

Africa’s Conflict with the International Criminal Court: The African Court of Justice and Human and Peoples’ Rights as an Alternative to the ICC

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I. OVERVIEW

In late January of 2017, the African Union, at the Assembly of the Union’s 28th Ordinary Session, considered, and ultimately approved, a nonbinding decision concerning the continued relationship between Member States of the African Union (AU) and the International Criminal Court (ICC).¹ The decision generally called for the support of a mass withdrawal from the ICC by Member States of the AU due to what some African states have described as actions by the ICC to undermine African sovereignty and the ICC’s unfair targeting of Africans.² Yet for some, the

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1. Assemb. of the Afr. Union, Dec. 622 (XXVIII) (Jan. 30-31, 2017) [hereinafter A.U. Dec. 622].

2. *African Union Backs Mass Withdrawal from ICC*, BBC (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073>; see also Elise Keppler, *AU’s ‘ICC Withdrawal Strategy’ Less than Meets the Eye*, HUM. RTS. WATCH (Feb. 1, 2017), <https://www.hrw.org/news/2017/02/>

decision did not go far enough, as it is nonbinding and does not compel absolute withdrawal from the court.³ In what appears to be an anticipatory response to this sentiment, the decision included support for those states that unilaterally sought to withdraw from the Rome Statute and the ICC.⁴ The decision stated that the AU “[welcomes] and [fully supports] the sovereign decisions taken by Burundi, South Africa, and The Gambia as pioneer implementers of the Withdrawal Strategy, regarding their withdrawal from the ICC.”⁵ While The Gambia has since recanted its intent to withdraw, South Africa⁶ and Burundi have proceeded.⁷ While the decision was perhaps the most forceful indication yet of growing frustration that African states have with the ICC, for many who advocate for the ICC, it was a victory for the court’s continued efforts to prosecute those responsible for crimes of genocide, crimes against humanity, and war crimes.⁸

While the general sentiment of the decision aims at withdrawal, the decision does refer to a possible substitute of the ICC with another, continental court of justice.⁹ In paragraph four of the decision, the Assembly expresses “deep concern at the slow pace of ratification of the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples’ Rights (ACJHPR) . . . and [reiterates] its previous call on Member States to sign and ratify the Protocol, as soon as possible.”¹⁰ The Assembly’s addition of this paragraph refers to the African Court of Justice on Human and Peoples’ Rights, a court sitting in

01/aus-icc-withdrawal-strategy-less-meets-eye; see also Aaron Brooks, *African Union Calls for Mass Withdrawal from ICC*, EAST AFR. MONITOR (Feb. 5, 2018), <https://eastafricamonitor.com/african-union-calls-mass-withdrawal-icc/>.

3. *African Union Backs Mass Withdrawal from ICC*, *supra* note 2.

4. A.U. Dec. 622, *supra* note 1, ¶ 6.

5. *Id.*

6. There is currently conflict between the political and judicial branches over the question of South Africa’s withdrawal. See Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>.

7. Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal from the International Criminal Court*, NAT’L. PUB. RADIO (Feb. 14, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court> (noting that the announcement of withdrawal was made by former Gambian President Yahya Jammeh, who stepped down from power in December 2016; as the withdrawal had yet to go into effect subject to the Rome Statute one-year period, newly elected President Adama Barrow reaffirmed The Gambia’s commitment to the court.).

8. *African Union Backs Mass Withdrawal from ICC*, *supra* note 2.

9. A.U. Dec. 622, *supra* note 1, ¶ 4.

10. *Id.*

Arusha, Tanzania, that was established by Member States of the African Union to “ensure the protection of human and peoples’ rights in Africa.”¹¹ The “Amendments to the Protocol” refers to a proposed extension of the ACJHPR’s jurisdiction to include serious crimes currently covered by the ICC.¹² As one Nigerian scholar notes, “The decision by the African Union to imbue the African Court on Human Rights with criminal jurisdiction smacks of confrontation with the international community because some of their Member States are parties to the Rome Statute that created the [ICC].”¹³

Thus, it is the purpose of this Comment to pursue an answer to not only whether accusations of African bias have merit but ultimately to conclude whether the ACJHPR could serve as a legitimate alternative to the ICC.

II. THE ROME STATUTE

In 1998, a conference of 160 states established the framework for what would become the ICC.¹⁴ Adopted at that conference, the Rome Statute set forth the jurisdiction of the court, in addition to the procedures and processes for States to cooperate with the ICC.¹⁵ The Rome Statute provides that the ICC has jurisdiction to hear “the most serious crimes of concern to the international community as a whole.”¹⁶ Specifically, the ICC has jurisdiction with respect to the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁷ Of the 160 states that have established a formal relationship with the ICC, thirty-three are from the African continent.¹⁸

11. *Establishment of the Court*, AFR. CT. ON HUM. & PEOPLE’S RTS., <http://www.african-court.org/en/index.php/about-us/establishment> (last visited Mar. 13, 2018).

