

CHAPTER 4:

INTERNATIONAL CRIMINAL JUSTICE AND AFRICA THE STATE OF PLAY

In February 1999, Senegal became the first State Party to ratify the Rome Statute. This is not by chance. The ideals of international justice are contained in African seminal norms. The Constitutive Act of the AU provides that the organisation shall function consistently with ‘condemnation and rejection of impunity’, among other principles and – quite extraordinarily – also provides for the right of the AU to intervene in a Member State in the event of war crimes, genocide and crimes against humanity. This is a unique provision in the founding document of an intergovernmental organisation.

FATOU BENSOUDA¹
PROSECUTOR OF THE ICC

International Criminal Justice in Africa – A Snapshot

In Africa, 34 states have ratified or signed the Rome Statute, accounting for more than half the continent. All eight situations before the ICC are in Africa. African countries have already contributed greatly to ensuring accountability for atrocities committed on the continent. The work of the ICTR, the SCSL, broad African membership of the ICC, and recent progress in the case of Hissène Habré are testament to a willingness on the part of Africa to support efforts to secure accountability for international crimes.

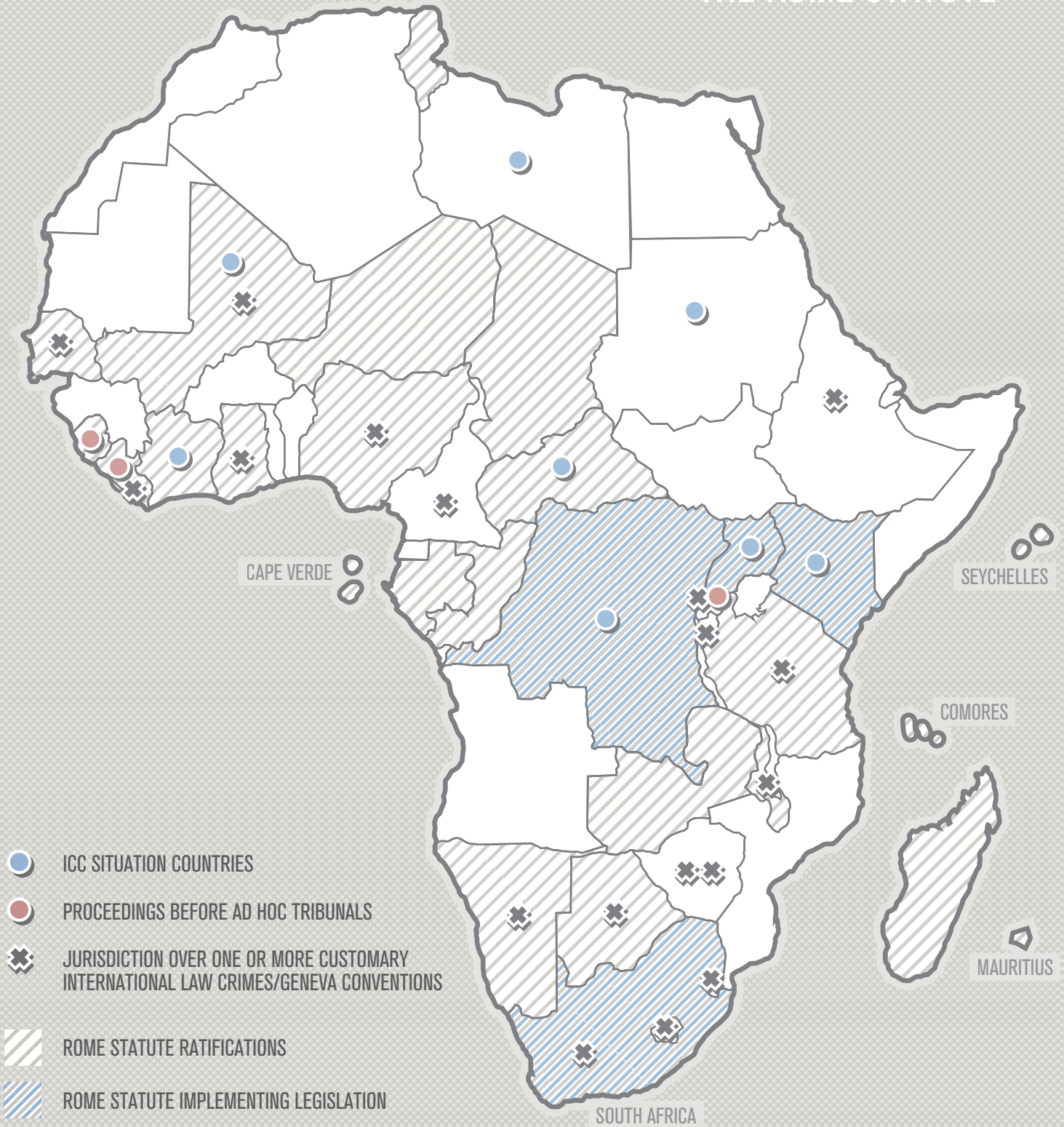
At the continental, regional and national level there is, at least on paper, a commitment to ensure accountability for international crimes, both within the framework of the Rome Statute and in respect of other international conventions and national criminalisation of international crimes in domestic penal codes. This commitment, although not always uniform and, unfortunately, not often acted upon, provides both a legal and moral basis to ensure Africa is proactively involved in the international criminal justice project.

