Withdrawal from the International Criminal Court: Does Africa have an alternative?

*Michelle Nel and Vukile Ezrom Sibiya**

Abstract

After a century in the making, the International Criminal Court (ICC) came into existence in 2002 with an overwhelming number of states ratifying the Rome Statute. With 34 signatories, Africa is the largest contributor in the Assembly of State Parties, yet Africa has become its severest critic. As threats of withdrawal become a reality with the imminent withdrawal of Burundi, this article considers the question of whether Africa has an alternative solution. With an African Union (AU) Constitutive Act purporting a commitment to combating impunity and promoting democracy, rule of law and good governance, one would expect the AU to be ready to pick up the reins. To end impunity and hold perpetrators accountable, finding an alternative for the lacuna left in the absence of the ICC has never been more pressing. The recent adoption of a strategy by African countries for a mass withdrawal has pushed the matter to the fore. This article discusses the feasibility of amnesty, domestic and local trials,

* Dr Michelle Nel is a senior lecturer in criminal and military law at the Faculty of Military Science, Stellenbosch University. She is an admitted advocate to the High Court and has published a number of peer-reviewed articles on military law, international law and maritime security.

* Mr Vukile Ezrom Sibiya is a lecturer in labour law and security law at the Faculty of Military Science, Stellenbosch University, as well as a guest lecturer in international law at the Senior Military Management Programme.

or an African regional court as viable alternatives to ICC jurisdiction and prosecution. The creation of an African regional court in the guise of the African Court of Justice and Human Right (ACJHR) seems the preferred solution, enabled by the Malabo Protocol extending its jurisdiction to international and transnational crimes. Slow ratification does not bode well for the proposed ACJHR and its extended jurisdiction. Time is of the essence and whatever solution is found will necessitate decisive action by the AU.

Keywords: ICC, African Union, African Court of Justice and Human Rights, impunity, amnesty, regional courts

Historical background

The idea behind the establishment of the permanent International Criminal Court (ICC) was debated nearly a century ago (Schabas 2014:171). To promote the affirmative conclusion several states entered into a number of treaties, but few were signed. Consequently, the treaties were never forcefully implemented. Where states were able to reach consensus, it culminated in a number of ad hoc international tribunals being formed to delve into atrocities and infringements of human rights committed during conflicts in the world (Bassiouni 1997:11).

After World War I, despite attempts under the Treaty of Peace with Germany [Treaty of Versailles] of 1919 to haul former German Emperor Kaiser William II before an international tribunal, only a few German officers faced the German Supreme Court at Leipzig. Germans viewed this prosecution with scepticism since war crimes were committed by both sides (Bassiouni 1991:2).

The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was formed pursuant to the 1919 Paris Peace Conference. Citing atrocities by Turkish forces against Armenians as a violation of 'laws of humanity' and deserving of punishment, the Commission recommended the prosecution of those implicated by a proposed international tribunal (Meron 2006:555). The United States

opposed the idea, contending inter alia that the 'laws of humanity' were imprecise (Meron 2006:556). Another unsuccessful attempt was made by the never ratified Treaty of Sevres (Meron 2006:558), followed closely by the Treaty of Lausanne in 1923 exonerating Turkish forces implicated in atrocities by granting them amnesty (Bassiouni 1991:3). The Allies' compromise seemed to be politically motivated since the Turkish ruling elite, being partial to the western powers, was needed to control the Bosporus and Dardanelles Straits through which the Russian Navy could reach the Mediterranean (Bassiouni 1991:17).

The assassination of Prince Alexander of Yugoslavia prompted the adoption of the Convention for the Prevention and Punishment of Terrorism by the League of Nations in 1937 (United Nations General Assembly Law Commission 1949), its Protocol providing for the establishment of an international criminal tribunal which never came into force – as only India ratified it (Bassiouni 1991:4).

Two ad hoc international military tribunals, the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East, followed in the wake of the World War II atrocities. A number of factors led to criticism of these tribunals, in particular the Nuremberg Tribunal, which was seen as a selective prosecution which favoured the allied forces, and was accordingly lambasted as nothing but 'Victors' Justice' (Economides 2003:34). Professor Christopher Blakesley (1994:80) argues that crimes committed by Soviets against minorities in Poland and the Baltic states could have been easily classified as 'crimes against humanity'. He questions the failure to haul Allied forces before tribunals notwithstanding the heinous acts committed in Tokyo, Dresden, Hiroshima or Nagasaki.

The continued quest to establish an international tribunal can be traced through post-World War II conventions such as the Geneva Convention on the Prevention and Suppression of the Crime of Genocide of 1948 which contained a provision predicting the establishment of the ICC by expressly recognising the jurisdiction thereof.

Lessons learnt

The Nuremberg and Tokyo prosecutions influenced the United Nations (UN) debate on the establishment of a permanent international court – a process that continued until it was stalled during the cold war era (Dugard 2011:171). Momentum was regained in 1989, following Trinidad and Tobago's motion to combat drugs and trafficking through the establishment of an International Criminal Court, when the United Nations General Assembly sanctioned the International Law Commission to develop a draft statute for an International Criminal Court (Schabas 2014:188). At its 46th session, the Commission adopted the formal draft and handed it over to the General Assembly for deliberation (Dugard 2011:171; Crawford 1995:404).

It was amidst the development of the draft statute that the United Nations Security Council (UNSC) was obliged to establish an ad hoc tribunal to deal with the atrocities committed in the former Yugoslavia. In May 1993, they adopted resolution 827 authorising the Tribunal to deal with individuals implicated in the transgressions of International Humanitarian Law (Schabas 2001:11). After the Rwandan genocide, the UNSC adopted resolution 955 in November 1994 in response to Rwanda's call for the establishment of an ad hoc tribunal to deal with those deemed liable for the atrocities committed in Rwanda and its neighbouring states (Schabas 2001:11).

In spite of their shortcomings, the Nuremberg and Tokyo tribunals served as a foundation upon which the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established (Meron 2006:559). Prof John Dugard asserts that 'the Rwanda and Yugoslav Tribunals furthered the widespread belief that a permanent international criminal court was desirable and practical' (Dugard 2011:172).

