the court before its establishment is unhelpful. If the aforementioned concerns are addressed and the Malabo Protocol is ratified, the ACJHR could be a cogent African alternative to achieving justice for the victims of international crimes. The court is a step towards augmented accountability in Africa, while mitigating the effects of international interference.

In addition to the establishment of a continental court, several African states have employed mechanisms that further the delivery of international criminal justice at domestic and regional levels. These include the creation of temporary courts and the promulgation of domestic legislation dealing with international crimes. The success of these efforts is an example for Africa and holds valuable lessons for the future.

Hybrid courts, for example, combine several different legal systems, addressing the gap between the constraints of a national court and the overreach of a regional court. Moreover, they can operate effectively alongside domestic judiciaries. As a fairly recent legal development, the use of hybrid courts has been limited thus far. A successful example is the [Special Court for Sierra Leone](#), established at the request of its government to the UN for a court that could address the serious crimes committed against civilians and UN peacekeepers during the country's decade-long civil war (1991–2002).<sup>76</sup> Its operation saw 10 people brought before the court, including former Liberian president Charles Taylor, for the violation of international and domestic humanitarian law.<sup>77</sup> In 2013 the court became the first in the world to complete its mandate and transition into a residual mechanism, which still exists today.

---

Hybrid courts, for example, combine several different legal systems, addressing the gap between the constraints of a national court and the overreach of a regional court

---

---

74 Kemp G, *op. cit.*

75 Asaala EO, *op. cit.*

76 Siwingwa E, *op. cit.*

77 *The Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, 2013.

Similarly, the [Extraordinary African Chambers](#) sits in Senegal and boasts the first prosecution of a former African head of state in another country. The Chambers had the jurisdiction to prosecute international crimes committed in Chad from 1982 to 1990 during the rule of then president Hissène Habré, whose tenure was marked by severe political oppression, torture and the death of approximately 40 000 people.<sup>78</sup> When Idriss Déby came to power, he appointed a truth commission to investigate crimes committed during Habré's regime. News of this commission became public and Habré fled to Senegal. A civil society group in Senegal then filed a suit against him, resulting in his indictment in 2000. However, Habré continuously sought the dismissal of this suit in Senegal, largely on the basis that he had immunity as a former head of state.<sup>79</sup> Senegal then amended its constitution to confer jurisdiction to its national courts and the result was the creation of the Extraordinary African Chambers; the first of its kind. In July 2015 Habré was brought before the tribunal on charges that placed him at the centre of incidents of torture and international crimes in Chad. In May 2016 Habré was found guilty of crimes against humanity and sentenced to life in prison. His prosecution is evidence that where there is political will and adequate resources, the cause of justice in Africa can be advanced.

## CONCLUSION

Africa has witnessed some of the worst atrocities of the past century. While many of these crimes can be attributed to colonialism and the exploitive practices of the West, others have been committed by African leaders post-independence in an impunity epidemic.<sup>80</sup> Although efforts to change this culture are evident in the normative shift towards human rights and democracy, many crimes by heads of state and government continue to go unpunished.

The recent threats of withdrawal from the ICC, made by several African countries, exemplify the conflict between Africa's desire to face impunity and the equally strong desire to assert its sovereignty and independence. These debates are a result of continued dissatisfaction with the operation of the ICC. Coupled with pressure from the AU, which places emphasis on goals of African solidarity and the achievement of peace over justice, some states have found it difficult to balance their obligations to the two institutions.

The perception that the ICC is biased against Africa is common. However, this paper suggests that the focus on Africa is a reflection of the UNSC's restriction of the ICC. The exercise of the ICC's jurisdiction is limited to those countries to which the UNSC does not object, making investigation in countries such as Syria difficult and prosecution of African leaders a plausible option. As it turns out, the ICC is not too powerful; it is too

78 Taffo FF, 'The Hissène Habré Case', ACCORD (African Centre for the Constructive Resolution of Disputes), 2013, <http://www.accord.org.za/conflict-trends/the-hissene-habre-case/>, accessed 21 August 2018.