12. *Jurisdiction*, AFR. CT. ON HUM. & PEOPLE’S RTS., <http://en.african-court.org/index.php/about-us/jurisdiction> (last visited Mar. 18, 2018); see Fred A. Agwu, *The African Court of Justice and Human Rights: The Future of International Criminal Justice in Africa*, 6 AFR. REV. 30, 30 (2013) (discussing the overlap in jurisdiction of the proposed extension of the ACJHPR and the ICC).

13. Agwu, *supra* note 12, at 30.

14. INT’L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 1, 3, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> (last visited Oct. 29, 2018).

15. *Id.*

16. Rome Statute of the International Criminal Court art. 5, ¶ 1, July 1, 2002, 2187 U.N.T.S. 92.

17. *Id.*

18. *African States*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (last visited Mar. 16, 2018).

There are three situations in which a case may be brought before the ICC: (1) a State Party, believing that a crime within the court's jurisdiction has been committed, may refer a case to the ICC prosecutor, (2) under Chapter VII of the United Nations Charter, the United Nations Security Council, believing that a crime within the court's jurisdiction has been committed, may refer a case to the prosecutor, and (3) the prosecutor may initiate her own investigations in respect to a crime.¹⁹ Once referred to the ICC Prosecutor, a preliminary examination will begin to determine whether there is sufficient evidence of crimes within the ICC's jurisdiction.²⁰ This step also determines whether national proceedings within the country at issue are genuine.²¹ As the ICC notes, the court is "intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not [or] are unwilling or unable to do so genuinely."²² The ICC does not have its own police force or enforcement body and "relies on cooperation with countries worldwide for support, particularly for making arrests, transferring arrested persons to the ICC detention center in The Hague, freezing suspects' assets, and enforcing sentences."²³

III. PRELIMINARY EXAMINATIONS, INVESTIGATIONS INTO SITUATIONS, AND CASES

Currently, ten preliminary examinations are underway; three of which concern possible crimes occurring in the African states of Gabon, Guinea, and Nigeria.²⁴ Beyond the preliminary examinations, the ICC prosecutor may then open a formal investigation into "situations" of alleged crimes committed, based on the referral process promulgated by the Rome Statute.²⁵ Since the court's inception, eleven situations have been investigated; ten of which concern African States.²⁶ Since the

19. Rome Statute of the International Criminal Court, *supra* note 16, art. 13.

20. *Legal Process*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> (last visited Mar. 12, 2018).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Preliminary Investigations of the International Criminal Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/pe.aspx#Default=%7B%22k%22%3A%22%22%7D#eb04684c-1c88-48c8-9ed5-aeba105c7014=%7B%22k%22%3A%22%22%7D> (last visited Mar. 12, 2018).

25. *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situation.aspx> (last visited Mar. 12, 2018); *see also* Rome Statute of the International Criminal Court, *supra* note 16, art. 13, ¶ 1.

26. *Situations Under Investigation*, *supra* note 25.

ratification of the Rome Statute, situations are currently under investigation in the Democratic Republic of the Congo, Uganda, Darfur, Kenya, Libya, Cote d'Ivoire, Mali, Burundi, and two in the Central African Republic.²⁷ Georgia is currently the only non-African state being investigated by the ICC prosecutor.²⁸

The ICC prosecutor may then request that ICC judges issue an arrest warrant or a summons to appear before the court.²⁹ This process is the beginning of the pretrial stage and the initiation of a case in the ICC adjudicative process.³⁰ Since 2002, twenty-six cases have been or are currently before the ICC.³¹ Of these twenty-six cases, all have concerned persons indicted arising from investigations into situations into African Member States to the Rome Statute.³²

IV. AFRICAN BIAS

A. Grievances

The main argument by several African states has been that the court disproportionately focuses on Africa.³³ As previously noted, every case, and thus, every person convicted by the court, has been African.³⁴ Yet, a more specific issue several African nations have raised with the court is the lack of immunity from the court's jurisdiction given to current African heads of state.³⁵ Article 27 of the Rome Statute states:

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

27. *Id.*

28. *Id.*

29. *Legal Process*, *supra* note 20.

30. *Id.*

31. *Cases of the International Criminal Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/cases.aspx> (last visited Mar. 12, 2018).