The Rome Statute

Intense negotiations lasting five weeks in Rome signalled an end to the longest protracted process of drafting and agreeing on the Statute for the ICC (Economides 2003:37). States, Non-Governmental Organisations (NGOs) and activists' groups were to ensure that 'the long held dream of the ICC [would] now be realised' (Economides 2003:29). The primary aim of the ICC was to put a halt to impunity for perpetrators of the most egregious crimes and violations of human rights of international concern. Despite the heated debate surrounding many of these issues, ranging from fears of states that their sovereign rights would be impinged to concerns that the Statute conflicted with their foreign policies, a group of like-minded states, including Germany and Canada, pushed for 'a very powerful ICC with primacy over state practice' (Economides 2003:45; Benedetti et al. 2014:65).

The Statute of the ICC was adopted on 17 July 1998 by an overwhelming majority of states attending the Rome Conference. The Treaty (United Nations 1998) was adopted after 120 states voted in favour of adoption. Only China, Israel, Iraq, and the United States voted against it, and 21 abstained. By the 31 December 2000 deadline, 139 states had signed the treaty and by 11 April 2002, it had been ratified by 66 states (Benedetti et al. 2014:173). To date it has been ratified by 122 states, of which 34 are African.[1]

Situation and investigations

Since the ICC's inception, all the warrants against implicated persons have been issued against Africans although preliminary investigations have been conducted throughout the world, namely, Ukraine, Iraq/United Kingdom, Columbia, Afghanistan and Georgia. In Georgia the Prosecutor opened a

1 The latest ratification status is available from: <https://asp.icc-cpi.int/EN_Menus/asp/pages/asp_home.aspx> [Accessed 4 February 2017].

proprio motu[2] investigation on 27 January 2016 over 'alleged crimes against humanity and war crimes committed in the context of an armed conflict between 1 July and 10 October 2008' (Office of the Prosecutor 2016; Gegout 2013:808). The Prosecutor is yet to issue indictments as a result of ongoing preliminary investigations (Office of the Prosecutor 2016).

While Palestine was accepting the jurisdiction of the ICC on 1 January 2015 and acceding to the Rome Statute on 2 January 2015, the Prosecutor opened a preliminary examination for atrocities in Palestine and East Jerusalem since 13 June 2014. Following the 2009 military coup of José Manuel Zelaya Rosales, the President of Honduras, the ICC instituted preliminary investigations on crimes committed during the post-coup period; however on 28 October 2015, the Prosecutor closed the preliminary examination citing lack of reasonable basis to proceed with an investigation (Office of the Prosecutor 2016). In 2014, the ICC Prosecutor, Mrs Fatou Bensouda, re-opened the preliminary examination of the situation in Iraq, aimed at analysing alleged crimes attributed to the armed forces of the United Kingdom deployed in Iraq between March 2003 and July 2009 (Office of the Prosecutor 2016).[3]

These preliminary investigations outside the African region serve to demonstrate the Court's preparedness to take on cases beyond Africa, thereby dispelling the myth that the ICC only focuses on situations in Africa.

Concerns raised by African countries

Africa is the largest regional grouping of countries within the ICC's Assembly of States (Murithi 2012:4). The idea of an autonomous apolitical international court attracted overwhelming support on the African continent (McNamee 2014:5). In spite of the perceived support of the ICC

2 Kaul (2010) states that under Arts 13 (c) and 15 of the Rome Statute, the prosecutor is empowered to initiate investigations ex officio solely based on his or her own appreciation of a certain situation or information (Art. 15 (3)–(5) Rome Statute).

3 According to the OTP report dated November 2016, the Prosecutor is in the process of gathering factual evidence in order to establish if there were atrocities committed during armed conflict in Iraq which may lead to indictment of those implicated.

and its ideals, it became clear that a number of African countries have now turned hostile towards the very institution it has pledged to support. Forerunners of this hostility seem to have come from the AU, the one organisation that represents all the countries on the African continent (Murithi 2012:4). This is an organisation whose Charter on Human and People's Rights very clearly states in the preamble that signatories will 'coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and ... promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights', and further recognises that human beings are entitled to 'national and international protection'.

These principles are further repeated in the AU's Constitutive Act as its objectives 'encourage international co-operation' and 'promote and protect human and people's rights' in accordance with the Charter of the UN and the Universal Declaration of Human Rights (African Union 2000).[4]

A number of high-profile, much publicised incidents have precipitated a change from initial support of the ICC to the AU's current hostile stance. The indictment of the Sudanese President Omar al-Bashir by the ICC Prosecutor and the African countries' perceived[5] refusal to assist in his arrest was followed by the indictment of Kenya's Uhuru Kenyatta and William Ruto who were subsequently elected president and deputy-president respectively. It has been argued that Africa's hostility should not be seen as a rejection of international justice per se; but rather a rejection of the continuing power plays by the more powerful nations in the international community (McNamee 2014:6). The perception remains that in spite of a number of conflicts throughout the world, to date the

4 See Art. 3 of the Constitutive Act of the African Union.

5 African countries did not in fact oppose the prosecution of Al-Bashir by the ICC. Their concern related to the timing of issuing of the arrest warrants which coincided with regional peacebuilding efforts (Murithi and Ngari 2011:9).

ICC has focussed exclusively on Africa (Murithi 2012:4).[6] This has created a wariness amongst African leaders regarding the agenda of the ICC. It has been argued that Africa is being singled out since the ICC cannot risk alienating its biggest financial supporters, and Africa lacks the diplomatic and economic power of other countries (Murithi 2012:5). This argument, however, loses traction if one considers the fact that a number of the prosecutions and investigations before the Court was due to self-referral by African states. Uganda, The Democratic Republic of the Congo (DRC) and the Central African Republic are cases in point (Hansen 2013).