79 Human Rights Watch, 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal', 3 May 2016, <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>, accessed 21 August 2018.

80 AfriCOG, *op. cit.*

weak. It is neither as effective as its proponents suggest nor as biased as its critics believe it to be.<sup>81</sup> Moreover, the UNSC's referral/deferral power has secured the council's place in the ICC–Africa debate. Although it is a separate body, it is possibly being irresponsible by ignoring the issues being raised when it could leverage its power to engage on and produce solutions.

Apart from these operational concerns, there are foundational issues regarding the interpretation and application of international criminal law and justice as the ICC sees fit. Within the context of the traditional politics versus law argument, the ICC has shown that it is unable to rise above the conflicts inevitable in the politics of state cooperation, rational considerations and self-interest.<sup>82</sup> Here, the failure of some African states to arrest al-Bashir, despite possible legal repercussions and criticism, demonstrates the relationship between law and politics in terms of state cooperation. It also speaks to the wider discrepancy between the norms of international criminal law and actual state behaviour. The ICC, operating at the heart of a political arena, is continuously limited by politics.

Africa's criticisms of the ICC should not, however, be seen as a rejection of the principles of international criminal justice. Several developments signify support for efforts to guarantee accountability in respect of international crimes. No continent has paid more than Africa for the lack of legitimate institutions of law and justice. Against the backdrop of a culture of impunity, Africa has made commendable efforts to institutionalise justice mechanisms. If African states are sincere about their commitment to deliver international criminal justice, they must prove this by adopting and ratifying the protocols on the ACJHR. Failure to do so will only confirm the fears of critics – that these so called 'efforts' are just a front for the protection of criminal leaders. If executed correctly, Africa has an opportunity to move the concept of criminal justice away from the limited definition contained in the Rome Statute, which aims only to punish perpetrators of crimes, towards a broader concept that recognises the impact of crimes and includes a process of reconciliation.<sup>83</sup>

There are real concerns on both sides of the spectrum that require immediate attention. While there is a need to find balance between the search for justice and political stability, the ICC cannot be used as the scapegoat for continued disappointments in several African countries that predate the ICC's existence. International criminal justice is, at this stage, a non-negotiable. Debates need to go beyond the usual 'for or against' rhetoric to ask what standard of international justice the present system can provide, and how it can be improved.

---

There is a need  
to find balance  
between the search  
for justice and  
political stability

---

---

81 Apiko P & F Aggad, *op. cit.*

82 Asin J, 'Pursuing al Bashir in South Africa: Between "apology and utopia"', in Van der Merwe HJ & G Kemp (eds), *op. cit.*

83 Rodman KA, 'Justice as a dialogue between law and politics: Embedding the ICC within conflict management and peacebuilding', *Journal of International Criminal Justice*, 12, 3, 2014, pp. 437–469.



## **SAIIA'S FUNDING PROFILE**

SAIIA raises funds from governments, charitable foundations, companies and individual donors. Our work is currently being funded by, among others, the Bradlow Foundation, the UK's Department for International Development, the Konrad Adenauer Foundation, the Royal Norwegian Ministry of Foreign Affairs, the Swedish International Development Cooperation Agency, the World Bank, the Swiss Agency for Development and Cooperation, the Open Society Foundations, the Organisation for Economic Co-operation and Development, Oxfam South Africa and the Centre for International Governance and Innovation. SAIIA's corporate membership is drawn from the South African private sector and international businesses with an interest in Africa. In addition, SAIIA has a substantial number of international diplomatic and mainly South African institutional members.



---

Jan Smuts House, East Campus, University of the Witwatersrand  
PO Box 31596, Braamfontein 2017, Johannesburg, South Africa  
Tel +27 (0)11 339-2021 • Fax +27 (0)11 339-2154  
[www.saiia.org.za](http://www.saiia.org.za) • [info@saiia.org.za](mailto:info@saiia.org.za)