

CENTRE FOR AFRICAN JUSTICE PEACE AND HUMAN RIGHTS

THE ICC AND AFRICA





TABLE OF CONTENTS

04 INTERVIEW WITH PROFESSOR
DIRE TLADI

12 INTERVIEW WITH DEBORA
KAYEMBE

24 INTERVIEW WITH ANGELA
MUDUKUTI

34 INTERVIEW WITH DR. ADEJOKÉ
BABINGTON-ASHAYE

42 REASSESSING THE RELATIONSHIP
BETWEEN THE INTERNATIONAL CRIMINAL
COURT AND THE AFRICAN STATES
by Dr. Oriola O. Oyewole

46 THE INTERNATIONAL CRIMINAL COURT'S
PERCEIVED LACK OF CREDIBILITY WITHIN
AFRICAN STATES
by Anna Olivia Kho

50 REFLECTIONS ON AN IMPERFECT MATCH: THE
INTERNATIONAL CRIMINAL COURT'S
CURRENT PROBLEMS VIS-À-VIS AFRICA
by Axel Helgi Ívarsson

52 THE MALABO PROTOCOL AND THE
MOVE TOWARDS REGIONALISATION
by Mariana Baptista

54 AFRICAN CHALLENGES TO THE ICC
by Mayowa Olowoselu

57 THE ICC'S AFRICAN BIAS: THE APPROPRIATION
OF A LEGITIMATE NARRATIVE BY
PERPETRATORS
by Joanna Frivet

61 THE PROSECUTION OF OMAR AL-BASHIR AND
THE RELATIONSHIP BETWEEN THE ICC AND THE
AFRICAN STATES
by Laura Pes

"I was raised to believe no one was better than me and I was better than no one. I was taught to treat everyone equally regardless of their status in life."

- Adejoké Babington-Ashaye



Interview With **DIRE TLADI**



Dire Tladi is a Professor of international law at the University of Pretoria, a Fellow at the Institute of Comparative and International Law in Africa and a formerly Principal State Law Adviser (International Law) at the South African Department of International Relations and Cooperation. He was previously the legal advisor of the South African Permanent Mission to the United Nations. He is also a member of the International Law Commission (ILC) and currently its Chairperson. He holds an LL.B. from the University of Pretoria, an LL.M. from the University of Connecticut and a Ph.D. from Erasmus University Rotterdam. He has published widely in various areas of international law.

As a team, we wonder what influenced you to focus your career on international law. And, as a member of the International Law Commission, what do you think are the new contributions the Commission will introduce to the international law sphere?

I was a law student many years ago, in the 90s. In my first year of Law, I participated in the All Africa Human Rights Moot Court Competition, and I thought “Wow, this is a really interesting part of law”. The following year I participated in the Jessup International Law Moot Competition. So, really, from my second year onwards, just because the subject was much more interesting than my other law subjects, I thought this was the most exciting thing. In other words, from my second year of studies onwards, I knew that international law was what I wanted to do.

In terms of the contribution of the ILC, if you look at its history, the ILC has had a huge influence over much of international law. I think the same is possible with jus cogens. My hope is that the ILC would be able to sort of take this subject, which is an enigma, from the periphery, if you like, and really put it right down in the centre of international law as a concept that has the ability to influence. And I think the ILC has shown the ability to do that in the past, and I think it is something the ILC could also do with jus cogens – to really make it a more useful concept rather than just a concept that is written about, argued about... Take it out of the law journals and put it into reality, if you like, and influence law in a more direct way.

As an African, what challenges did you face while practicing law at international organisations? If there are any.

There are lots. A challenge that I can immediately think of, and I guess this is a challenge that would apply to Africans in general, is that very often there are very few of us involved. What I mean by involved is really participating, so if you look at the ILC, there are a certain number of seats that need to be filled by Africans but in terms of the voice of Africans it is certainly much smaller in comparison to the number of seats that we have. So that is one challenge. But for me, the biggest challenge is that if you come from certain parts of the world, you have to work doubly hard to get any kind of respect. So, there is always this sense that when you come from Africa, it has to be of low standard, so the bar is set slightly differently, I think. There is a perception, and because there is a perception, the expectation is whether your work and contribution are going to be acceptable. It has to be extra special. That is always the sense that I get.