Mueller (2014:29) argues that the move away from support of the ICC can be attributed to changes in the political situation and weaknesses in the rule of law. She argues that ratification and compliance was easy as long as support of the ICC carries little political risk. The history of the ICC investigations shows that the ICC initially concentrated on non-state actors and one side of the conflict (Mueller 2014:29).[7] In its 12 years of existence there have only been two successful prosecutions. Politicians can be forgiven for thinking that they would not become vulnerable to the ICC since it is an accepted rule in international customary law that a serving head of state is immune from the jurisdiction of other states (Akande 2008:1). Although Article 27(2) of the Rome Statute provides that such immunities do not prevent the ICC from instituting prosecution, to date serving heads of state have been relatively protected from prosecution.[8] Since their election as president and deputy-president, both Kenyatta and

6 There are however sufficient reasons to pursue the indictments and statistically the number of atrocities in Africa makes it a natural conclusion that the focus of prosecution will be on Africa. It is also of interest that it is the governments that are complaining and not the victims – see in this regard the discussion in Du Plessis et al 2013.

7 The conflict in Northern Uganda serves as example. In 2003 the Government of Uganda referred the conflict to the ICC. The chief prosecutor issued arrest warrants for five members of the Lord's Resistance Army (LRA) but chose not to issue warrants for members of the Ugandan Army. The crimes committed by the LRA were deemed of 'higher gravity than those allegedly committed by the Ugandan Army' (Malu 2015:87).

8 A notable exception is the indictment by the ICTY of Slobodan Milosevic while he was a serving head of state.

Ruto have been successful in mobilising the AU and challenging the ICC on legal grounds,[9] thereby frustrating the ICC's ability to go ahead with their cases (Mueller 2014:26).

However, the ICC's investigation of Kenya dramatically increased the political risk factor for other countries (Mueller 2014:29). With the high level of conflict in Africa and the involvement of both state and non-state actors, African leaders could clearly see that they were not as immune from the ICC as previously believed. Soon after the ICC prosecutor named the Kenyan defendants in December 2010, the AU came out in support of a deferment of the investigations, ostensibly to allow Kenya the opportunity to prosecute its cases in its own courts (Mueller 2014:31). When this proved unsuccessful,[10] the AU proposed a resolution for African states to pull out of the ICC. This was followed by a special summit in October 2012 to discuss the possible pull-out of African countries. The AU painted the ICC as an 'anti-African, colonial, western institute' (Mueller 2014:32–35). The AU even went as far as submitting a motion to the UNSC that all African heads of state should be given immunity from prosecution, which was not accepted by the UNSC (Mueller 2014:37).[11]

One of the objectives of the ICC is to end impunity, and the hostility towards the ICC raises concerns regarding the fate of other human rights treaties and international criminal justice in general (Mueller 2014:26). One need only look at the relative impotence of the African Human Rights Commission, who can only make recommendations, and the lack of political will in

9 Kenyatta challenged the admissibility of the trial before the ICC, arguing that Kenya was undergoing extensive legal and judicial reforms which would allow for the domestic prosecution of these trials. When this was unsuccessful he challenged the jurisdiction of the ICC on the grounds that the severity of the alleged crimes against humanity did not meet the required threshold as required in terms of the Rome Statute. This challenge also failed (Mueller 2014:26).

10 Due to its previous refusal, human rights bodies and victims did not trust the about-face of Kenya in expressing its desire to handle its own prosecutions (Mueller 2014:31).

11 Seven members voted in favour of the resolution while eight abstained. For a comprehensive discussion on the reasons for abstention see United Nations Security Council 2013.

implementing their suggestions. Desmond Tutu, prominent South African Nobel Peace Prize winner and human rights activist, stated that 'African leaders behind the move to extract the continent from the jurisdiction of the [ICC] [w]ere ... seeking a licence to kill, maim and oppress their people without consequence' (Mueller 2014:37). The message of the ICC is that serious international crimes such as genocide, crimes against humanity and war crimes cannot be tolerated. This is an important rationale for international criminal justice – an intolerance for impunity should act as a deterrent. This requires that the international structures put in place to enforce international jurisdiction remain credible (Kastner 2012:10).

It is by ending impunity that the ICC assists emerging democracies in strengthening their own laws, thereby supporting respect for human rights (Murithi and Ngari 2011:18). The continued tension between the AU, the UNSC and the ICC will necessarily filter down to these emerging democracies. Tensions are most visible in the African context and consequently it has been argued that 'the impact of the ICC on global justice will be determined in Africa' (Murithi and Ngari 2011:18). Where most human rights treaties do not have any means of enforcement, the Rome Statute is enforceable. This in itself should mean that countries should be compelled to comply with the indictments. The challenge arises when a body is dependent on the co-operation of a government to fulfil its mandate yet it is that same government that stands to be investigated. Without the political will of its State Parties the ICC cannot function effectively. It frequently happens that those accused of atrocities in civil wars end up as leaders in the post-conflict governments (Murithi 2012:5). Some African countries' blatant disregard for the actions taken by the ICC does not bode well for its credibility.

This raises the important question: Does Africa have an alternative solution? The mandate of the AU ostensibly complements that of the ICC – both strive to end impunity and hold violators accountable. The problem lies with their divergent approaches, which is not surprising since the AU is a political body and the ICC a judicial body (Murithi 2012:7). This difference also reiterates the dichotomy between attaining justice versus attaining peace.

The one does not necessarily include the other.[12] By entering the international arena the judiciary is effectively entering the arena of politics, something that usually does not fall within its ambit. The ICC's mandate does not include the pursuit of peace and reconciliation (Murithi and Ngari 2011:2). Courts are by nature retributive and generally not focussed on reconciliation. With its colonial history it is also not surprising that the AU does not want to expose its political leaders to what is perceived as a mainly European judicial system.[13] The history of the African countries is an important consideration in the reasons for the violent atrocities taking place. Merely prosecuting a handful of individuals does not address the deep-rooted structural and socio-economic concerns that often drive the violence (Murithi and Ngari 2011:9). One could ask whether the pursuit of justice is feasible if it is to the exclusion of lasting peace.