32. *Id.*

33. Sewell Chan & Marlise Simons, *South Africa to Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?action=click&contentCollection=Africa&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

34. *Id.*

35. *Id.*

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.³⁶

South Africa, in particular, has argued that its laws are in conflict and lack consistency with the Rome Statute insofar as they provide sitting leaders diplomatic immunity from prosecution while the Rome Statute does not.³⁷

A similar grievance has been expressed by Burundi, whose President was reelected to a third, and as some would say unconstitutional, term back in early 2016.³⁸ In April of 2016, the ICC prosecutor announced a preliminary examination into alleged crimes resulting from the election, including allegations of the deaths of hundreds in violent street protests and political killings.³⁹ Responding to the examination into the alleged crimes, the Burundi parliament in October of 2016 voted overwhelmingly, in a vote of 94-2 with 14 abstentions, to withdraw from the ICC.⁴⁰ As Edouard Nduwimana, a Burundian legislator, stated, “The importance of justice is to reconcile people, the importance of justice is to solidify peace[.] If you look at how the I.C.C. is working now, and saw that we want to let them implement what they want, do you think Burundi would be very peaceful?”⁴¹ For a fitting response to Nduwimana’s question, one only has to look at the perspective of the Burundian President’s office, which stated that “[t]he ICC has shown itself to be a political instrument and weapon used by the west to enslave.”⁴² The office further stated that withdrawal was “a great victory for Burundi because it has defended its sovereignty and national pride.”⁴³ One year later, in October of 2017, Burundi’s preliminary vote to withdraw became effective under the Rome Statute, and Burundi officially became the first member state to the Rome Statute to withdraw.⁴⁴

36. Rome Statute of the International Criminal Court, *supra* note 16, art. 27, ¶¶ 1-2.

37. Chan & Simons, *supra* note 33.

38. Jeffrey Gettleman, *Raising Fears of a Flight from International Criminal Court, Burundi Heads for Exit*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/world/africa/burundi-moves-to-quit-international-criminal-court-raising-fears-of-an-exodus.html>.

39. *Id.*; *Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN (Oct. 27, 2017), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>.

40. Gettleman, *supra* note 38.

41. *Id.*

42. *Burundi Becomes First Nation to Leave International Criminal Court*, *supra* note 39.

43. *Id.*

44. *Id.*

While Burundi's decision to withdraw seems fairly logical given the preliminary examination into the violence surrounding the Burundian President's election to a third term, South Africa's decision is more peculiar, and in the eyes of some scholars, more impactful.⁴⁵ South Africa's announcement of withdrawal hinges on an obligation under the Rome Statute to arrest anyone sought by the ICC.⁴⁶ And yet, South Africa ignored this obligation when President Omar Hassan al-Bashir of Sudan, a sitting head of state for whom the ICC had issued an arrest warrant, visited South Africa.⁴⁷ The Sudanese President had been charged with war crimes, crimes against humanity, and genocide in the Darfur region of Sudan.⁴⁸ Mr. Bashir visited South Africa and was allowed to leave without arrest.⁴⁹ South Africa's Justice Minister, Michael Masutha, expressed that handing over a foreign leader to the court would have been an infringement on South Africa's sovereignty.⁵⁰

Several other countries have supported South Africa and Burundi's decision to formally pursue withdrawal.⁵¹ Kenyan President Uhuru Kenyatta, himself a head of state targeted and tried by the ICC, has called for a large-scale plan to withdraw from the court.⁵² Kenyatta's appearance before the ICC stemmed from similar charges as Burundi.⁵³ He was charged for his involvement in post-election violence in 2008, where over 1000 people died.⁵⁴ The charges were eventually dropped because of lack of evidence.⁵⁵ And yet, Kenyatta argues that the court's ability to prosecute sitting heads of state undermines his ability to ensure the national security of his country and to combat armed groups.⁵⁶ Criticizing Article 27 of the ICC's 1998 Rome Statute,⁵⁷ Kenyatta, referring to his government, stated, "We've had to contend with the ICC pursuing weak, politicized cases. This has become a huge distraction from our duty to

45. Chan & Simons, *supra* note 33.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See *ICC Debate: Africa vs 'Infamous Caucasian Court'?*, ALJAZEERA (Oct. 28, 2016), <https://www.aljazeera.com/news/2016/10/icc-debate-africa-infamous-caucasian-court-161028142708060.html>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See Rome Statute of the International Criminal Court, *supra* note 16, art. 27, ¶¶ 1-2.

serve our people and this continent fully. This is not what Kenya signed up for when we joined the ICC.”⁵⁸

B. Merit

Since the court’s inception, several academics and specialists in the field have preoccupied their studies and research in an attempt to answer the question of whether there is, in fact, a bias toward Africa.⁵⁹ Alas, the answer is not simple, but rather quite complex according to Yale University Professor Dr. Kamari Clarke, who argues that the question isn’t so much whether there is an assumption of African bias, but rather why Africa and not the United States, or why Joseph Kony and not George Bush?⁶⁰ According to Clarke, “It’s important to reflect on how particular historical conditions . . . contributed to the conditions for violence in the Middle East and in West, Central, and East Africa.”⁶¹ In particular, the demand by many non-African actors for Africa’s resources may provoke other illegal activities, “including the sale of arms to rebel groups.”⁶² Ignoring these conditions and historical forces may cause the court to focus on individuals, rather than seek to understand the broader structural issues that may lead to the crimes within the court’s jurisdiction.⁶³ Thus, Clarke notes, that “assigning . . . responsibility to a few representative persons—commanders, heads of state, leaders of rebel groups—obscures the link between Africa’s resource crises and contemporary violence.”⁶⁴ Ultimately, the question may not be so much if the ICC is targeting Africa, but rather why Africa is under the magnifying glass of the ICC.⁶⁵