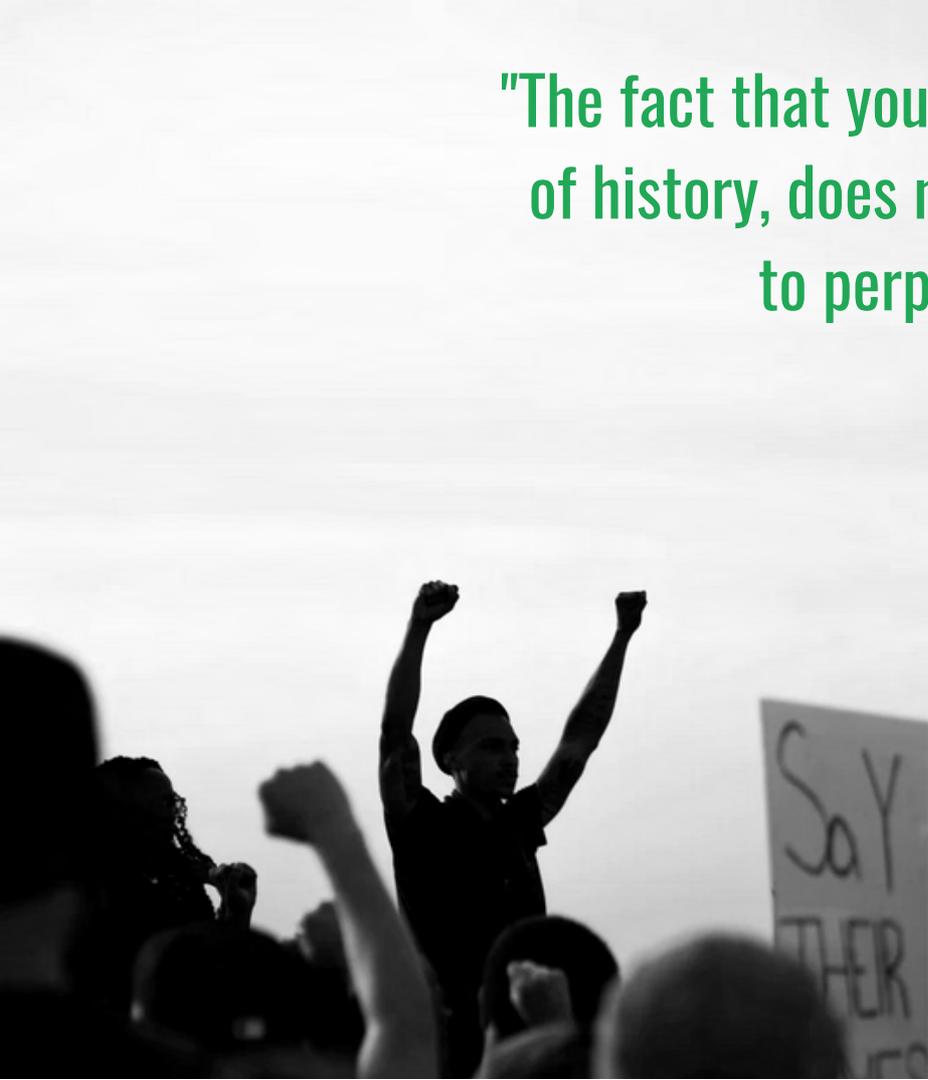
I've just written a piece in the UCI Journal (University of California, Irvine) on race and international law. There I focus on the work of the ILC, from an African perspective. My sense is that your work is judged slightly differently than the work of other members just because of where you come from. I might be wrong but there is a big challenge for you to not fall under this perception.

The ICC has been accused of being a tool of Western imperialism, punishing only leaders of small, “weak states” (especially African based on the statistics). Russia announced in 2016 that it would no longer be a signatory of the Statute. They accused the ICC of being ineffective and biased. Several African countries have expressed their desire to leave the ICC, and in some cases have resigned their membership. In the debate 'Omar al-Bashir: Beyond the Sound Bites' at the University of Pretoria, you referred to the ICC as “a giant with limbs that can really effectively do what it needs to do with the corporation of State Parties”. Can you explain your statement in light of current developments of the ICC?

One thing I do want to say, as a starting point, is that there is a famous improper saying about statistics: statistics don't tell you everything. Actually, they tell a lot of things but they also hide a lot. So, I think that when you look at the statistics, they certainly tell you a lot. And, they tell you that it is true that a lot of the cases that have been instituted have been directed at Africans. Last time I wrote about this was in an article in the German Yearbook of International Law 2017, and there the statistics were as follows: there had been 44 cases levelled against individuals; all 44 had been levelled against Africans. That is an important statistic and it tells you a lot. You can flip that around a little bit and say “well, there are certain things that it hides” right? So it doesn't tell you for example that it is affected by the conflicts of the African continent, so you would expect

that there would be an imbalance. It doesn't tell you that a lot of these cases are self-referrals. Now, my own position is, what I would like to call a "nuanced" position, is that there are arguments and counter arguments for all of these things. So, if you think about the issue of self-referrals, you may also make the argument that these self-referrals are not really self-referrals, they are referrals that the ICC requested State Parties to make. If you look you will see that in those self-referrals, those self-referred cases, the ICC is only prosecuting rebel movements and not state officials. There are all kinds of arguments, the only point I'm making is that the position I have adopted is always a very nuanced position, it's not anti this or anti that, it's a very nuanced position.