African states took the opportunity presented by the Rome Conference in 1998 to participate fully in the creation of the first permanent international criminal court, and this active participation has been well documented.² As Mochochoko notes:³

“Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.”

This support during the drafting process was continued once the Rome Statute was opened for ratification. Senegal was the first state to ratify the Statute, and to date 34 African states have followed suit. Since then, African states have continued to play a key role in operationalising and strengthening it, most recently through their participation in the Kampala Review Conference where in 2010, against international expectations, agreement on the definition of the crime of aggression was reached. There are a number of judges from Africa elected on to the ICC and in 2012,

34 OUT OF 54 HAVE RATIFIED THE ROME STATUTE



the new prosecutor, Fatou Bensouda, who hails from The Gambia, was elected. At the same time that states were negotiating the Rome Statute that changed the structure of the international order, African states were restructuring the regional order through the transition from the Organisation of African Unity (OAU) into the AU. One of the cornerstones of this new regional organisation was the need to prevent and punish international crimes: the AU's Constitutive Act (article 4(h)) proclaims as a founding principle "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".⁴ Recently, in its report on universal jurisdiction, the AU's Office of Legal Counsel noted that article 4(h) "provides the basis of the practice of the African Union on universal jurisdiction over war crimes, genocide and crimes against humanity".⁵ To this end, the AU is currently working on a Model Law on Universal Jurisdiction for international crimes. The AU is also currently considering an amendment to the continent's human rights architecture that will grant the African Court of Justice and Human Rights (ACJHR/the African Court) jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes.⁶

This commitment to collective responsibility (and accountability) for the prevention and punishment of international crimes is carried through into sub-regional organisations as well. Most notably, the International Conference on the Great Lakes Region (ICGLR)⁷ – established in 2006 – recognised that "genocide, war crimes, and crimes against humanity are crimes under international law and against the rights of peoples", and required member states to take specific measures to prevent and punish these crimes.⁸ Furthermore, the ICGLR's *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*

(Great Lakes Pact) contains a provision on combating impunity that further elaborates on member states' obligations in this regard. This includes a provision that the status of an official shall not be a bar for a member state complying with a request for surrender from the ICC, or another state.⁹

While progress has been made at the national level, some work remains to be done. Of the 34 African states that have ratified the Rome Statute, few have adopted the necessary legislation to implement the obligations under the Statute and provide for the prosecution of international crimes in domestic courts.¹⁰ Furthermore, domestic practice remains sparse. Save for the hybrid SCSL and Rwanda, African states have not for the most part been active in prosecuting international crimes domestically – despite ample opportunities to do so. More notably, African states have been unwilling to exercise universal jurisdiction in respect of crimes committed in neighbouring countries, let alone further abroad. However, as discussed below, CSOs have been instrumental in turning the tide on this pattern of inactivity in African states, and prosecutions are under way or imminent in the DRC, Senegal and South Africa.¹¹

Deconstructing the Relationship between Africa and the International Criminal Justice Project

In recent years, the relationship between Africa and the ICC has come under increasing strain. To understand the state of play, it is important to appreciate that the international justice project involves a number of actors, each of which share a unique relationship with one another:

- African states
- The AU
- The UN Security Council
- The ICC

African States

Africa is made up of 54 sovereign and independent states, 34 of which have agreed to be bound by the Rome Statute and are obliged under international law not only to cooperate with the ICC but also not to act in a manner which would defeat its object and purpose. Among African states there are a number of different positions on the ICC. Notably, relatively few states have adopted outright negative stances towards the ICC. Those that have done so, such as Sudan and to some extent Kenya, are often motivated by domestic considerations related to the ICC's current caseload, or possible future prosecutions. In contrast, a number of states have come out independently in support of the ICC (most vocally Botswana), while others have voted with their feet by choosing to refer crimes committed in their territory to the ICC: Uganda, DRC, Central African Republic, Ivory Coast and Mali. However, the nuances of different positions held by African states on the ICC have been lost in the consensus-based decision-making process at a continental level.

