

**IMPLICATIONS OF THE AFRICAN COURT OF
HUMAN AND PEOPLES' RIGHTS BEING
EMPOWERED TO TRY INTERNATIONAL CRIMES
SUCH AS GENOCIDE, CRIMES AGAINST
HUMANITY, AND WAR CRIMES**

AN OPINION

SUBMITTED BY

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1 OVERVIEW

The proposal to extend the jurisdiction of the African Court on Human and Peoples' Rights to cover international crimes amounts to creating a regional criminal court for Africa. This proposal confronts insurmountable legal and practical obstacles. These obstacles include the absence of:

- an instrument creating crimes within the jurisdiction of such a court, enumerating the elements of crimes within the scope of the court and punishment for them, and establishing the procedures for proceedings with respect to such crimes;
- a regional system of enforcement and co-operation in criminal matters;
- a permanent continental court or tribunal;
- a clear regional norm of compliance with judicial decisions; and
- any assurance that there can be agreement on any or all of the above issues.

International crimes are “breaches of international rules entailing the personal criminal liability of individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).”¹ Such acts usually involve mass atrocities and may be prohibited by states through customary international or treaty law, and include torture, war crimes, crimes against humanity, crimes against peace, genocide, piracy, and hijacking.

The institutions of Africa's regional human rights system, especially the African Court on Human and Peoples' Rights and the African Commission and Human and Peoples' Rights, promote and ensure State responsibility for violations of human rights guaranteed by the African Charter on Human and Peoples' Rights

¹ Antonio Cassese, *International Criminal Law*, Oxford, Oxford University Press, (2003) 23.

and the protocols thereto. The African Charter does not envisage the creation of a mechanism to address international crimes. The creation of a regional criminal jurisdiction for Africa would erase the essential distinction long settled in international law between mechanisms for enforcement of State responsibility on the one hand, and individual responsibility on the other. It would also undermine the region's capacity to effectively address mass atrocities.

Regional human rights institutions in Africa, especially the African Court and African Commission on Human and Peoples' Rights, can prevent descent into mass atrocities and international crimes by ensuring that States are held responsible for serious and massive violations of human rights, as established in Article 58 of the African Charter on Human and Peoples' Rights. For this to happen, however, African States must comply with the decisions of both institutions. Thus far, this has not been the case.

Against this background, African States are for the moment best served by improving the capacities and resources of existing regional human rights institutions, establishing a culture of compliance with decisions of these institutions, and enhancing the overall effectiveness and credibility of the continent's human rights system.

If, however, African States choose to extend the jurisdiction of the African Court on Human and Peoples' Rights to cover international crimes, any such revision should fulfill at least two clear criteria: it must not compromise the goal and obligation of ensuring accountability for grave crimes, and it must be compatible with the objects and purposes of the United Nations (UN) Charter and, by implication, the Rome Statute of the ICC.

Compliance with these goals will ultimately necessitate a fundamental re-design of the instruments and institutions of Africa's regional human rights system and a massive commitment of regional financial and diplomatic resources on a scale that African States have so far been unwilling (and seemingly unable) to make.

Such re-design will inevitably be prolonged. Africa hardly needs nor can it afford the cost in time, resources, and credibility to the regional human rights system.

Absent such a prohibitively costly and fundamental re-design, an extension of the jurisdiction of the Court would create a regional African exceptionalism to international criminal law and international justice, ultimately damaging the credibility and effectiveness of Africa's regional human rights system. In the space between an African exceptionalism and an ineffectual regional system, an African impunity gap could become institutionalised, rendering international criminal law irrelevant to Africa. This outcome is both undesirable and avoidable.

2 STATEMENT OF INTEREST

This opinion is submitted with reference to the decision of the Assembly of Heads of State and Government of the African Union requiring the Commission of the African Union, together with the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights, to consider the implications of extending the jurisdiction of the Court to cover international crimes. It is submitted by the following institutions (hereafter referred to as "the Authors"):

- Coalition for an Effective African Court on Human and Peoples' Rights, CEAC;
- Darfur Consortium;
- East African Law Society, EALS;
- International Criminal Law Centre, of the Open University of Tanzania, ICLC;
- Open Society Justice Initiative;
- Pan-African Lawyers Union, PALU;
- Southern Africa Litigation Centre, SALC; and
- West African Bar Association, WABA

Together, these institutions combine expertise in international human rights law, international criminal law, the law of international institutions, as well as experience in the comparative laws and practice of regional human rights institutions in Africa and beyond. The urgency and gravity of the issues under consideration require that the Commission of the AU as well as the African Court and Commission on Human and Peoples' Rights should receive the benefit of the expertise at the disposal of the Authors.