This raises the question of what alternatives are available as opposed to prosecution before the ICC. Must offenders in fact be prosecuted? A number of international criminal treaties impose a duty on signatory states to prosecute individuals. These treaties are limited in application to either narrowly defined actions or to atrocities committed in international armed conflicts, thereby excluding the most prevalent cases of non-international armed conflicts (Scharf 1996:43–46). The same cannot be said for a number of general international human rights conventions. They do not impose any duty to prosecute, only to 'ensure the rights enumerated therein' (Scharf 1996:48).

12 Some argue that peace and justice are not necessarily mutually exclusive either. An initial focus on restorative justice before other avenues of justice should enable a country to consolidate peacebuilding efforts. Overemphasis on one at the expense of the other does not lead to lasting stability (Murithi and Ngari 2011:8 and 10).

13 Tladi (2009:66) postulates that the argument against imperialist interference has lost ground considering that the values espoused by the ICC, such as intolerance against impunity, have been 'appropriated by African culture'. He argues that one cannot simply ignore the fact that 33 of the 54 AU member states have ratified the Rome Statute and that the values enshrined in the Rome statute have also been included in the AU Constitutive Act. He postulates that 'the time has come to accept the values under consideration are not only part of European heritage but the common heritage of mankind, including Africa'.

Other possible alternatives?

Amnesty

Countries have resorted to a number of measures in trying to bring an end to violence and move towards peace. Transition may often only be possible where the needs of the state to balance a delicate political process and resolve the conflict can be reconciled with the international community's need to exact justice from the perpetrators of international crimes (Naqvi 2003:583). This cannot be done if the perpetrators of systematic human rights abuses are not held accountable (Mennecke 2008:1). Should accountability necessarily mean prosecution? The granting of amnesty, an option not deemed acceptable in the context of serious international crimes, has long been in use to facilitate conflict resolution and 'create conditions for reconciliation' (Arsanjani 1999:65). Several countries have offered domestic amnesty to perpetrators of a number of atrocities[14] and in some cases the amnesties were supported by the UN as a means of restoring peace and democracy. Amnesties are usually negotiated in an agreement or legislated to form part of national laws (Naqvi 2003:583).

Would the granting of amnesty to perpetrators impact an ICC investigation? It is required in principle, when negotiating amnesty, to exclude amnesties for international crimes that fall within the jurisdiction of the ICC (Murithi and Ngari 2001:5). A number of provisions in the Rome Statute clearly shows that the ICC is not in favour of amnesties (Arsanjani 1999:67).[15] The reality is, however, that this may often be the only way to draw actors from opposite sides of the conflict to a dialogue enabling a resolution to the conflict. The Rome Statute does not specifically prohibit amnesties and until the ICC has ruled on the matter, it remains debatable whether the ICC would recognise a domestic amnesty law granting amnesty to a perpetrator suspected of serious international crimes. Looking at the main objective of the ICC as facilitating the end of impunity, amnesty would seemingly

14 Scharf (1996:41) refers inter alia to Argentina, Cambodia, Chile, Haiti and South Africa.

15 See in this context inter alia the Preamble of the Rome Statute, Article 1 and Article 17.

not be conducive towards this end. National amnesty laws would also not bind the ICC as an international organisation which bases its resolutions on treaty law (Naqvi 2010).

Domestic and local trials

Even where countries have shown their apparent willingness to protect human rights by signing the Rome Statute, it does not necessarily follow that the domestic courts are equipped to prosecute perpetrators of violent atrocities. Very few African countries have in fact adopted the Rome Statute into their domestic law. Without such domestication perpetrators cannot be prosecuted on a national level, leaving the ICC with no option but to institute prosecution. It also shows a clear lack of political will by African leaders to protect human rights and end impunity.[16]

Africa has however shown that prosecution of the most serious crimes is indeed possible as evidenced by the Habré trial in Senegal. This trial was the first African-led prosecution, incorporating a blend of international and domestic laws (Sirleaf 2016:16). Despite experiencing financial difficulties, deposed Chadian President Hisséne Habré was convicted on 30 May 2016 by the Extraordinary African Chambers in the Senegalese court system for crimes, including war crimes, crimes against humanity, torture, sexual violence and rape (Human Rights Watch 2016b, Tladi 2009:67). He was sentenced to life in prison. Justice is therefore possible if the political will exists, but remains difficult to obtain. Habré's victims waited 25 years for justice.

Domestic courts may not be the only solution. Africa has a rich tradition of traditional justice mechanisms, which are often used by communities to handle disagreements (Muruthi and Ngari 2011:6). Can these traditional mechanisms, however, sufficiently address the most serious of international crimes? There are some examples where traditional mechanisms have been successful in attaining justice and also facilitating reconciliation. One such example can be found in the Gacaca trials held in Rwanda after the 1994

16 For a more detailed discussion see Institute for Security Studies 2009.

genocide killed close to 1 000 000 people. These trials ran parallel to the processes of the ICTR and the domestic court system. To a certain extent these courts functioned as a type of truth and reconciliation commission in that victims had the opportunity to find out what happened to their family members during these trials. Where perpetrators convinced the courts of their repentance, punishments tended to be more lenient than in the case of those who did not repent, and in many instances the perpetrators were even allowed to return and reintegrate into their communities without incurring punishment. More than 1.2 million cases were tried in 12 000 courts compared to the approximately 63 cases handled by the ICTR.[17]

Corey and Joireman (2004), however, argue that the Gacaca trials did not facilitate conciliation but in fact emphasised the ethnic divide and pursued inequitable justice since they only prosecuted genocide and not war crimes. For a number of years this has indeed been the pervasive opinion. Since the Gacaca trials ended in 2013, studies evaluating the impact of the trials on justice and conflict resolution are only now emerging. Although the main focus of the trials seemed to be on restorative justice, sentences incurred did in fact also reflect punitive aims. In spite of severe criticism of the process and outcomes over the years, Brehm and others (2014:346–347) find that the Gacaca trials rather encourage the use of innovative means to deal with lesser offences in a number of social contexts. Whether community-based trials are a viable method of dealing with mass atrocities remains a matter for debate, but the Gacaca trials can be regarded as 'a powerful response to mass crime and an important element in the struggle to address society-wide tragedy and move forward' (Brehm et al. 2014:347).