The AU

The AU was formed in 2002 to replace the OAU. To properly understand the AU's apparently hostile relationship with the ICC, it is necessary to separate the body into its constituent parts. On the one hand, there is the AU Commission – the autonomous “Secretariat of the AU” under the leadership of the chairperson of the Commission. Until recently, the AU Commission was headed by Jean Ping, who became the ICC's most vocal critic during his tenure. In 2012, Ping was replaced by South Africa's Nkosazana Dlamini-Zuma. Separate from the Commission is the AU Assembly of Heads of State and Government, the “supreme organ” of the AU, a plenary body made up of representatives of all African states. While the Assembly has adopted a number of decisions critical of the ICC, it is important to note that its decisions are usually adopted by consensus, which has resulted in the silencing of dissenting and more moderate voices on the ICC at times.¹² In addition to this, the influence of the AU Commission in the drafting of Assembly decisions has been raised in the past as a contributing factor to the anti-ICC rhetoric contained therein.

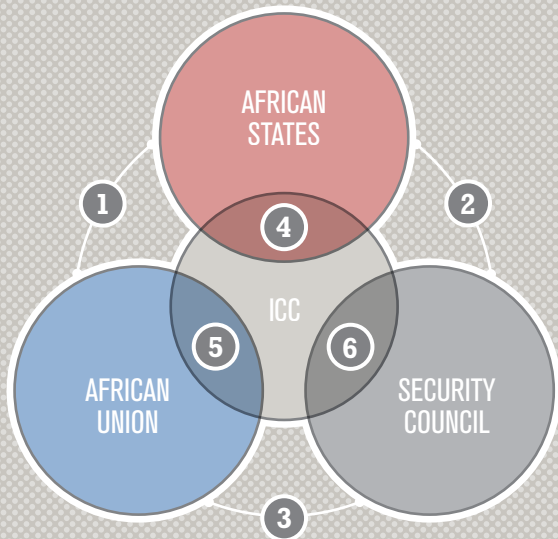
The UN Security Council

The UN Security Council is a political body, entirely separate from the ICC, comprised of representatives of the five permanent member states (China, France, Russia, the United Kingdom and the United States), and ten non-permanent seats, filled by states from around the world on a rotational basis. Under the UN system, the Security Council is tasked with maintaining international peace and security, and is given extraordinary power to do so. Under the Rome Statute,¹³ the Security Council may use this power to “refer” a state to the ICC for investigation and prosecution, even if that state is not party to the Rome Statute or “defer” an ongoing investigation temporarily in the interests of international peace and security.¹⁴ As discussed below, African states' positions on the ICC are a combination of complaints about, inter alia, the make-up of the Security Council, the powers given to the council under the Rome Statute, and the way the powers of referral and deferral are exercised.

The ICC

The judicial functions of the ICC are discussed in detail above; however, it is worth pointing out that the relationship between the ICC and African states has been influenced by non-judicial factors as well. Chiefly, the former prosecutor was accused of being “rude” and undiplomatic in his dealings with African states. This “failure of diplomacy” contributed to, and was compounded by, the AU's decision to delay the establishment of a liaison office for the ICC at its headquarters in Addis Ababa.

THE INTERNATIONAL CRIMINAL JUSTICE PROJECT IN AFRICA: THE BIGGER PICTURE



1. African States and the African Union

- The AU has called on African states to not arrest Bashir
- Mali, Chad, Djibouti, Kenya, and Malawi have hosted Bashir

2. African States and the Security Council

On the two occasions that the Security Council referred African situations to the ICC African countries voted in favour of the referrals:

- Sudan referral: Benin and Tanzania
- Libya referral: South Africa, Gabon and Nigeria

3. African States and the ICC

- 34 African states have ratified the Rome Statute
- 8 African situations are before the ICC:
 - 4 Self referrals (CAR, Uganda, DRC, Mali)
 - 1 request for ICC assistance (Ivory Coast)
 - 1 Prosecutor referral (Kenya)
- ICC Prosecutor is from the Gambia
- 4 African judges serve at the ICC

- 6 African countries have implemented the ICC Act
- Malawi, Kenya and South Africa have cooperated in respect of the arrest warrant against Bashir
- Mali, Chad, Djibouti, Kenya and Malawi have hosted Bashir on different occasions

4. The ICC and the African Union

- The AU has accused the ICC of targeting Africa.
- The AU has called for African states not to cooperate with the ICC in respect of arrest warrants for Bashir.
- The AU accuses the ICC of undermining its efforts of promoting peace and security.
- The AU has indicated its intention to approach the International Court of Justice (ICJ) for an advisory opinion on the question of immunity.
- The AU intends to vest the African Court of Human and Peoples Rights with international criminal jurisdiction.