3. BACKGROUND: EXTENSION OF THE JURISDICTION OF THE AFRICAN COURT SHOULD BE COMPATIBLE WITH OBLIGATION TO COMBAT IMPUNITY

Any consideration of whether or not to extend the jurisdiction of the African Court on Human and Peoples' Rights must be governed by the obligation undertaken by the States parties to the Constitutive Act of the African Union to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;² uphold the right of the Union to intervene in a State party in order to suppress "grave circumstances" arising in relation to international crimes, such as war crimes, crimes against humanity or genocide;³ and to promote respect for the sanctity of human life, including the condemnation and rejection of impunity.⁴

At its 12th Ordinary Session at the beginning of February 2009, the Assembly of Heads of State and Government of the African Union adopted a Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, which requested:

... the Commission (of the African Union), in consultation with the African Commission on Human and Peoples' Rights, and the African Court on

² Constitutive Act of the African Union, Art. 3(h)

³ *Ibid.*, Art. 4(h)

⁴ *Ibid.*, Art. 4(o)

Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.⁵

In July 2009, the 13th Ordinary Session of the Assembly of Heads of State and Governments reaffirmed this in a separate Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court further requesting:

the Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity.⁶

It may be pointed out that these decisions were made in the context of addressing concerns about “the abuse of the principle of universal jurisdiction” and the International Criminal Court (ICC), respectively. It cannot, however, be assumed that a regional criminal jurisdiction for Africa would necessarily address these concerns. As the AU-EU Expert Group on the Principle of Universal Jurisdiction points out in its report, “positive international law recognizes no hierarchy among the various bases of jurisdiction that it permits.”⁷ The creation of a regional criminal jurisdiction for and by Africa would not eliminate the existing bases of jurisdiction for international crimes nor diminish the prerogative of any

⁵ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/3 (XII) Assembly/AU/Dec.213(XII), para. 9 (2009)

⁶ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), para. 5.

⁷ *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Doc. 8672/1/09, Rev. 1, para 14

States wishing to assert them. On the contrary, it could complicate or diminish the ability of African States to effectively address these concerns in forums that exist or may be created for that purpose.

In the above-cited decisions and others preceding them, AU member States have consistently been careful to reaffirm commitment to combating impunity in Africa in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union.⁸ They have, for instance, condemned gross violations of human rights in Darfur, and demanded “the perpetrators be apprehended and brought to justice”.⁹ It is reasonable to conclude that in accordance with the text and tenor of the decisions of the AU, any extension of the jurisdiction of the African Court cannot merely be presumed to be for the purpose of combating impunity but must in fact be demonstrably in support of that goal and constitutive obligation of all AU member States.

The reference to the (African) Court in these decisions is ambiguous. The African Court on Human and Peoples’ Rights is established by a Protocol to the African Charter on Human and Peoples’ Rights adopted in June 1998, which entered into force in January 2004.¹⁰ At the end of August 2009, 25 African States had ratified or acceded to this Protocol,¹¹ which endows the African Court with

⁸ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), ¶4; Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/3(XII) Assembly/AU/Dec.213(XII), ¶3; Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Sudan, Assembly/AU/Dec.221(XII), ¶6; Assembly/AU/Dec. 103 (VI); Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.213(XII), preamble; Communiqué of the 142nd Meeting of the Peace & Security Council, PSC/MIN/Comm (CXLII), 2.

⁹ Assembly/AU/Dec.221, (XII) ¶7

¹⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, adopted 9 June 1998, entered into force 25 January 2004 (hereafter referred to as the “African Court Protocol”).

¹¹ The States that have ratified the African Court Protocol are: Algeria, Burkina Faso, Burundi, Comoros, Cote d’Ivoire, Gabon, Ghana, Gambia, Kenya, Libya, Lesotho, Malawi, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda. The current list of ratifications is available at

jurisdiction over contentious or advisory cases or complaints concerning the responsibility of African States parties for violations of or compliance with the provisions of the African Charter on Human and Peoples' Rights.¹² The Court, whose headquarters is located in Arusha, Tanzania, does not currently have criminal jurisdiction.