The African regional courts as an alternative?

On paper Africa has a good track record in the development of human rights documents to protect its people. Even during the reign of the Organisation of African Unity (OAU), an organisation known for its

17 See the discussion on the UN Background information on the justice and reconciliation process in Rwanda (United Nations 2016) for a detailed history on the Rwanda tribunal.

non-interventionist approach, a number of regional conventions were adopted as part of its legislative framework. The focus on human rights protection was developed further since the OAU partnered with the International Committee of the Red Cross (ICRC), and culminated with the evolution of the OAU into the AU (Mubiala 2002:35–59). For the first time, the Constitutive Act of an African regional organisation asserted a right to intervene in other countries where the AU Assembly agrees that the breaches are grave enough to warrant intervention (Viljoen 2004:349). One would therefore expect no hesitation in holding perpetrators accountable for serious violations of the human rights they reportedly support. The African Commission on Human and Peoples' Rights, modelled on the UN Human Rights Committee, was appointed as custodian responsible for human rights compliance in Africa. At its inception, it was the only body in Africa tasked with the promotion and protection of human rights. As part of its mandate its function includes consideration of complaints filed by various individuals and NGOs. These complaints are lodged in the form of communications which are usually considered during closed sessions and are of a confidential nature (African Union 2009).[18] In instances of dire emergency, the Commission would inform the Chair of the AU and request an in-depth study of the situation, or alternatively a fact-finding mission.

Unfortunately the decisions taken by the Commission are regarded as non-binding since the Commission is at most a quasi-judicial body. Decisions cannot be published without the authority of the AU Assembly of Heads of State and Government. The African Charter furthermore did not provide any enforceable remedies to track compliance by states with these decisions. The member states were obliged to give bi-annual reports on the state of human rights within their country, but few states complied and the Commission had no authority to enforce this.

18 A communication is a 'document submitted by a State Party, a Non-Governmental Organisation (NGO) with Observer Status before the African Commission or an individual alleging violations of the provisions of the African Charter by a State of the African Union' (African Union 2009).

This is set to change. In the Commission's Rules of Procedure, adopted in 2010, part four creates a relationship between the Commission and the African Court on Human and People's Rights. Rule 114 states that the court now complements the protective mandate of the Commission and allows the Commission to approach the Court where a country is unwilling to comply with the recommendations made by the Commission in addressing serious human rights violations. Although this is a step in the right direction, the African Court still lacks international criminal jurisdiction to prosecute serious violations. It would probably be able to make an order compelling a member state to address the concerns of the Commission, but it is still unclear to what extent this order would be enforceable.

It is necessary to make a brief overview of the history of the African Court in order to understand the reluctance towards accepting such a court as the solution to the prosecution of atrocities.

The genocide in Rwanda and wide-spread human rights abuses in Sierra Leone clearly showed the need for Africans to act against atrocities committed in Africa. Although ad hoc Tribunals were created, the prevalence of conflicts and the resultant abuses show the clear need for a permanent African court. Unfortunately this was not always the accepted mindset. Historically African leaders have shown a reluctance to submit themselves to a court's jurisdiction. In 1963 the founding conference of the OAU rejected the draft Charter that provided for a Court of Mediation, Conciliation and Arbitration (Udombana 2003:819). Their decision to rather create the Commission of Mediation, Conciliation and Arbitration in pursuit of facilitating peaceful dispute settlement is an indication of African leaders' preference for the use of quasi-judicial bodies rather than courts with enforceable jurisdiction.[19] The Commission never became operational.

The next opportunity for creating a pan-Africanist court once again met with failure when the OAU refused to establish the African Human

19 Udombana (2003:818) postulates that African dispute settlement favours 'consensus and amicable dispute settlement, frowning upon the adversarial and adjudicative procedures common to Western legal systems'.

Rights Court in accordance with the African Charter, settling instead on the African Commission on Human and People's Rights, who may only now potentially have the ability to enforce its recommendations. As stated above, it is unclear to what extent and what form the enforcement will take.

The Protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the Establishment of the African Court on Human and Peoples' Rights was adopted as a protocol to the African Charter in June 1998 by the Assembly of Heads of State and Government in Ouagadougou, creating the African court. There was however some reluctance by African states in accepting the Court's jurisdiction. The Protocol was adopted in 1998 but only came into operation six years later in 2004 after 15 states had ratified it. As of the beginning of 2014 only 27 out of a possible 54 AU states have ratified the protocol. The slow ratification would seemingly indicate a continued reluctance by African nations to subject themselves to the jurisdiction of the court.[20] This does not bode well for a replacement of the ICC – which in fact has more African countries having ratified its treaty. The African court held its first public hearing only in 2012, eight years after coming into operation.

ACHPR is not the only court envisaged for Africa. The Constitutive Act of the AU makes provision for an African Court of Justice, the main judicial body of the AU (Udombana 2003:816).[21] The idea was that this court would interpret the Constitutive Act and resolve disputes between states (Pityana 2003). This court never came into existence. Its function is currently being fulfilled by the ACHPR.

20 The reluctance of African states in ratifying the Protocol partly stems from a lack of understanding of the role of the Court in their domestic jurisdictions. They seem reluctant to accept extra-territorial jurisdiction and fear that an African court may in fact undermine their domestic courts (Pityana 2004:123 and 129).