To answer your question, I certainly remember that debate, I don't remember making that statement in that debate but it's a statement I've had in several articles. In fact, it's not my statement. It's a statement that I've basically quoted from someone else. The statement implies that the ICC and other tribunals such as the ICTY and the ICTR are giants without limbs (not with limbs). The point being made by this quotation is that a giant is something that is big and can do a lot of things but because it doesn't have limbs it can't do the things that it needs to do. So, in other words, for it to be able to achieve its objectives, it needs states to cooperate. States effectively become the limbs of these tribunals, and without these limbs, without state cooperation, this giant is basically useless. My sense is that, by and large, states do cooperate, and that includes African states, but of course in one particular case, in a particular situation, and it so happens politically to be the most sensitive one, states haven't cooperated and have continuously refused to cooperate to this day.



"The fact that you are on the right side of history, does not give you a licence to perpetrate these crimes."

You mentioned something about the cases being self-referral, particularly directed to rebel cases, so where rebels don't fight or conflict with rebels themselves, they are mostly with states but they are being paid, so would you say that criminality is being politicised, and that findings are discriminating?

I wouldn't say that criminality is politicised. I think that the ICC does what the ICC does, what it is supposed to do. When individuals have committed crimes under the Statute of the ICC, one hopes that the ICC will take the action that it is required to take. The politisation is not so much in criminality but rather in the extent to which crimes committed by others aren't pursued, so we should be happy that the ICC presues crimes that are committed. There shouldn't be complaints about that and we shouldn't label that as politicising of criminality. What we should complain about is instances where the ICC or any other tribunal for that matter does not pursue other cases for political reasons there you can talk about politisation but it's not politisation of criminality as such it's just politisation. Take Libya as an example. In Libya there was a conflict between rebels and the government. Of course we all know that the government at the time, the Gaddafi government, committed all sorts of crimes but we also know that the rebel movement also did the same. In fact, a lot of the criminality, if you like, of the rebel movement, particularly after taking power, was captured on video, in reports by Human Rights Watch, and other NGOs, like Amnesty International, but those crimes were not pursued. It's not so much the politicisation of criminality, it's the failure to act against criminal acts perpetrated by those that are seen as angels or those that are seen as being on the right side of the issue.

In your professional opinion, how can the relationship between the ICC and the African states be strengthened?

I think at the moment that relationship is in a really good place. The big difficulty, the big issue, the big elephant in the room between the African states and the ICC was the al-Bashir case and I don't think that particular case is going to be an issue between the African states in general and the ICC simply because he's no longer head of state. So, the question then really would be "how can we make sure that in the future these kinds of things don't happen again?" and here I would say a couple of things.

One is that from the African states themselves it's important that the position that is adopted isn't seen as a position that intended to shield a particular person, and one way to do that is to actually try to resolve the legal issue related to the al-Bashir matter now. I therefore think it would be ideal if African states pursued the question of an ICJ advisory opinion concerning the immunity of heads of state in domestic court for purposes of arrest and surrender to the ICC or other international tribunals.

In terms of ambiguity, in 2017 when the Pre-Trial Chamber II of the ICC declared that South Africa failed to meet its regulations or obligations by not arresting the Sudanese President, in your debate you mentioned something on how the law is ambiguous because it doesn't necessarily urge states to arrest, it's more like an advice to do. South Africa didn't arrest him and it almost even led South Africa to withdraw from the Rome Statute, so in this case, would you say that African countries that choose to be united would mean pan-Africanism is on the rise, that states would rather support each other rather than adhere to some of these treaties, including the Rome Statute?

I don't know. I don't think the law is ambiguous, at least from my perspective it is not ambiguous. I think the law is very clear that there are different sets of rules at play... I mean, this whole relationship between Sudan and the ICC is not governed by the Rome Statute because Sudan is not a party to the Rome Statute, so it is governed by rules of customary international law. For me the rules of customary international law are clear. In fact, I would go further and say the Rome Statute itself gives effect or reflects these rules of customary international law in its article 98. So, as a matter of law, I think South Africa was right to not arrest Mr. Bashir. We can have a discussion about the policies and the implications. I think the UNSC Resolution referring the situation in Sudan to the ICC created the problems because it did not oblige all states to cooperate with the ICC. The only state that was obliged under that Resolution was Sudan. So, there is a breach of International Law, but it is by Sudan for not handing over Bashir. That's the point about the legal position.