However, in July 2008, the African Union adopted another Protocol to create an African Court of Justice and Human Rights.¹³ This Protocol merges the African Court on Human and Peoples' Rights and the separate Court of Justice of the African Union¹⁴ into a dual-chamber African Court of Justice and Human Rights to function both as the judicial organ of the African Union and also as the regional human rights court for Africa. Like the current African Court, this composite court also lacks criminal jurisdiction. Upon entry into force of this Protocol, Article 1 provides that this composite court will replace the African Court on Human and Peoples' Rights.¹⁵ In particular, Article 7 of the composite court Protocol provides:

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights shall remain in force for a transitional period not exceeding one (1) year or any

<http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf>

¹² African Court Protocol, Articles 3-5.

¹³ Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Sharm-El-Sheikh, Egypt, 1 July 2008, (hereafter referred to as "Composite Court Protocol")

¹⁴ Created under Articles 5(d) and 18(1) of the Constitutive Act of the African Union, adopted in Lomé, Togo, 11 July 2000, entered into force 26 May 2001. The Protocol of the Court of Justice of the African Union was adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 11 February 2009. At the end of August 2009, 16 AU member States had ratified the Protocol: Algeria, Comoros, Egypt, Gabon, Gambia, Libya, Lesotho, Mali, Mozambique, Mauritius, Niger, Rwanda, South Africa, Sudan, Tanzania, and Tunisia. The Gambia was the latest State to deposit its instrument of ratification on 9 July 2009. Status of ratification is available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Court%20of%20Justice.pdf>

¹⁵ Under Article 9(1) thereof, the Composite Court Protocol will enter into force 30 days after the receipt of the 15th instrument of ratification. At the end of August 2009, only Libya and Mali had ratified the Protocol.

other period determined by the Assembly [of Heads of State and Governments of the African Union], after entry into force of the present Protocol, to enable the African Court on Human and Peoples' Rights to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights.

Quite clearly, the African Court on Human and Peoples' Rights is currently a transitional institution that will in the foreseeable future be replaced by the African Court of Justice and Human Rights. References to the "African Court" in the decisions of the Assembly of Heads of State and Government under consideration are thus best read as references to the African Court of Justice and Human Rights. Any change to the jurisdiction of the African Court can only occur in the context of a re-design or amendment of the institutional architecture of the composite court Protocol and will only take effect after the entry into force of that Protocol. Pending this, the existing framework of international norms and institutions, led by the permanent institution of the ICC, remain the only instruments available for ensuring accountability for international crimes and combating impunity for them in Africa.

The fundamental nature of the obligation to combat impunity and suppress and punish international crimes within the Constitutive Act of the African Union and in general international law requires that any review of the jurisdiction of the African Court should complement and be compatible with this existing international system in whose establishment and continued sustenance States parties to the African Union have been and remain pivotal.¹⁶

¹⁶African States played leading roles in the establishment of the ICC and Africa, with 30 States parties, has the largest single continental block of votes in the Assembly of States Parties (ASP) to the ICC. The African States that have ratified the Rome Statute of the ICC are: Burkina Faso- 30 November 1998, Senegal- 2 February 1999, Ghana- 20 December 1999, Mali- 16 August 2000, Lesotho- 6 September 2000, Botswana- 8 September 2000, Sierra Leone- 15 September 2000, Gabon- 20 September 2000, South Africa- 27 November 2000, Nigeria- 27 September 2001, Central African Republic- 3 October 2001, Benin- 22 January 2002, Mauritius- 5 March 2002, Niger- 11 April 2002, Democratic Republic of the Congo- 11 April 2002, Uganda- 14 June 2002, Namibia- 20 June 2002, Gambia- 28 June 2002, United Republic of Tanzania- 20 August 2002,

4. THE LEGAL CAPACITY OF THE AU TO EXTEND THE JURISDICTION OF THE AFRICAN COURT TO INTERNATIONAL CRIMES IS LIMITED BY THE REQUIRMENT THAT THE REVIEW MUST BE SUBSTANTIVELY COMPATIBLE WITH BOTH THE UN CHARTER AND THE ROME STATUTE OF THE ICC

The legal bases for the power of the AU to review the jurisdiction of the Court can be located within the law of treaties, including the Constitutive Act of the African Union and the UN Charter. While the AU has legal capacity to review or extend the jurisdiction of the African Court to cover international crimes, any such review should fulfill at least two clear criteria:

- it must be compatible with the objects and purposes of the United Nations (UN) Charter and, by implication, the Rome Statute of the ICC; and
- it must not compromise the objective of ensuring accountability for grave crimes.