5. The ICC and the Security Council

The Security Council has referred 2 situations to the ICC pursuant to Article 16:

- Sudan
- Libya

6. The Security Council and the African Union

- The Security Council has the power to refer situations occurring in countries that are not party to the Rome Statute to the ICC. This power is exercised when the Security Council believes that a referral is in the interest of international peace and security.
- The Security Council can defer proceedings before the ICC, if it believes that it is in the interest of justice to do so.
- The AU's anti-ICC rhetoric is largely due to the manner in which the Security Council has used its referral power (in respect of Libya and Sudan) and failure to use its deferral power, at the request of the AU, in respect of Sudan.
- The Security Council is accused of not utilising its power properly and consistently, and that political motives drive decision making.
- Referrals and deferrals are made without the input of the ICC

Disaggregating the Issues in the Africa-ICC Relationship

The fact that all eight situations before the ICC are African and a perception that European states are abusing the universal jurisdiction principle in respect of senior African politicians, has led to the allegation of a bias against Africa. This has resulted in states questioning the international criminal justice project altogether. The low-point of this testy exchange has undoubtedly been the decisions of the AU Assembly of Heads of State and Governments instructing African states not to cooperate in the arrest and surrender of President Bashir to the ICC, which damaged the relationship between the ICC and African states (discussed in infographic).

The claim that the ICC is biased towards crimes committed in Africa is a serious one.

However, the first thing to note is that the charge of an African focus by the ICC is over-blown. The majority of situations currently before the ICC were instigated by African states themselves referring alleged crimes to the prosecutor (See Uganda, DRC, CAR and Mali). Although the Ivory Coast and Kenya proceedings were instigated by the prosecutor, both were done with the support of the states concerned (although the Kenyan support later waned). Alternatively, viewed from a different perspective, this bias towards Africa is a positive one in that it favours victims of international crimes committed in Africa.

In truth, there are reasonable explanations for the fact that all the active situations before the ICC are in Africa: there is a preponderance of conflicts in Africa; and as the biggest regional bloc of states the chances of cases being generated from Africa are high. There are also hostile political conditions and jurisdictional limitations that prevent the ICC from pursuing several deserving cases from other parts of the world (such as Gaza and Syria).

However, while these responses may serve to temper the force of the anti-African charge against the ICC, they should not detract from the legitimate and well-founded concerns raised by African states regarding the ICC. Chief among these is the role the UN Security Council plays in the operation of the ICC through article 13(b) and article 16 of the Rome Statute respectively.¹⁵ These concerns are not novel; rather, the role played by the Security Council was the most divisive issue during the drafting of the Rome Statute. For their part, African states were not happy with any role for the Security Council, even a limited one, but in 1998 many viewed this Faustian bargain as necessary in order to enable the court to come into being and secure the support of certain powerful states. In recent years, however, this compromise has become increasingly less tenable to African states. As such, the role of the Security Council remains the seminal concern of African states today. This complaint is broader than international criminal justice and implicates the very structure of the international legal order. Nevertheless, it is a valid one.

Africa v the ICC or AU v Security Council?

When assessing the international criminal justice project in Africa, it is an unfair generalisation to say that Africa is anti-ICC. To adopt this view ignores the multiple actors involved, and the specific elements and decisions that have given rise to some of the criticisms. When one talks about the international justice project in Africa it is important to be aware of a number of aspects that speak to both the support and criticism that is to be found in Africa.

- The AU's criticisms against the ICC are not an accurate reflection of the support for international criminal justice in Africa. Individual state support has been shown by a number of countries.
- The AU blames the ICC for the actions of the Security Council. The ICC and the Security Council are two independent and completely separate institutions and cannot be considered as a single entity. The ICC cannot be blamed for decisions made by the Security Council and cooperation with the ICC by African states should not be withheld because of unpopular decisions taken by the Security Council.

Is the ICC Targeting Africa?

CSOs working in the area will be confronted with these criticisms, and must be prepared to address them in the course of their work if they are to build support for the international criminal justice project. ICC prosecutor Fatou Bensouda addresses these concerns:

“Let me turn squarely to the question you would like me to answer today. All the persons accused by the ICC are African. That is true. Why?”

Because the Rome Statute says that we should select the gravest situations under the Court's jurisdiction. There are also more than 5 million African victims displaced, more than 40 000 African victims, hundreds of thousands of African victims transformed into killers and rapists, thousands of African victims raped.

You are still asking why we are in Africa?