Another perspective from Margaret deGuzman, a professor at Temple University Beasley School of Law, suggests that the ICC’s targeting of Africa is not so much a tangible, political question, but rather a failure on the ICC’s part to correctly manage perception.⁶⁶ There is a possibility that, even though the court has traditionally enjoyed

58. *ICC Debate: Africa vs ‘Infamous Caucasian Court’?*, *supra* note 51.

59. Kamari M. Clarke, *Is the ICC Targeting Africa Inappropriately or Are There Sound Reasons and Justifications for Why All of the Situations Currently Under Investigation or Prosecution Happen to Be in Africa?*, ICC FORUM (Mar. 17, 2013), <http://iccforum.com/africa>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Margaret M. deGuzman, *Is the ICC Targeting Africa Inappropriately?*, ICC F. (Mar. 17, 2013), <http://iccforum.com/africa>.

widespread support among African populations, the criticism of the court is no longer contained to African governments, but may in fact be seeping into the general citizenry.⁶⁷ Thus, it appears that after years of legitimate prosecutions and investigations, the factual emphasis on Africa may have led to a negative narrative, disseminated by certain heads of state who were legitimately targeted by the ICC.⁶⁸

And yet, there is perhaps evidence of clear targeting of Africa.⁶⁹ Charles Taku, Lead Counsel for the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the ICC, argues that the cases opened in Africa by the ICC prosecutor have not justified the stated reasons for intervention.⁷⁰ Taku focuses on the mechanisms that can bring a situation under the purview of the court, noting, “Regrettably many African leaders are mere puppets of neo-colonial interest that has helped them to eternalize power in exchange for defending the neo-colonial economic and hegemonic agenda. It is often under these circumstances that crimes falling under the jurisdiction of the ICC . . . are perpetrated.”⁷¹ The process to refer a case to the ICC can therefore help to solidify the power of many African leaders.⁷² “For these neo-colonial puppets, the ICC . . . referral procedure has become the new weapon of silencing opposition”⁷³ Taku argues that the issue is more pervasive in that another referral mechanism—the power by the United Nations Security Council to refer a situation to the ICC—“is a viable weapon to support regime change.”⁷⁴ The last referral mechanism—the power, with the court’s permission, of the ICC prosecutor to initiate preliminary examinations or large-scale investigations—is perhaps a policy consideration rather than a legal consideration.⁷⁵ Referring to the investigation into the situation in Democratic Republic of the Congo, Taku argues:

[H]ow can anyone reasonably explain the fact that such intervention has not led to the investigation and prosecution of powerful individuals close to

67. *Id.*

68. *Id.*

69. Chief Charles A. Taku, *Has the International Criminal Court Inappropriately Targeted Africa?*, ICC F. (Mar. 17, 2013), <http://iccforum.com/africa>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

powerful Western economic and geo-political interests whom UN ... Mapping and Expert Reports have determined bear the greatest responsibility for the crimes perpetrated in the East of the Democratic Republic of the Congo?⁷⁶

Thus, according to Taku, the targeting of Africa seems too narrow and ignores the broader forces that contribute to violence in certain regions of the continent.⁷⁷

And yet, the merit of these grievances can't be discussed outside the context of the ICC prosecutor. Elected in 2011, Fatou Bensouda was sworn in as the prosecutor of the ICC in mid-June 2012.⁷⁸ Prosecutor Bensouda is originally from The Gambia and is the first international maritime law expert of The Gambia.⁷⁹ Yet, does having a prosecutor from Africa help to improve the court's relationship with Africa?⁸⁰ After all, the AU did endorse Bensouda's candidacy for ICC prosecutor.⁸¹ Prior to her election as ICC prosecutor, Bensouda stated, "Anytime I hear this about ICC targeting Africa, ICC doing double justice, it saddens me, especially as an African woman, also knowing that these conflicts, most of these conflicts are happening on the continent of Africa."⁸² Bensouda's primary position has been that ICC trials are for Africans because the many victims of crimes have been African.⁸³ Bensouda stated in 2011, "We say that [the] ICC is targeting Africans, but all of the victims in our cases in Africa are African victims. They are not from another continent. They are African victims and they are the ones who are suffering these crimes."⁸⁴ And it is perhaps true that Bensouda's election as prosecutor could provide a consistent response to African governments who criticize the ICC—that since they chose her, they shouldn't undermine the court's integrity

76. *Id.*

77. *Id.*

78. *Profile of Fatou Bensouda, Prosecutor*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/otp/who-s-who/pages/fatou-bensouda.aspx> (last visited Mar. 19, 2018).