21 The Constitutive Act did not elaborate on the composition of the Court, its mandate or function.

Just as the development of the ACHPR was gaining momentum, the Chairperson of the AU Assembly at the time, President Olusegun Obasanjo, revived the idea of a merger between the ACHPR and the African Court of Justice (Sceats 2009:4). The suggestion was accepted and in July 2004 the AU Assembly agreed to the merger. As soon as the new court is established, it will be known as the African Court of Justice and Human Rights (ACJHR) and will be the main judicial organ of the AU (Sceats 2009:5). The Protocol establishing the court was adopted in July 2008 at the 11th AU Summit, but to date has only been ratified by five of the required 15 countries. Reflecting on the rocky history of the establishment of a pan-Africanist court, it remains doubtful that the court will become operational in the near future. In the interim the ACHPR remains operational until such time that the pending cases can be transferred to the human rights section of the African Court of Justice (Sceats 2009:6).[22]

The new ACJHR will have jurisdiction to hear cases brought against member states for the infringement on human rights. Where violations are found, the court would be able to issue binding judgments and could order compensation for the victims. They will also be able to issue advisory opinions on general questions of human rights law (Sceats 2009:6). Although the focus of the court originally was on human rights, the Assembly of Heads of State and Government requested a study into the implications of extending the court's jurisdiction to criminal matters in 2009. The subsequent Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) was adopted in June 2014 by the AU Heads of State and Government meeting

22 This interim measure was taken due to lobbying efforts of a number of NGOs who feared that human rights would have no judicial protection while waiting for the new court to come into existence. The ACHPR has both contentious and advisory jurisdiction, hearing cases and disputes relating to the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol as well as other human rights instruments ratified by its state parties. As of March 2017 the Court has received 124 applications since its first judgement in 2009. It has finalised 32 cases. Their website can be accessed at <en.african-court.org>.

in Malabo, Equatorial Guinea. The Malabo Protocol proposes to extend the jurisdiction of the ACJHR to international as well as transnational crimes (Amnesty International 2016).

If given criminal jurisdiction, the ACJHR will have an advantage that its European and inter-American counterparts and even the ICC do not have. Article 28 of the Statute of the ACJHR, as well as the preamble of the Protocol of the Statute, reiterates the Constitutive Act of the AU which provides for a Court of Justice with the jurisdiction to interpret and apply the Constitutive Act and '*all other Treaties* adopted within the framework of the Union'.[23] The other international courts are limited to interpreting only one treaty.

A negative aspect however is that complaints are only possible against states and not against individuals. Consequently it may be extremely difficult for those most in need of assistance to bring a matter before the Court. The Court only allows direct access to member states and a limited number of African NGOs. All other NGOs as well as individuals will only be able to gain access if the State against whom the action is based signs a special declaration acceding to the jurisdiction of the Court to hear the case (Sceats 2009:2). It would not be surprising if few, if any, states actually grant such permission, especially seen against their perceived reluctance to subject themselves to the court's jurisdiction.

By implementing and supporting an African court with jurisdiction over international crimes, African countries will be a step closer to ensuring that the ICC will not prosecute Africans. Since the ICC's jurisdiction is complementary, intervention will only take place where the domestic courts fail to establish credible avenues for prosecuting serious crimes (Muruthi and Ngari 2011:3). The actual exercise of the complementary jurisdiction may potentially create tension between the ICC and the African court. Article 46 A bis of the Malabo Protocol immunises serving heads of state and government, or anybody acting in such capacity for the

23 Emphasis added.

tenure of their office. This includes senior state officials. These immunities include functional and official immunities as provided under customary international law and deemed necessary in the maintenance of international peace and co-operation (Sirleaf 2016:11). Whereas the Rome Statute allows for the indictment of sitting heads of state, the African court will only have jurisdiction once their term ends. Considering the indefinite terms of tenure of some heads of state it remains to be seen whether the ICC will wait on the African court. Doing so could lead to justice denied for a number of victims.

Currently the complementary nature of the ICC's jurisdiction does not apply to regional jurisdiction, only domestic, but it would be possible to amend the Rome Statute in this regard or reach an agreement between the two courts (McNamee 2014:13). The ideal would be that the African Court address serious crimes and that referral to the ICC only takes place where the African court could not adequately redress the wrongs (McNamee 2014:13).

Conclusion

The strong anti-ICC stance of the AU has placed pressure on African signatories of the Rome Statute to bow under the regional pressure and not co-operate with the ICC (Weldehaimanot 2011:219; Tladi 2009:61). Africa's failure to hand over Al-Bashir is a case in point. The ICC's insistence on executing the arrest warrant has prompted the AU to discuss withdrawal at a number of summit meetings, culminating in Burundi, Gambia and South Africa indicating their intention to withdraw from the ICC.

After the UN Human Rights Council resolved to create a commission of inquiry into alleged human rights abuses, Burundi sent their formal notification of withdrawal to the UN, accusing powerful countries of using the ICC to punish African leaders (Human Rights Watch 2016a). Gambia's announced withdrawal was subsequently revoked by the newly elected President Barrow (Keppler 2017b).

On 19 October 2016 South Africa seemed set to withdraw when the Minister of International Relations and Co-operation signed the notice of withdrawal

from the ICC, informing the UN that South Africa's obligations to peaceful conflict resolution was incompatible with the UN's. The withdrawal would take effect one year after receipt of the notice (Nichols 2016). After the Gauteng High Court however ruled that South Africa's initial process of withdrawal was unconstitutional and therefore invalid, South Africa had to issue a notice to revoke their withdrawal (Staff Reporter 2017).

These proposed withdrawals raised the spectre of a possible mass exodus. The AU had made no secret of its acrimony towards the ICC. At the recent 28th Annual Summit of Heads of State at the end of January 2017 in Addis Ababa, the AU managed to adopt an ICC withdrawal strategy. The strategy is regarded by some as a 'political message' to the ICC (Du Plessis 2017). Although the strategy is non-binding since the AU is not a state party and cannot make decisions for the collective group, it is of serious concern that the AU has reached this stage of contemplating mass withdrawal without having a permanent alternative in place.[24] Membership to the ICC, once regarded with optimism, has become a serious divisive issue in Africa. Burundi is still set to withdraw and South Africa's revocation of their withdrawal was not due to a change of heart – its constitutional processes prevented withdrawal and its stance towards the ICC remains. On the other side of the issue is Nigeria, Senegal and Cape Verde who reiterate that the ICC still has an important role to play on the continent. These countries have lodged formal reservations to the decision adopted by the heads of state. Malawi, Tanzania, Tunisia and Zambia have requested more time to study the strategy. It is against this divisive background that now, more than ever, the AU must act decisively and not pay mere lip-service to its 'unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the Continent …' (Weldehaimanot 2011:214).