Because the Rome Statute says the Court shall only step in when the domestic authorities do not pursue accountability themselves. And in all the cases we selected there were no such proceedings. When the legal criteria are met, the Office of the Prosecutor shall open investigations.

You are still asking why?

Do you know that African leaders requested the Court to intervene in six of our situations: President Museveni in Uganda referred the situation in Uganda to the Office of the Prosecutor; President Kabila referred the situation in the DRC to the Office of the Prosecutor; President Bozize referred the situation in CAR; Benin and Tanzania voted in the UN Security Council to refer the Darfur situation; South Africa, Gabon and Nigeria voted in the Security Council referral of the Libya situation to the ICC; and in Ivory Coast both presidents Gbagbo and Ouattara accepted jurisdiction of the ICC. These decisions, taken by African states, reflect leadership and commitment to ensuring that international crimes do not go unpunished.

Perhaps you are now asking why we are not investigating possible crimes in Lebanon, Syria, Iraq, Sri Lanka, Burma, Nepal, Yemen, Bahrain, Zimbabwe, USA, China, Russia, or Pakistan.

These states are non-States-Parties. As I have explained, we can only open an investigation where we have jurisdiction. We would only have jurisdiction over these particular countries where there was a referral by the UN Security Council or through the acceptance of the jurisdiction of the state concerned. Naturally, the state could also decide to join the Rome Statute.

The Court is a judicial institution and any decision to proceed with an investigation is guided solely by assessing the facts on the basis of the criteria set out in the Rome Statute. We are not influenced by any factors relating to geographical or political balance.”¹⁶

The Current State of Affairs

The first decade of the ICC has demonstrated the reinvigorated relevance of international criminal law. While challenges will continue, it is important not to lose sight of the opportunities; the international criminal justice project is at a critical moment in its development and should be nurtured.

In 2012, the ICC secured its **first conviction** – that of **Thomas Lubanga Dyilo**. While this is an important milestone, it was too long in coming and there were a number of avoidable difficulties along the way.¹⁷

The year 2012 also saw the changing of the guard, with the new chief prosecutor, Fatou Bensouda taking office.¹⁸ Her predecessor – Luis Moreno Ocampo – was a controversial figure. While he undoubtedly put the ICC on the map, his abrasive style alienated many, both within his office and beyond, and he was the target of African criticism regarding the selection of only African situations. The new prosecutor has the unenviable task of bringing the ICC's relationship with African states back from the brink, which will require feats of both style and substance. Thankfully, she enjoys the support of a broad cross-section of civil society in undertaking this task.

From the perspective of African states and CSOs, more efforts must be made to improve their relationship with the international criminal justice project – in which they and their electorates have so much invested. Here too there has been a change at the top that augurs well for supporters of the ICC. South Africa's Nkosazana Dlamini-Zuma was elected as the AU's new chairperson in July 2012. While her standpoint on the ICC remains unclear, the man she replaced – Jean Ping – was not a great supporter of the ICC, nor of Ocampo. Dlamini-Zuma's steerage of the AU will be crucial in respect of two of its international criminal justice related initiatives on the horizon.¹⁹

African civil society has taken the opportunity to raise issues with the new leadership at these institutions.²⁰

At the regional level, a development that has raised concerns is the **proposed amendment of the statute of the African Court to grant it jurisdiction over the international crimes**²¹ of genocide, war crimes and crimes against humanity, as well as several transnational crimes. The draft protocol has been approved and has been recommended to the AU Assembly for adoption. Currently, the AU is waiting for a report on the financial

“I am humbled by the privilege, responsibility, and vote of confidence bestowed upon me by the Assembly of States Parties and the wider international community. I am particularly thankful for the confidence the African Union had in me and its support for my candidature. This is yet another clear demonstration of the continent's commitment to international justice and the fight against impunity. The one thing that I can assure every one of you is that I will be the prosecutor for all the 121 States Parties, acting in full independence and impartiality.

The world is increasingly understanding the role of the Court; Africa understood it right from the start. As Africans, we know that impunity is not an academic or abstract notion. This African commitment to ending impunity is a reality, and we have to find a way to focus our attention on it.”

ICC prosecutor Fatou Bensouda interview with New African Magazine

and structural implications of expanding the African Court's jurisdiction.²² Commentators have been critical of the expansion of the continent's human rights court's jurisdiction to international crimes generally, and the current draft protocol's text specifically. The chief concern is the uncertain relationship between the expanded African Court and the ICC, with some suggesting that the move by the AU is designed to displace the jurisdiction of the ICC as a result of concerns about the ICC's work in Africa.²³ While some of these concerns are valid, it is worth recalling that the origins of the expansion of the African Court's jurisdiction lie in the Hissène Habré debacle, with this option being mooted as one way of sharing the prosecutorial responsibility, financial and otherwise. It remains to be seen whether this proposal is viable, both legally and practically, and civil society must work with the new AU chairperson to ensure that whatever the outcome, it results in the strengthening of the international criminal justice architecture.