79. *Id.*

80. See Mark Kersten, *The ICC's Got an African Prosecutor: Does it Matter?*, JUST. CONFLICT (Jan. 5, 2012), <https://justiceinconflict.org/2012/01/05/the-iccs-got-an-african-prosecutor-does-it-matter/>.

81. Mark Kersten, *ICC's Next Top Prosecutor: In the Bag—AU Endorses Bensouda for ICC Prosecutor*, JUST. CONFLICT (Sept. 2, 2011), <https://justiceinconflict.org/2011/09/02/iccs-next-top-prosecutor-in-the-bag-au-endorses-bensouda-for-icc-prosecutor/>.

82. Scott Stearns, *African Union Says ICC Prosecutions Are Discriminatory*, VOA (July 4, 2011), <https://www.voanews.com/a/article--african-union-says-icc-prosecutions-are-discriminatory-125012734/158424.html>.

83. *Id.*

84. *Id.*

through volleys of sharp disparagement.⁸⁵ But it is also possible that Bensouda's election as prosecutor is only a short-term solution.⁸⁶ After all, only five years later the AU formally announced support for countries who want to withdraw and support for the African Court of Justice and Human and Peoples' Rights as a substitute path to the ICC.⁸⁷

V. AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

A. *Legitimate Alternative?*

The African Court of Justice and Human and Peoples' Rights was established following the signing of the African Charter on Human and Peoples' Rights, the "main African human rights instrument that sets out the rights and duties relating to human and peoples' rights in Africa."⁸⁸ The structure of the court is set forth under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol).⁸⁹ Article three of the Protocol states that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."⁹⁰ A proposed modification to this amendment was made in 2009, when the Assembly of Heads of State and Government of the African Union required the AU commission, in consultation with the ACJHPR, to provide a study on the possibility of extending the jurisdiction of the ACJHPR to include international crimes such as genocide, crimes against humanity, and war crimes.⁹¹ The draft, known as the Malabo Protocol, is still being considered;⁹² however, the process is taking place against the backdrop of the AU's "open hostility to the [ICC's] focus on African situations."⁹³

While timing of the proposed extension of jurisdiction and ongoing criticism of the ICC appear to be politically related, the question still

85. See Kersten, *supra* note 80.

86. See *id.*

87. See A.U. Dec. 622, *supra* note 1, ¶ 4.

88. *Establishment of the Court*, *supra* note 11.

89. *Id.*

90. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 3, ¶ 1, June 10, 1998 (Afr. Union).

91. *Jurisdiction*, *supra* note 12.

92. *Id.*

93. See Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, 235 INST. FOR SEC. STUD. 1, 1 (2012).

remains whether the ACJHPR could be a viable alternative to the ICC, or at least function as a court with concurrent jurisdiction.⁹⁴ As South African law professor Max du Plessis argues, the reality of an alternative venue for international crimes in the ACJHPR is fraught with many obstacles.⁹⁵ Du Plessis argues that the process of extending the ACJHPR's jurisdiction has lacked transparency, "with limited consultation among legal experts in AU member countries, officials of relevant institutions, or civil society."⁹⁶ Du Plessis' argument appears to lie on the premise that in order to create a legitimate alternative to the ICC, you must engage the key decision and policy makers who were instrumental in the creation of the ICC in the first place.⁹⁷ He states, "In light of their key role in the establishment and implementation of African regional human rights mechanisms and the ICC, civil society organi[z]ations have critical expertise to offer, as do other relevant stakeholders."⁹⁸

This lack of transparency could create obvious issues for the court as the sole adjudicative organ for international crimes and could create overlapping obligations for Member States if it functions with concurrent jurisdiction with the ICC.⁹⁹ It is possible that, given that the AFJHPR could share concurrent jurisdiction with many courts, these courts may work to negotiate who is best equipped to handle certain types of cases.¹⁰⁰ And yet, this pragmatic approach ignores any priority that may be given to certain courts and may place state parties in circumstances with conflicting legal obligations.¹⁰¹ The Malabo Protocol itself chooses to not explicitly identify the ICC as a concurrent court but instead states that "[t]he jurisdiction of the Court shall be complementary to that of National Courts."¹⁰² Thus, the Protocol seems to ignore the very real obligation that many of its Member States already have to the ICC.¹⁰³

More specifically, there is likely ambiguity and future conflict if state parties ratify the Malabo Protocol because of its different approach than

94. See *id.*; see Parusha Naidoo & Tim Murithi, *The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the Political Dimensions of Concurrent Jurisdiction*, 20 INST. FOR JUST. & RECONCILIATION POL'Y BRIEF 1, 1 (Oct. 2016).