The Protocol establishing the African Court of Justice and Human Rights omits any provisions on treaty review. In the absence of any such provisions, the review or amendment of the Protocol is governed by the general law of treaties which recognizes that a treaty may be amended by agreement between the parties thereto.¹⁷ Substantively, the Constitutive Act of the AU contains provisions requiring the organization to take effective action against impunity for international crimes, such as war crimes, crimes against humanity and

Malawi- 19 September 2002, Djibouti- 5 November 2002, Zambia- 13 November 2002, Guinea- 14 July 2003, Congo- 3 May 2004, Burundi- 21 September 2004, Liberia- 22 September 2004, Kenya- 15 March 2005, Comoros- 18 August 2006, Chad- 1 January 2007, Madagascar- 14 March 2008

¹⁷ Article 39 of the Vienna Convention on the Law of Treaties (1969)

genocide.¹⁸ These provisions may be read to empower the AU to review the treaty provisions on the jurisdiction of the Court.¹⁹

Article 52(1) of the UN Charter authorizes the existence of regional arrangements such as the AU “for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.” Article 52 is an exception to the regime of universality that underpins the UN Charter and remains subject to the controlling objectives of the Charter.

The Preamble to the Rome Statute of the ICC acknowledges that international “crimes threaten the peace, security and well-being of the world” and enjoins that “effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” International co-operation in this context could mean co-operation between two or more countries and clearly includes regional or continental co-operation. A major objective of the UN is the mobilization of “effective collective measures for the prevention and removal of threats to peace,”²⁰ such as international crimes.

Within this framework, regional instruments, such as the AU Refugee Convention, preclude from the ambit of refugee protection persons who have committed international crimes or who are guilty of acts contrary to the principles of the United Nations.²¹ Similarly, Article 58(1) of the African Charter on Human and Peoples’ Rights empowers the institutions of Africa’s regional human rights system to take measures with respect to “serious or massive violations of human rights,” an expression which arguably contemplates international crimes.

¹⁸ Constitutive Act of the AU, Articles 3(h), 4(h) & (o), 5(1)(d) & 9(1)(d)

¹⁹ African Union, *Report of the Committee of Eminent Persons of the African Union on the Case of Hissene Habré*, para 23, p. 4. (2006)

²⁰ UN Charter, Article, 1(1)

²¹ AU Convention Governing the Specific Aspects of the Refugee Problems in Africa (1969), Article 1(5)

However, the UN Charter subjects the AU's proposed review of the jurisdiction of the African Court to a substantive criterion of compatibility with the objectives and purposes of the Charter²² and, in particular, the objective of ensuring "effective collective measures" against international crimes. This implies, firstly, that the outcome of the review must demonstrably fulfill the Charter criterion of effectiveness. The standards of effectiveness are not anywhere defined but it is reasonable to suggest that any review outcome that diminishes or detracts from existing standards of accountability for international crimes cannot be regarded as effective. Secondly, therefore, to the extent that the Rome Statute of the ICC is established "in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole"²³ as such a collective measure, the validity of the proposed review is also necessarily dependent on its being compatible with the principles and standards of the Rome Statute. On current evidence, the AU member States are unlikely to meet these standards in the nearest future.

5 THE EXTENSION OF THE JURISDICTION OF THE AFRICAN COURT FACES INSURMOUNTABLE DESIGN AND PRACTICAL DIFFICULTIES LIKELY TO RENDER THE RESULT INEFFECTUAL AND INCOMPATIBLE WITH THE OBJECTS AND PURPOSES OF THE UN CHARTER

The fiscal implications of conferring criminal jurisdiction on the African Court, including the costs of endowing it with adequate human and institutional resources and ensuring its ongoing funding, raise serious questions about the effectiveness, independence and impartiality of such a Court.