REGIONAL AND INSTITUTIONAL ADVOCACY

15/11/2012

On 15 November 2012 twenty CSOs wrote to the ICC prosecutor, Fatou Bensouda.

The organisations noted that:

“a critical challenge for the OTP, and the ICC more generally, is its relationship with Africa, and particularly the African Union (AU). Many of our organizations campaigned for the establishment of the ICC.”

They pointed out that, “[d]espite tensions between the ICC and the AU, there also have been recent indications of the more positive view of the ICC among African governments. As you know, Malawi’s new president, Joyce Banda, made it clear in May 2012 that Malawi would fulfill its ICC obligations and arrest al-Bashir if he attended the African Union Summit there. Other states—including Botswana, South Africa, Burkina Faso, and Niger—also have reaffirmed publicly the need to arrest ICC suspects on their territories.”

The following recommendations were made:

- 1. That a more proactive approach to be taken by the OTP to explain the parameters under which the ICC can and cannot act in relation to different country situations.**
- 2. That the OTP actively encourages, in public and private communications, the importance of complementarity and the role of African states and the AU in promoting complementarity.**
- 3. That the OTP undertake more and improved overall outreach.**

The organisations concluded that:

“Over the past 10 years, some of our organizations have substantially contributed towards the work of the court through disseminating information about the work of the OTP and the ICC generally. We believe increased outreach and public information efforts by the OTP at all levels, from the grassroots to the AU, in collaboration with the ICC’s outreach office, is vital to facilitate better relations with African states and greater clarity on the involvement of the ICC in Africa.

We also encourage your office to regularly engage local civil society in countries where the ICC is conducting investigations. We believe this will enhance your office’s understanding of concerns from the communities most affected by the crimes, and allow your office to make information available on country situations under the OTP’s purview that is responsive to local concerns, thereby enhancing the court’s impact. Your recent visit to Kenya provides a good example of such type of interaction; this was welcome and should be continued.”

17/01/2013

On 17 January 2013 140 African CSOs and international organisations with a presence in Africa wrote to the AU commission chair on combatting impunity. The letter congratulated the chair on her appointment, urged her to take up the cause of justice for victims of the gravest crimes - genocide, war crimes, and crimes against humanity - and offered observations and recommendations that they believe would be useful to promote that objective.

These observations and recommendations included:

- The importance of taking account of Africa's role in calling for ICC involvement in African countries.
- The need for AU support to promote domestic capacity to prosecute serious crimes committed in violation of international law.
- Appreciating and recognising the show of support by a number of African countries for the ICC.
- And expression of concern about the expansion of the jurisdiction of the African Court.
- That communications be improved between the AU and the ICC.

In light of their key role in the establishment and implementation of African regional human rights mechanisms and the ICC and their interactions with victims, CSOs have critical expertise to offer to the AU. However, in the past there has been unwillingness on the part of the AU to engage with civil society in a transparent and cooperative manner.

It is hoped that with Chairperson Dlamini-Zuma at the helm of the AU, the institution will be more accessible to civil society, and that she will foster a constructive relationship with civil society, facilitating increased public participation and engagement between African civil society, AU institutions and working groups.

To read the letters, visit www.southernafricalitigationcentre.org.za

AN AFRICAN CRIMINAL COURT: WANT V NEED?

In July 2012, at the 19th Summit of the Assembly of the AU, African heads of state agreed to postpone the adoption of a draft amendment protocol on the Statute of the African Court. The draft amendment protocol proposes giving the African Court criminal jurisdiction for the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as trafficking in persons and drugs, terrorism, piracy, unconstitutional changes of government and corruption.

South African CSO, the Institute for Security Studies (ISS) released an evaluation of the implications of expanding the African Court's jurisdiction, noting that this move is, "fraught with many legal and practical complexities."

Key concerns highlighted include:

- Expanding the jurisdiction of the African Court to include criminal matters could negatively impact on the current work of the African Court to promote and protect human rights.
- The International Criminal Law Section of the African Court will be expensive to establish and maintain.
- There are many legal substantive and procedural shortcomings in the current draft protocol on the African Court relating to, for example, jurisdiction, complementarity and international treaty law.
- There is a general lack of awareness on the part of governments and other stakeholders about the practical implications for domestic law and international law obligations.
- The process thus far has been rushed and lacks significant political commitment from AU member states.
- There is potential for duplication of current international criminal justice institutions and the lack of clarity on issues of complementarity could result in the African Court competing with the ICC.