95. See du Plessis, *supra* note 93, at 1.

96. *Id.*

97. *Id.*

98. *Id.*

99. See Naidoo & Murithi, *supra* note 94, at 4.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

the ICC to sitting heads of state.¹⁰⁴ Under Article 27 of the Rome Statute, sitting heads of state are not immune from the ICC's jurisdiction, nor can actions taken in their official capacity be used to reduce a sentence.¹⁰⁵ Conversely, under the Malabo Protocol, Article 46A bis states that “[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”¹⁰⁶ This clear conflict could find Member States to the ICC in breach of their obligation to not give immunity to sitting heads of state, while also, if eventually ratified, finding themselves in breach of the Protocol.¹⁰⁷ Moreover, there may be a disconnect between the overall policy objective of immunity—that is to ensure that while a head of state is in office their duties are not complicated by lengthy prosecution—and the stance of the Malabo Protocol, which may prevent criminal accountability for heads of state altogether.¹⁰⁸ The end result could be “conflicting and overlapping obligations placed on Member States in instances of both courts investigating the same case.”¹⁰⁹ It is therefore possible that the ICC and ACJHPR would perhaps operate in competition; a reality that may force countries to pick and choose which obligations they will follow, and which obligations they will breach.¹¹⁰ Moreover, perhaps the most damning revelation of the head of state immunity provision is that targeted demographics, who may become victims of genocide or other crimes against humanity ordered by the head of state, could be left with no judicial recourse against their perpetrator.¹¹¹ This conclusion could in fact make the ACJHPR obsolete.¹¹²

On another front, there is concern that the Malabo Protocol gives the ACJHPR such expansive jurisdiction to hear international crimes that have yet to be considered by, or are within the jurisdiction of, other international judicial bodies.¹¹³ Specifically, the Malabo Protocol states that fourteen different crimes fall within the ACJHPR's jurisdiction,

104. *Id.* at 5.

105. Rome Statute of the International Criminal Court, *supra* note 16, art. 27, ¶¶ 1-2.

106. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 46A bis, July 1, 2008 (Afr. Union) [hereinafter Protocol on Amendments].

107. *See* Naidoo & Murithi, *supra* note 94, at 5.

108. *Id.*

109. *Id.* at 4.

110. *Id.*

111. *See id.* at 5.

112. *Id.*

113. *See id.*; du Plessis, *supra* note 93, at 6.

including “The Crime of Unconstitutional Change of Government.”¹¹⁴ Crimes such as the “Unconstitutional Change of Government” have yet to be recognized or fully understood and formed in international criminal law.¹¹⁵ While the effort to formulate some of these laws is admirable, especially given the high rate of military coups, rigging of elections, and heads of state that don’t leave office that have occurred on the African continent, it is especially important that the court effectively and thoughtfully assess new crimes that can be brought to the ACJHPR.¹¹⁶

There is also fear that given the broad scope of the ACJHPR’s jurisdiction, the ACJHPR may simply not be able to function effectively.¹¹⁷ With the addition of an expanded jurisdiction to include international crimes, there is a legitimate question whether the court has the capacity to fulfill its obligations.¹¹⁸ Especially given that the Malabo Protocol calls for an extension of jurisdiction into some of the most serious and violent crimes, there is an obligation that the court have the means and resources to effectively adjudicate those issues.¹¹⁹ This point is reinforced when one simply looks at the list of crimes to be added if the Protocol is ratified: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.¹²⁰ For comparison, again, the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹²¹ Moreover, the ICC, a court with jurisdiction over a much more limited scope of crimes, took ten years to finish its first trial.¹²² As du Plessis states,

While there may be legitimate criticisms of the ICC for how [the first] trial progressed, the fact remains that international criminal trials are a slow and laborious process at the best of times, particularly if proper fair trial guarantees are to be respected. The process of doing justice to these

114. Protocol on Amendments, *supra* note 106, art. 28A, ¶ 4.

115. See Naidoo & Murithi, *supra* note 94, at 5.

116. See *id.*

117. See du Plessis, *supra* note 93, at 6.

118. *Id.*

119. *Id.*

120. Protocol on Amendments, *supra* note 106, art. 28A.

121. Rome Statute of the International Criminal Court, *supra* note 16, art. 5.

122. du Plessis, *supra* note 93, at 6.

prosecutions runs the risk of being severely compromised when a court is expected to do too much by way of the crimes on its docket.¹²³

This criticism has resulted in tangible examples of deficiencies with the court.¹²⁴ In particular, the first case before the court, under its original jurisdiction, not yet including its expanded jurisdiction, concerned the torture and murder of tens of thousands by the order of the former President of Chad, Hissène Habré.¹²⁵ The case was rejected because of a simple issue of admissibility, yet took the court over a year to come to that conclusion.¹²⁶