²² *Case Concerning Military and Para-Military Activities in and Against Nicaragua*, Jurisdiction and Admissibility, (1984) *ICJ Reps*, 392, para 107

²³ Rome Statute of the ICC, Preamble, para., 9

Like the regional human rights courts in both the Americas and Europe, Africa's regional human rights court neither has nor needs criminal jurisdiction. This is because:

Regional and treaty bodies are organs of *State responsibility* in the sense that their jurisdiction is limited to analyzing whether a State has breached its obligations under a specific human rights treaty and if so, to provide redress to the victim of the violation. They are emphatically not empowered to adjudicate claims against individuals for actions that in addition to being a human rights violation may constitute crimes as well. This feature – and also that organs of State responsibility are not empowered to consider abuses committed by non-State actors unless the State is complicit in some fashion -- is a major distinguishing factor between them and international criminal tribunals....In fact, regional treaty bodies and international criminal tribunals were created at different times and for different historical reasons.²⁴

AU member States clearly supported this position when, in adopting the Statute of the African Court of Justice and Human Rights in 2008, they rejected the recommendation of the experts who sought to confer criminal jurisdiction on the Court.²⁵ To seek such a fundamental review of this decision as is now proposed, so soon after it was adopted, before the entry into force of the Protocol—and well before the Court has been given the opportunity to prove itself—calls into question the credibility of the AU's decision making processes.

Conferring criminal jurisdiction on the African Court will require the re-design of the institutions and instruments of the African regional human rights system as well as the establishment and funding of a complementary regional regime of

²⁴ Juan Mendez, "Regional Courts and Commissions", Consultative Conference on International Criminal Justice, United Nations Headquarters, September 9-11 2009, p. 1, italics original.

²⁵ See, African Union, *Summary Report of the Working Group on the Draft Single Instrument Relating to the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, UA/EXP/Fusion.Cours/Rpt.1

co-operation in criminal matters. Necessary adjustments that will need to be made to the design of the Court include the creation of standards guaranteeing the independence of the Prosecutor, and the articulation of trigger mechanisms, the rights of victims (including the protection of witnesses and victims), the rights of the defence, co-operation and assistance,²⁶ compliance with decisions and orders of the Court, and adequate funding and facilities for the Court. The fiscal implications of these adjustments will be exponentially onerous and call into question the desirability and effectiveness of the process.

As presently envisaged under Article 8(4) of the Statute of the African Court of Justice and Human Rights, only the President and Vice-President of the African Court of Justice and Human Rights will be full-time judges for the duration that they hold these positions. The criteria for the election of the judges of the Court in Article 4 of the Statute (of the African Court of Justice and Human Rights) do not include any requirement for expertise in criminal law of any kind. The Protocol does not provide for a Prosecutor nor does it have an appeals chamber. Similarly, there are no provisions prescribing punishment for crimes, criminal procedure, or the rights and protections for victims, witnesses or the defence. The amendment will also require the creation of at least two more sections or chambers within the African Court – a criminal section and an appeals chamber.²⁷

²⁶ With respect to co-operation, Article 28 of the Statute of the International Criminal Tribunal for Rwanda, ICTR, provides:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - (a) The identification and location of persons;
 - (b) The taking of testimony and the production of evidence;
 - (c) The service of documents;
 - (d) The arrest or detention of persons;
 - (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda

²⁷ Article 16 of the Statute of the African Court of Justice and Human Rights creates two Sections within the Court: a General Affairs Section and a Human Rights Section

Quite apart from these design implications, a mechanism of regional co-operation for the Court will need to be established and implemented as well as arrangements for holding detainees and prisoners. An enhanced African Court will have to be provided with these facilities. If these are unaffordable, then agreements will have to be reached with African States for them to take responsibility for the detention of accused persons undergoing trial before the Court and the imprisonment of individuals convicted after such trials. In addition, a re-designed African Court with criminal jurisdiction will need the capacity to undertake outreach, protect victims and witnesses, and collect and preserve evidence. The capacity of African States to muster the resources and will to guarantee these facilities—even as many of them struggle to guarantee the independence of their domestic judicial institutions—is open to question.²⁸

When all the design requirements are aggregated, the result will be an institution quite different from the African Court on Human and Peoples' Rights and the institution contemplated in the African Court of Justice and Human Rights. An enhancement of the jurisdiction of the African Court to cover international crimes without the extensive re-design and fiscal provisions called for by these adaptations will not pass muster. With the proposed enhancement of the jurisdiction of the Court, its operational costs will be bound to escalate exponentially well beyond the present annual budget of the African Court of US\$6 million or the US\$3 million annual budget for the African Commission on Human and Peoples' Rights. To demonstrate the full impact of the fiscal implications of international criminal trials, the unit cost of a single trial for an international crime is estimated to be US\$20 million.²⁹ This is nearly double the approved 2009 budgets for the African Court and the African Commission