24 According to Human Rights Watch, the strategy of ICC withdrawal is not in fact a clear call for mass withdrawal. It is a call for further research and consideration of the idea of a collective withdrawal. The strategy also reiterates the AU's concerns regarding its relationship with the UNSC and once again calls for an amendment of the Rome Statute to exempt sitting heads of state from prosecution. It does however provide information to states on how to withdraw from the ICC (Keppler 2017a).

Sources

African Union 2000. *Constitutive Act of the African Union*. Available from: <http://www.achpr.org/files/instruments/au-constitutive-act/au_act_2000_eng.pdf> [Accessed 14 February 2017].

African Union 2009. Communication procedure. African Commission on Human and People's Rights. Available from: <http://www.achpr.org/communications/procedure/> [Accessed 14 February 2017].

Akande, Dapo 2008. The Bashir Indictment: Are serving Heads of State immune from ICC prosecution? Oxford Transitional Justice Research Working Paper Series. Available from: <https://www.law.ox.ac.uk/sites/files/oxlaw/akande1.pdf> [Accessed 14 February 2017].

Amnesty International 2016. Malabo Protocol: Legal and institutional implications of the merged and expanded African Court. Available from: <https://www.amnesty.org/en/documents/afr01/3063/2016/en/> [Accessed 14 February 2017].

Arsanjani, Mahnoush H. 1999. The International Criminal Court and national amnesty laws. Proceedings of the Annual Meeting (American Society of International Law), 93, pp. 65–68.

Bassiouni, M. Cherif 1991. The time has come for an International Criminal Court. *Indiana International and Comparative Law Review*, (1), pp. 1–43.

Bassiouni, M. Cherif 1997. From Versailles to Rwanda in seventy-five years: The need to establish a permanent International Criminal Court. *Harvard Human Rights Journal*, 10, pp. 11ff.

Benedetti, Fanny, Karine Bonneau and John Washburn 2014. *Negotiating the International Criminal Court Statute: New York to Rome, 1994–1998*. Leiden, Martinus Nijhoff Publishers.

Blakesley, Christopher L. 1994. Obstacles to the creation of a permanent war crimes tribunal. *The Fletcher Forum*, 327, pp. 77–102. Available from: <http://scholars.law.unlv.edu/facpub/327> [Accessed 14 February 2017].

Brehm, Hollie N., Christopher Uggen and Jean-Damascéne Gasanabo 2014. Genocide, justice, and Rwanda's Gacaca courts. *Journal of Contemporary Criminal Justice*, 30 (3), pp 333–352.

Corey, Allison and Sandra F. Joireman 2004. Retributive justice: The Gacaca courts in Rwanda. *Africa Affairs*, 103 (410), pp. 73–89.

Crawford, James 1995. The ILC adopts a statute for an International Criminal Court. *The American Journal of International Law*, 89 (2), pp. 404–416.

Dugard, John 2011. *International Law: A South African perspective*. 4th ed. Cape Town, Juta.

Du Plessis, C. 2017. African countries adopt strategy for mass withdrawal from ICC. *Eyewitness News*, 1 February. Available from: <https://ewn.co.za/2017/02/01/African-countries-adopt-strategy-for-mass-withdrawal-from-icc> [Accessed 1 February 2017].

Du Plessis, Max, Tiyanjana Maluwa and Annie O'Reilly 2013. *Africa and the International Criminal Court*. London, Chatham House. Available from: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf> [Accessed 14 February 2017].

Economides, Spyros 2003. The International Criminal Court: Reforming the politics of international justice. *Government and Opposition*, 38 (1), pp. 29–51.

Gegout, Catherine 2013. The International Criminal Court: Limits, potential and conditions for the promotion of justice and peace. *Third World Quarterly*, 34 (5), pp. 800–818.

Hansen, Thomas O. 2013. Africa and the International Criminal Court. In: Murithi, Tim ed. *Handbook of Africa's International Relations*. Abingdon, Routledge. pp. 165–179.

Human Rights Watch 2016a. Burundi: ICC withdrawal major loss to victims. *Human Rights Watch*, 27 October. Available from: <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> [Accessed 18 April 2017].

Human Rights Watch 2016b. The trial of Hisséne Habré. Available from: <https://www.hrw.org/tag/hissene-habre> [Accessed 01 February 2017].

Institute for Security Studies 2009. Statement by representatives of African civil society and the legal profession on the implications of the African Union's recent decisions on universal jurisdiction and the work of the International Criminal Court in Africa, Cape Town, 11 May 2009. Available from: <https://issafrica.s3.amazonaws.com/site/uploads/PRAUICC110509.PDF> [Accessed 14 February 2017].

Kastner, Philipp 2012. *International criminal justice in bello? The ICC between law and politics in Darfur and Northern Uganda*. Leiden, Martinus Nijhoff Publishers.

Kaul, Hans-Peter 2010. International Criminal Court. *Oxford Public International Law*. Available from: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42?print> [Accessed 17 April 2017].

Keppler, Elise 2017a. AU's ICC strategy 'less than meets the eye': Opposition to withdrawal by states. *Human Rights Watch*, 1 February. Available from: <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye> [Accessed 18 April 2017].

Keppler, Elise 2017b. Gambia rejoins ICC: South Africa, Burundi now outliers on exit. *Human Rights Watch*, 17 February. Available from: <https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc> [Accessed 18 April 2017].

Malu, Linus N. 2015. The International Criminal Court and conflict transformation in Uganda: Views from the field. *African Journal on Conflict Resolution*, 15 (2), pp. 81–103.

McNamee, Terence 2014. The ICC and Africa: Between aspiration and reality: Making international justice work better for Africa. Discussion Paper 2/2014. Brenthurst Foundation. Available from: <http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commisioned_Reports/Brenthurst-paper-201402-ICC-and-Africa.pdf> [Accessed 14 February 2017].