Yet, while the ACJHPR has faced, and likely will continue to face, continued criticism and obstacles in its pursuit to become a true international court, is there any positive façade to the court? Could the court in fact be an example for other, more continental courts? For the supporters of the ACJHPR, the court could perhaps contribute to the proliferation of international criminal law and may in fact grow to become a useful complement to the ICC.¹²⁷ Moreover, while there have been several courts established for the purpose of adjudicating international crimes concerning a specific region or incident, there has yet to be a regional or continental court of international law that is equipped to deal specifically with a certain region.¹²⁸

B. *Acceptance of the ACJHPR or the ICC?*

The potential hope for the court in the field of international law cannot occur without real support from the various Member States of the AU and, perhaps most importantly, the African state parties to the Rome Statute and the ICC.¹²⁹ Under the ACJHPR's current jurisdiction, there is practically zero compliance with the court's decisions.¹³⁰ Of the fifty-four

123. *Id.*

124. See Andrew Zimmermann & Jelena Baumler, *Current Challenges Facing the African Court on Human and Peoples' Rights*, 7 KAS INT'L REPS. 38, 38 (2010).

125. *Id.*

126. *Id.*

127. See Moritz Vormbaum, *The Search for Alternatives: The "African Criminal Court,"* IT. INST. FOR POL. STUD. (Mar. 28, 2017), <http://www.ispionline.it/it/pubblicazione/search-alternatives-african-criminal-court-16451>.

128. *Id.*

129. See *Africa's Human Rights Court and the Limits of Justice*, ALJAZEERA (Jan. 7, 2017), <https://www.aljazeera.com/programmes/talktojazeera/2017/01/africa-human-rights-court-limits-justice-170107092107153.html>.

130. ALEJANDRO FUENTES, RAOUL WALLENBERG INST. OF HUMAN RIGHTS & HUMANITARIAN LAW, COMPLIANCE WITH (QUASI-) JUDICIAL DECISION WITH THE REGIONAL AFRICAN HUMAN RIGHTS SYSTEM. CHALLENGES AND OPPORTUNITIES (2017).

Member States of the AU, only thirty recognize the ACJHPR at all.¹³¹ Moreover, only seven states that recognize the ACJHPR allow citizens and other organizations to file cases.¹³² This is especially critical, because, by not allowing citizens and other organizations to bring a case before the court, individual states can act as filters of what can be referred to the court.¹³³ Ultimately this would require states, in certain circumstances, to implicate themselves when referring a case to the ACJHPR.¹³⁴ Regarding the signing of the Malabo Protocol, and thus an extension of the ACJHPR's jurisdiction, only eleven states have signed, and not one country has yet to succeed with ratification.¹³⁵ Yet, the biggest issue is that many on the continent are unaware that the court even exists.¹³⁶

This question is perhaps best understood in the context of the continued support for the ICC within Africa.¹³⁷ While the AU sought to voice its support for the announced withdrawal, at least in early 2017, of South Africa, The Gambia, and Burundi,¹³⁸ there was an even larger contingent opposed to any withdrawal from the ICC.¹³⁹ Several countries voiced their support for the ICC, including Burkina Faso, Botswana, Ghana, Liberia, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania, and Zambia.¹⁴⁰ This support is bolstered by suggestions from ICC-supporting states to work to improve the ICC from within, rather than on the outside, subsequent to mass exodus.¹⁴¹ More so, several supporters, including Nigeria, the continent's largest economy, find it improper that the AU has

131. See *Africa's Human Rights Court and the Limits of Justice*, *supra* note 129.

132. *Id.*

133. Lydia W. Kembabazi, A Critique of Accessibility to the African Court for Human and Peoples' Rights by Individuals and NGO's; Drawing Experiences from the Inter American and European Systems 35 (2013) (unpublished LLM thesis, Central European University), www.etd.ceu.hu/2013/winyi_lydia.pdf.

134. See *id.*

135. *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Statute of the African Court of Justice and Human Rights*, ASSEMBLY AFR. UNION (Feb. 2, 2018), 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.

136. J. Sophia A.B. Akuffo (President of the Court), *Report of the African Court on Human and Peoples' Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa* 8 (Nov. 8-9, 2012).

137. See A.U. Dec. 622, *supra* note 1, ¶ 6.

138. *Id.*

139. Paul Nantulya, *What's Next for Africa and the International Criminal Court*, AFR. CTR. FOR STRATEGIC STUD. (Dec. 7, 2017), <https://africacenter.org/spotlight/whats-next-africa-international-criminal-court-icc/>.