²⁸ See, for instance, "Niger: President Sacks Constitutional Court.", available at <http://allafrica.com/stories/200906300351.html>. In *Lubuto v. Zambia*, Case no. 390/1990, Views adopted on 31 October 1995, before the United Nations Human Rights Committee, Zambia sought to argue -- but the Committee disagreed -- that a developing country such as it is could not be expected to have the resources to fund adequate justice provision

²⁹ Adam Smith, *After Genocide: Bringing the Devil to Justice*, New York, Prometheus Books, (2009) The International Criminal Tribunal for Rwanda (ICTR) spent \$1.1 billion US Dollars to conclude 45 trials, an average of some \$24.4 million US Dollars per case. Visit <http://tj-forum.org/archives/001724.html>

standing at US\$7,642,269 and US\$3,671,766, respectively. It also represents 14.26% of the AU's total annual budget of US\$140,037,880 for 2008.³⁰

An inadequately resourced African Court with criminal jurisdiction could easily institutionalise regional exceptionalism for international crimes. Under Article 26(1) of the Statute of the African Court of Justice and Human Rights, the Assembly of Heads of State and Government of the AU approve the budget of the Court. International crimes by definition are invariably crimes of state policy or of a systematic nature.³¹ Potentially, the decision makers in the Assembly could be the individual targets or focus of criminal proceedings before the Court. The clear implication here is that an African Court with an enhanced criminal jurisdiction will confront a credible risk of interference with its independence through budgetary constraints capable of compromising its independence and effectiveness in a manner incompatible with the Article 52 and 103 of the UN Charter.

However, instead of undertaking the extensive review that would be required to confer jurisdiction for international crimes on the African Court, the AU could decide to endow itself with the power to refer situations of international crimes in Africa to the African Court on an *ad-hoc* basis as the need arises. The Committee of Eminent African Jurists on the Case of Hissène Habré concluded in 2006 that the African Union had such powers within the Constitutive Act.³² Even this limited step, it is submitted, will require extensive amendment of the Composite Court Protocol to endow the Court with the skills and capacities to function as an institution with criminal jurisdiction, including the need for a pool of judges with the expertise to preside over criminal trials. Moreover, transparent safeguards will have to be established to ensure that such a mechanism is not abused in

³⁰ African Union, *Budget Execution Report*, 30 September 2008, EX.CL/455(XIV) – a, p.1. Also in 2008, the annual budget of the African Court on Human and Peoples' Rights was \$7,901,214 and for the African Commission on Human and Peoples' Rights, \$6,003 857. See *Ibid.*, Annex 1, p. 9

³¹ See Rome Statute of the ICC, Articles 6, 7(1) & 8(1).

³² African Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, July 2006, para 23, p. 4

order to preclude effective accountability for international crimes. As such, it would fail to address the obstacles that preclude such a court from being an effective instrument for fighting impunity in Africa.

6 AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS WITH CRIMINAL JURISDICTION COULD LICENSE AN IMPUNITY GAP CONTRARY TO THE CONSTITUTIVE ACT OF THE AFRICAN UNION AND THE UN CHARTER

The African regional human rights system has not yet evolved an effective norm of compliance and co-operation with regional courts and tribunals. Reinforced by the prohibitive design and resource constraints confronting the review of the jurisdiction of the African Court of Justice and Human Rights, this could license an African exceptionalism to international justice, creating an impunity gap that would undermine the commitments to eliminate impunity made by African States in both the Constitutive Act of the African Union and the UN Charter.

In reaching this conclusion, consideration must be given to the absence of a framework for mutual cooperation on legal issues amongst African countries with regard to the putatively enhanced jurisdiction of the African Court. The effectiveness of such a Court, not having a police force to enforce its orders, would depend on the co-operation of States parties, including their assistance with investigations in situation countries and compliance with the Court's requests and orders. Given that investigations, arrests, and rendering are functions of domestic legal systems, the Court will have to rely on full cooperation from states. Thus it must be endowed with the requisite powers to seek and received habitual cooperation from states.