Mennecke, Martin 2008. Fragile states and the International Criminal Court: Friends or foes? DIIS Policy Brief. Available from: <http://pure.diis.dk/ws/files/69515/PB2008_10_International_Criminal_Court.pdf> [Accessed 14 February 2017].

Meron, Theodor 2006. Reflections on the prosecution of war crimes by International Tribunals. *The American Journal of International Law*, 100 (3), pp. 551–579.

Mubiala, Mutoy 2002. International Humanitarian Law in the African context. In: Juma, Monica K. and Astri Suhrke eds. *Eroding local capacity: International humanitarian action in Africa*. Spain, Grafilur Artes Gráficas. pp. 35–59.

Mueller, Susanne D. 2014. Kenya and the International Criminal Court (ICC): Politics, the election and the law. *Journal of Eastern African Studies*, 8 (1), pp. 25–42.

Murithi, Tim 2012. Africa's relations with the ICC: A need for reorientation? In: Heinrich Böll Stiftung *A Fractious relationship: Africa and the International Criminal Court*. Heinrich Böll Stiftung. pp. 4–9. Available from: <https://za.boell.org/sites/default/files/perspectives_1.12_web-1.pdf> [Accessed 14 February 2017].

Murithi, Tim and Allan Ngari 2011. *The ICC and community-level reconciliation: In-country perspectives*, Regional Consultation Report. Institute for Justice and Reconciliation. Available from: <https://www.africaportal.org/dspace/articles/icc-and-community-level-reconciliation-country-perspectives-regional-consultation> [Accessed 14 February 2017].

Naqvi, Yasmin 2003. Amnesty for war crimes: Defining the limits of international recognition. *International Review of the Red Cross*, 85 (851), pp. 583–626. Available from: <https://www.icrc.org/eng/resources/documents/article/other/5ssdux.htm> [Accessed 14 February 2017].

Naqvi, Yasmin 2010. Amnesty and the ICC. *The Peace and Justice Initiative: Towards universal implementation of the ICC Statute*. Available from: <http://www.peaceandjusticeinitiative.org/implementation-resources/amnesties-and-the-icc> [Accessed 18 May 2014].

Nichols, M. 2016. SA begins process to withdraw from International Criminal Court. *Mail and Guardian*, 21 October. Available from: <http://mg.co.za/articla/2016-10-21-south-africa-begins-process-to-withdraw-from-the-icc> [Accessed 01 February 2017].

Office of the Prosecutor 2016. *Report on Preliminary Examination Activities*, 14 November. Available from: <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe_eng.pdf> [Accessed 17 April 2017].

Pityana, Barney N. 2003. The African Court on Human and Peoples' Rights in Municipal Law. Paper presented at the Seminar for Eastern and Southern African States on the Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 9–12 December, in Gaborone, Botswana.

Pityana, Barney N. 2004. Reflections on the African Court on Human and Peoples' Rights. *African Human Rights Law Journal*, 4 (1), pp. 121–129.

Sceats, Sonya 2009. Africa's new Human Rights Court: Whistling in the wind? Briefing Paper, Chatham House. Available from: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp0309sceats.pdf> [Accessed 14 February 2017].

Schabas, William A. 2001. *An introduction to the International Criminal Court*. Cambridge, Cambridge University Press,

Schabas, William A. 2014. The United Nations War Crimes Commission's proposal for an International Criminal Court. *Criminal Law Forum*, 25 (1), pp. 171–189.

Scharf, Michael 1996. The letter of the law: The scope of the international legal obligation to prosecute human rights crimes. *Law and Contemporary Problems*, 59 (4), pp. 41–61.

Sirleaf, Matiangai V.S. 2016. The African justice cascade and the Malabo Protocol. University of Pittsburgh Legal Studies Research Paper Series: Working Paper no 2017-1. Available from: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901608> [Accessed 18 April 2017].

Staff Reporter 2017. South Africa revokes ICC withdrawal. *Mail and Guardian*, 8 March. Available from: <https://mg.co.za/article/2017-03-08-south-africa-revokes-icc-withdrawal> [Accessed 18 April 2017].

Tladi, Dire 2009. The African Union and the International Criminal Court: The battle for the soul of international law. *South African Yearbook of International Law*, 34, pp. 57–69.

Treaty of Peace with Germany (Treaty of Versailles) 1919. *Treaty of Peace with Germany (Treaty of Versailles)*. Available from: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002–0043.pdf> [Accessed 15 February 2017].

Udombana, Nsonqurua J. 2003. An African Human Rights Court and an African Union Court: A needful duality or a needless duplication? *Brooklyn Journal of International Law*, 28 (3), pp. 811–870.

United Nations 1998. *Rome Statute of the International Criminal Court*. Available from: <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> [Accessed 14 February 2017].

United Nations 2016. Background information on the justice and reconciliation process in Rwanda. *Outreach programme on the Rwanda genocide and the United Nations*. Available from: <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml> [Accessed 10 February 2017].

United Nations General Assembly Law Commission 1949. Question of international criminal jurisdiction. *Historical survey of the question of international criminal jurisdiction*. New York, United Nations Publication. Available from: <http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf> [Accessed 11 February 2017].

United Nations Security Council 2013. Security Council resolution seeking deferral of Kenyan leaders' trial fails to win adoption, with 7 voting in favor, 8 abstaining. Available from: <https://www.un.org/press/en/2013/sc11176doc> [Accessed 16 April 2017].

Viljoen, Frans 2004. Recent developments in the African regional rights system. *African Human Rights Law Journal*, 4 (2), pp. 344–352.

Weldehaimanot, Simon M. 2011. Arresting Al-Bashir: The African Union's opposition and the legalities. *African Journal of International and Comparative Law*, 19 (2), pp. 208–235. Available from: <http://www.euppublishing.com/doi/abs/10.3366/ajicl.2011.0011> [Accessed 14 February 2017].