140. *Id.*

141. Hlawulani Mkhabela, *Africa and the ICC Going Forward*, 31 IFRI 1, 5 (Jan. 17, 2017).

been the forum of support for withdrawal, when twenty of the AU's members are not state parties to the Rome Statute.¹⁴²

International organizations have also voiced their support for continued commitment of African states to the ICC.¹⁴³ Netsanet Belay, Amnesty International's Research and Advocacy Director for Africa, stated, prior to the AU Assembly decision, that "[r]ather than choosing to abandon what is in many cases the only avenue towards justice for millions of vulnerable victims of crimes under international law, states must engage in good faith with the International Criminal Court."¹⁴⁴ Furthermore, Belay, commenting on South Africa's intended departure from the ICC, stated, "South Africa's sudden notice to withdraw from the ICC is deeply disappointing. In making this move, the country is betraying millions of victims of the gravest human rights violations and undermining the international justice system."¹⁴⁵

Yet, perhaps the clearest indication of ICC support is whether African nations are continuing to cooperate with ICC Prosecutor Fatou Bensouda, despite an increasing push for withdrawal.¹⁴⁶ Bensouda has stated, "There is the perception that Africa is not cooperating with the ICC. We are receiving all the cooperation we need from individual African states. We are conducting investigations and requesting assistance which we're getting fully."¹⁴⁷ But, as Bensouda notes, "Perception is another issue to be addressed."¹⁴⁸

VI. CONCLUSION

The decision issued during the Assembly of the African Union has been the clearest statement from the African continent of discontent with

142. *Id.*

143. See *ICC: States Must Strengthen, Not Abandon, Only Route to Justice for Millions of Victims*, AMNESTY INT'L (Nov. 15, 2016), <https://www.amnesty.org/en/latest/news/2016/11/icc-states-must-not-abandon-only-route-to-justice-for-millions-of-victims/>.

144. *Id.*

145. *South Africa: Decision to Leave International Criminal Court a 'Deep Betrayal of Millions of Victims Worldwide'*, AMNESTY INT'L (Oct. 21, 2016), <https://www.amnesty.org/en/latest/news/2016/10/south-africa-decision-to-leave-international-criminal-court-a-deep-betrayal-of-millions-of-victims-worldwide/>.

146. See *Is Africa a Participant or Target of International Justice? An Interview with Fatou Bensouda*, AFR. LEGAL AID, <http://www.africalegalaid.com/is-africa-a-participant-or-target-of-international-justice-an-interview-with-fatou-bensouda-the-then-deputy-prosecutor-of-the-international-criminal-court-icc-by-evelyn-ankumah/> (last visited Mar. 22, 2018).

147. *Id.*

148. *Id.*

the ICC.¹⁴⁹ And yet, the decision issued during the Assembly is far from unanimous.¹⁵⁰ While there is an undeniable focus on Africa, if one is to ask ICC Prosecutor, and citizen of The Gambia, Fatou Bensouda, it is important that the ICC is an advocate for the victims of crime.¹⁵¹ As she states,

[T]here are over five million African victims displaced, more than 40,000 African victims killed, thousands of African victims are raped, hundreds of thousands of African children are transformed into killers and rapists, 100% of the victims are Africans, 100% of the accused persons are also Africans. We are on the side of the victims.¹⁵²

For those in favor of withdrawal, there still seems to be some recognition that these statistics require a judicial body that is equipped to deal with the sorts of international crimes currently undertaken by the ICC, however under the auspices of the AU, rather than the Rome Statute.¹⁵³

But, any further support of another judicial body is likely to come with a high cost, both financial and otherwise—an obvious expectation when the most heinous of crimes are being tried before a court.¹⁵⁴ It seems unlikely that the ACJHPR has the capacity to deal with the crimes that are currently being tried before the ICC.¹⁵⁵ And, even if the ACJHPR did develop the capacity, it is likely that it would take years to run efficiently, provide a framework of guidance to Member States when obligations to other international institutions overlap with the ACJHPR, and provide clarification of the multitude of crimes enumerated in the Malabo Protocol.¹⁵⁶ Given the ICC prosecutor's goal of working to advocate for the millions of victims in Africa, it seems that any present reliance on the ACJHPR would be severely misplaced. Should the ICC be concerned about their perception issue? In short, yes. However, the AU's endorsement of Prosecutor Bensouda, and the continued support of most African state parties to the ICC, will ensure that the court continues to pursue its mandate on behalf of the millions who need its help.¹⁵⁷

149. *African Union Backs Mass Withdrawal from ICC*, *supra* note 2; *see* Keppeler, *supra* note 2.

150. Nantulya, *supra* note 139.

151. *See Is Africa a Participant or Target of International Justice?*, *supra* note 146.

152. *Id.*

153. *See* A.U. Dec. 622, *supra* note 1, ¶ 4.

154. *See* du Plessis, *supra* note 93, at 6.

155. *Id.*

156. *See id.*; Naidoo & Murithi, *supra* note 94, at 4-5; Protocol on Amendments, *supra* note 106, art. 28A.

157. Kersten, *supra* note 80; Nantulya, *supra* note 139.