Although the African Charter has been universally ratified by all AU member States, African States have notoriously failed to comply with decisions of the African Commission on Human and Peoples' Rights, the functioning institution established to implement the provisions of the Charter. It has been estimated that

the rate of compliance with decisions of the Commission is a mere nine percent.³³ There is a similar pattern of resistance to compliance with the decisions of the sub-regional courts of justice. For instance, at the beginning of September 2009, Zimbabwe announced withdrawal from the jurisdiction of the South African Development Community (SADC) Tribunal “in an apparent bid by government to stop the effect of two judgments passed against it by the Windhoek-based court.”³⁴ Similarly, the Gambia has failed repeatedly to comply with decisions of the ECOWAS Court of Justice.³⁵ In East Africa, two contentious decisions of the East African Court of Justice have similarly not been complied with.³⁶ More than 11 years after the establishment of the African Court on Human and Peoples’ Rights and more than five years after the Court came into force, 52 of the 53 member States of the AU have not yet accepted the right of individual petition to the African Court on Human and Peoples’ Rights.³⁷

Taken together, these facts document the absence of an effective norm of co-operation with regional judicial institutions, and the lack of will to ensure such co-operation for a regional criminal jurisdiction at this time. In the absence of such a norm of compliance and co-operation, the existence of a regional human rights court with criminal jurisdiction would likely result in forum shopping by regional states accused of gross and massive violations of human rights. It would also lead to regional exceptionalism from international justice and create an impunity gap, precluding effective international action and excusing any regional inaction on individual accountability for international crimes. Effectively, it

³³ Frans Viljoen & Lirette Louw, “State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1993-2004”, 101 *Am. J. Int’l L.*, 1 (2007)

³⁴ Raymond Maingire, “Zimbabwe Withdraws from SADC Tribunal”, 2 September 2009, available at <http://www.thezimbabwetimes.com/?p=22107>. The major decision affected is the case of *Mike Campbell (Pvt) Ltd & Anor. v. Republic of Zimbabwe*, Case No. SADCT: 2/07

³⁵ E.g., *Manneh v The Gambia*, 5 June 2008, ECW/CCJ/JUD/03/08, see “IFJ Calls on ECOWAS and Gambia to Enforce Court Ruling on Disappearance of Journalist 3 Years On”, available at <http://africa.ifj.org/en/articles/ifj-calls-on-ecowas-and-gambia-to-enforce-court-ruling-on-disappearance-of-journalist-3-years-on>

³⁶ See EACJ Ref. No. 1 of 2006, *Prof. Peter Anyang’ Nyong’o & 10 Others v. Attorney-General of Kenya & 5 Others*; EACJ Ref. No. 1 of 2007, *James Katabaazi & 21 Others v. Attorney-General of Uganda & Another*.

³⁷ Only Burkina Faso has made the requisite Declaration accepting the right of individual petition to the Court.

would be contrary to the obligation of AU Member States in both the Constitutive Act and the UN Charter to eliminate impunity. An alternative to this, it is submitted, would be to encourage Member States of the African Union to enhance the credibility of Africa's regional human rights system not with enlarged subject-matter jurisdiction but with enhanced compliance, co-operation, and support.

7 EVEN WITHOUT EXPLICIT JURISDICTION OVER INTERNATIONAL CRIMES, THE EXISTING JURISDICTION OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS NEVETHELESS REMAINS QUITE RELEVANT TO THE PREVENTION OF INTERNATIONAL CRIMES IN AFRICA

The jurisdiction of the African Court precludes criminal matters but is quite relevant to the prevention of international crimes in Africa. Conferring criminal jurisdiction on the Court could diminish its capacity to play this role before it has proved itself to be a credible and capable regional system for the protection of human rights.

Article 3 of the Composite Court Protocol merging the two courts provides that “references made to the ‘Court of Justice’ in the Constitutive Act of the African Union shall be read as references to the ‘African Court of Justice and Human Rights’ established under Article 2 of this Protocol.”³⁸ In accordance with this provision, the merged African Court of Justice and Human Rights succeeds to the role of the AU Court of Justice as the judicial organ of the AU. It will, therefore, have primary jurisdiction to interpret and apply the provisions of the Constitutive Act of the AU, including those of Articles 3(h) and 4(h) relating to the suppression of impunity and intervention in respect of grave circumstances such as war crimes, crimes against humanity and genocide respectively, which provide the bases for any asserted roles of the AU in suppressing international crimes.