\$278,226,622

TOTAL BUDGET OF THE AFRICAN UNION

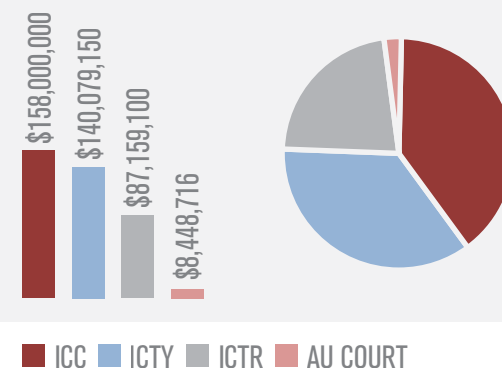
\$122,866,637

MEMBER STATE CONTRIBUTION OF TOTAL AU BUDGET

\$155,359,986

INTERNATIONAL PARTNERS CONTRIBUTION OF TOTAL AU BUDGET

CURRENT BUDGET OF THE AU COURT COMPARED TO THE ICC, ICTY, ICTR



The plan to expand the jurisdiction of the existing African Court continues to advance. The draft amendments to the protocol are set to be considered in 2013 once the budgetary implications – a concern raised by South Africa – are assessed further, the only aspect that has been raised at the AU.

If the budget of the African Court is likely to be the only impediment to the proposed expansion, a proper assessment will need to be carried out, and civil society is encouraged to prepare a shadow budget. One only has to look at the budget of the ICC, ICTR and the ICTY to get a sense of the high cost of dispensing international justice. The AU will certainly have to increase the funds it allocates to the African Court. The AU will also have to bear in mind that unlike existing criminal tribunals, which only have jurisdiction to hear a limited number of crimes, the African Court will encounter an additional financial burden brought about by the proposed inclusion of a number of non-core international crimes.

Furthermore this will impact on the financial contributions African states make to the African Union (the 34 African states parties to the Rome Statute already contribute to the ICC). Additionally, more than half the AU's budget comes from outside of Africa from institutions such as the European Union, and they may be reluctant to fund an initiative such as an African criminal court.²⁵

The second important initiative is the AU proposal to seek an advisory opinion from the ICJ regarding the immunities of state officials under international law. The AU Commission was asked to explore the possibility of this at the AU's 18th Summit of Heads of State and Government in January 2012, and at the July 2012 summit, the AU further clarified that the opinion was to be sought "on the question of immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC ..."²⁴

It is essential that debates around international criminal justice be properly contextualised. If individual states are to be encouraged to embrace the principle of complementarity and take steps domestically to ensure that they are able to investigate and prosecute international crimes, the AU's position must be understood as one which has been adopted in respect of specific instances and not the international criminal justice project in its entirety.

Turning to the ICJ should be welcomed (and encouraged) as a positive step towards a legal solution to a problem with immense political significance. More broadly, it is testament to both the relevance of international law, and the value that African states place on its ability to resolve matters of international concern in a fair and predictable manner.

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understood as one which has been adopted in respect of specific instances and not the international criminal justice project in its entirety. It will be demonstrated throughout this Report that the AU's position does not reflect the position of every African country. The AU's calls for noncooperation, have only been followed by certain countries – largely in respect of Bashir – while other countries have chosen to adhere to their Rome Statute obligations. There should also be a distinction made between countries that fail to give full effect to their international obligations because they are unable to, and those that are unwilling to cooperate.

Endnotes

1. F Bensouda "International Media Conference on the Battle Against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?" (6 July 2011) Gaborone, Botswana available at <http://www.wayamo.com/courses/botswana-07-2011.php>.
2. See M du Plessis "The ICC that Africa Wants" (2010) Institute for Security Studies available at <http://www.issafrica.org/uploads/Mono172.pdf>; P Mochochoko "Africa and the International Criminal Court" in E Ankumah & E Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005), 243; F Bensouda & H Jallow "International Criminal Law in an African Context" in (M du Plessis ed) *An African Guide to International Criminal Justice* (2008) 15 available at www.issafrica.org.
3. Mochochoko supra note 2.
4. Established in 2001 to replace the OAU. See Constitutive Act of the AU (2001) available at http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm.
5. Report on Model Law, Office of the Legal Counsel of the African Union (on file with author).
6. This merged court will replace the current African Court on Human and Peoples' Rights when sufficient states have ratified its founding instrument.
7. See the ICGLR website available at <https://icglr.org/index.php>.
8. Article 8, Great Lakes Pact. The organisation is composed of eleven member states, namely: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia.
9. Article 24(2), Great Lakes Pact.
10. See Chapter 6 of this Report.
11. See Chapter 8 of this Report.
12. Article 7(1), AU Constitutive Act states: "The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority."
13. For an overview of the relationship between the ICC and the Security Council see International Peace Institute "The Relationship Between the ICC and the Security Council: Challenges and Opportunities" (March 2013) available at http://www.ipacademy.org/media/pdf/publications/ipi_e_pub_relationship_bet__icc_and_sc__2_.pdf.
14. Rome Statute, Article 13(b).
15. Article 13(b) permits the Security Council to refer a situation of a non-ICC

- state party to the ICC. Article 16 permits the Security Council to defer proceedings. Both powers are exercised when it is in the interests of peace and security to do so.
16. Bensouda *supra* note 1.
 17. See K Ambos “The First Judgment of the International Criminal Court (Prosecutor v Lubanga): A Comprehensive Analysis of the Legal Issues” (2012) 12 *International Criminal Law Review* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030751. See also “The Prosecutor v Thomas Lubanga Dyilo – a Turbulent but Promising Retrospective” (2011) available at <http://www.haguejusticeportal.net/index.php?id=12989>. For an excellent overview of this case and its implications see “The Lubanga Trial” at the ICC portal available at <http://www.lubangatrial.org/about/>.
 18. A Ngari “Africa Looks Forward to “The Fatou Effect”” *The South African Reconciliation Barometer* available at <http://reconciliationbarometer.org/newsletter/volume-ten-2012/africa-looks-forward-to-the-fatou-effect/>. See also “Fatou Bensouda: ‘We Are Not Against Africa’” in which *New African Magazine* interviewed Bensouda following her election as prosecutor, available at <http://www.newafricanmagazine.com/features/politics/fatou-bensouda-we-are-not-against-africa>.
 19. R Brown “African Union Elects Woman Chair – Possible ICC Implications” *International Justice Project* available at <http://www.internationaljusticeproject.com/2012/07/16/african-union-elects-woman-chair-possible-icc-implications-2/>.
 20. See CSO letters addressed to new prosecutor Fatou Bensouda available at <http://www.southernafricalitigationcentre.org/2012/11/22/african-civil-society-write-to-the-new-icc-prosecutor/>; and AU chairperson Dlamini-Zuma available at <http://www.southernafricalitigationcentre.org/2013/01/18/african-civil-society-unites-140-african-ngos-write-to-au-chairperson-nkosazana-dlamini-zuma-on-issues-of-impunity-for-intl-crimes/>.
 21. Decision made pursuant to African Union Assembly decision, Assembly/AU/Dec.213 (XII) of February 2009, raising concerns over the abuse of universal jurisdiction. The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights is available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>.
 22. Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc. PRC/Rpt(XXV), Assembly of the Union Twentieth Ordinary Session 29 – 30 January 2012 Addis Ababa, Ethiopia, available at http://summits.au.int/en/sites/default/files/EX%20CL%20Dec%20726-766%20%28XXII%29%20_E_0.pdf.
 23. See M du Plessis “Implications of the AU Decision to give the African Court Jurisdiction over International Crimes” (2012) *Institute for Security Studies* available at www.issafrica.org/pgcontent.php?UID=31600%2621; Letter endorsed by 49 African CSOs addressed to the chairperson of the AU in May 2012 available at http://iccnw.org/documents/Letter_on_African_Court_May_2012_FINAL.pdf; M du Plessis, A Louw & O Maunganidze “African Efforts to Close the Impunity Gap” (2012) *Institute for Security Studies* available at <http://www.issafrica.org/pgcontent.php?UID=31915>. The authors argue that the short time frame which the AU has provided for the complex task of drafting the protocol occurs against the backdrop of the fractured relationship between the AU and ICC. The process of expanding the ACJHR jurisdiction is fraught with complexities and has implications for the international, regional and domestic levels. All these implications need to be considered, particularly the impact on domestic laws and obligations, and the relationship between African states parties to the Rome Statute of the ICC, the ICC itself and the ACJHR; A Wallis “AU Initiative Courts Controversy” *The Star* (7 June 2012) available at <http://www.iol.co.za/the-star/au-initiative-courts-controversy-1.1314112#.UTWwgK5SriQ>.
 24. Decision on The Progress Report of The Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. Ex.Cl/710(Xx), Assembly of The Union Eighteenth Ordinary Session 29 – 30 January 2012 Addis Ababa, Ethiopia available at [http://summits.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20\(XVIII\)%20_E_0.pdf](http://summits.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20(XVIII)%20_E_0.pdf).
 25. See M du Plessis “Implications of the AU decision to give the African Court Jurisdiction over International Crimes” *supra* note 23.