³⁸ Article 3, Reference to the single Court in the Constitutive Act

Similarly, by operation of Article 1 of the Composite Court Protocol, the African Court of Justice and Human Rights will also be the successor to the African Court on Human and Peoples' Rights, with jurisdiction to interpret and apply the provisions of the African Charter on Human and Peoples' Rights, including the provisions of the African Charter concerning serious or massive violations of human rights in Article 58 thereof. Such jurisdiction may be exercised with respect to determination of State responsibility for such acts. The African Commission on Human and Peoples' Rights could, additionally, investigate and report on such situations or provide technical assistance to African States confronting situations of serious or massive violations of human rights. Under the Rome Statute, national jurisdictions retain primary jurisdiction over such crimes except where they are "unwilling or unable genuinely" to ensure accountability for them.³⁹

8 CONCLUSION: A REGIONAL COMPLIANCE CULTURE IN SUPPORT OF AFRICA'S REGIONAL HUMAN RIGHTS INSTITUTIONS WILL ENABLE THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS TO PREVENT INTERNATIONAL CRIMES IN AFRICA

States Parties to the Constitutive Act of the African Union have an obligation to take effective action to prevent international crimes and eliminate impunity for them through effective measures to ensure individual accountability for such crimes. Such effective measures require co-operative State action and capable institutions. An amendment of the jurisdiction of the African Court to endow it with criminal jurisdiction will create a regional criminal court for Africa. As a legal proposition, such a regional Court confronts an insurmountable risk of being incompatible with the norms and standards of the Constitutive Act of the African Union and of the UN Charter.

³⁹ Rome Statute, Article 17(1)(a)

The AU only has the power to create such a Court if it is compatible with the goal and obligation of facilitating effective action against impunity. There is a serious risk that the creation of a regional criminal court by and for African countries will undermine effective accountability for international crimes in Africa, erode existing norms, institute a corrosive system of forum shopping for international crimes, prevent Africa's regional human rights system from fulfilling its potential, and derail the protection of human rights in Africa. Far from contributing to effective accountability for international crimes, such a regional criminal court would preclude accountability in any form.

As a practical matter, a regional criminal court for Africa will be unduly expensive and unaffordable. The prosecution of perpetrators of international crimes is not cheap. The policy, design, and practical difficulties associated with establishing such a court as outlined above lead to the conclusion that Africa does not need it, nor can afford it. African countries have been leaders in the creation of the ICC and need to be represented in ensuring that it is an accountable institution. A regional criminal court for Africa will diminish the voice and authority of Africa in the governance of the ICC, rendering it less accountable to African communities.

The AU and many of its member States have expressed credible concerns about international criminal justice mechanisms, including both universal jurisdiction and the ICC. With respect to the former, the process and report of the AU-EU Expert Group on the Principle of Universal Jurisdiction provides a road map of recommendations to be pursued in addressing these concerns. Concerning the latter, Africa remains the largest single regional grouping within the Assembly of States Parties (ASP) to the Rome Statute of the ICC. The effectiveness of the ASP as a mechanism for addressing these concerns is yet to be tested. The Review Conference of the ASP scheduled to be hosted by Africa in Kampala, Uganda, in 2010 will be an opportunity to challenge the ASP to address these concerns. To seek to initiate or undertake the process of establishing a regional criminal

jurisdiction before then could diminish the effectiveness of African States in ensuring that these issues are effectively addressed.

The AU can, meanwhile, promote the inherent complementarity between the ICC and Africa's regional human rights system. The African Court and Commission can contribute to preventing mass atrocities in Africa: investigating, collecting, and preserving evidence of such atrocities where they occur, determining State responsibility for them, and clarifying applicable norms of state conduct within the ambit of the Constitutive Act of the African Union and the African Charter. African States in turn can support these institutions in establishing a regional norm of legality and compliance with decisions of national and regional courts. It is possible to envisage a future without mass atrocities in Africa, and, indeed, a future in which there is no need for a regional or international court to try international crimes in Africa, because effective national and regional mechanisms of justice exist on the continent.

RESPECTFULLY SUBMITTED

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Open Society Justice Initiative

OPEN SOCIETY
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