The more political question of whether or not there is some pan-Africanism and a bonding together of African states, I'm also not sure about that. I think that there is certainly a feeling towards the commitment of the African Union. And here the issue was that there is a decision that had been taken by the African Union and it is difficult in politically sensitive cases such as this, to decide that you are not going to comply with that decision of the African Union. This is particularly in AU-related meetings. But I think also the point is that states make their decisions very much based on national self-interests and engage in political calculations in relation to a particular set of facts. So you find that there are times when African states band together because the spotlight is on that particular situation, in other cases they simply won't. And I can give you many examples where states go against decisions of the African Union, and they say they won't do certain things at the United Nations. It's a lot more nuanced, and I think you will find that the comment denominated in all my answers is nuanced. Everything is nuanced. And I think that's the case here as well.

Has the ICC become a political instrument to execute political opponents on the international sphere? Is it signaling the deterioration of the credibility of the ICC?

I wouldn't go that far. I wouldn't say that the ICC is a political tool. I think that the ICC, like any institution, makes decisions based on political considerations as well. There are certainly some decisions that are based on political considerations but the bottom line is that the ICC in those cases, in many of the cases before the ICC the indictments were because the crimes had been committed. In fact, in some cases that were politically sensitive, the accused had not been found guilty, so I think that if it was a political tool the outcome would be a foregone conclusion. So, I think it would be going too far. What I will say is that at least is clear to me, that while the ICC has often portrayed itself as only taking law into account, that law is not the only thing that takes into account. It takes law into account but there's also a fair amount of political considerations that it takes into account. For example, why is it that it has taken so long for the ICC to decide to open up investigations in Afghanistan. It eventually did, but it took a very long time. It started thinking about it in 2007 and then I think the decision to open up investigations was in 2019. That is a very long time. If you think about Libya and you compare that. The adoption of Resolution 1970 was on the 26th of February, I remember because it was two days after my daughter's birthday, and

already within two weeks there had been three indictments so that's an indication of the extent to which politics play a role. But I think it would be going too far to simply say it's a political tool. It's an organisation and that organisation is run by people and people make decisions, and in making decisions they will take into account politics. It's very hard not to take into account politics.



"My criticism would be that if you take into account politics you have to do so everywhere and that hasn't always happened."

How do you see the progress of ICC and what reforms would you suggest for its functional continuity of the Court?

I think the ICC has gone through a very difficult time in its life and you mentioned legitimacy in your previous question, and its legitimacy was tested, its credibility was tested. There was a time where people were making a point that the future of the ICC is in doubt and the ICC has come out perhaps slightly battered but it has come out, it survived. And that bodes well for the future of the ICC. I think, in general, the ICC will be fine going forward. I don't think it will be challenged as much as it has been challenged now, because I don't think we'll have another Bashir situation. What kind of reforms are necessary? I mean there are of course talks about reforms. I'm not sure exactly what type of reforms are necessary but it's important for State Parties to constantly be looking at how decisions are made, what type of decisions are made, what kind of judges you have, the extent to which you encourage and insist on the application of law rather than politics when you are on the bench. I think these are the kind of things that hopefully people look at.

We can all tell that you've really studied and practiced in the field to be called an expert and we give that to you. We would like to know how you relax because this particular field of law is very intense taking into consideration not just your country but an international platform. How do you keep balance? You mention you have a daughter. So how is your personal and professional life balanced?

I read fiction, lots of fiction. I enjoy reading fiction. I write fiction as well. In fact I have a new novel that has just come out, *Sins of the Father*, which touches on some international political issues. And incidentally my first novel was about the ICC. So, I write novels. I have a basketball hoop outside, I shoot now and again. I used to play as a young man, so I shoot now and again. It keeps

me fresh. I try to spend time by myself as well. It's good to switch off sometimes. But I'm not very good at work-life balance. In fact, that we are having this interview on Christmas Eve is a sign that I'm pretty bad at that. I try to at least from time to time switch off. I watch a lot of sports.

We are all bad actually. Ahlam, he writes fiction for his daughter so you can try to write fiction for your daughter as well.

(Ahlam): I will try. When you have kids it is not easy.

(D. Tladi): Yeah, it's not easy, indeed.

We have come to the end of the interview, there is only one more question left. We would like to know, as young people that we are, what advice would you give us seeking to replicate your marvellous journey in the legal profession?

That's my favourite question. The answer is: love what you do. It's that simple, if you love what you do, you have as good a chance as anything to make success of it. I mean, I can share with you things that I've done but those will differ from individual to individual. The one constant, the one absolute non-negotiable if you want to be successful at what you do, is to love what you do. Because when you love what you do, no matter how hard it is or how hard it becomes, you continue doing it, because you love it. No matter how tired you are, you continue doing it because you love it. So that's the one thing I'd leave you, love what you do.





“ So break the bias is the message, and also do not think that because you spent too much time in education, it makes you less women than any other woman. It makes you the queen. Because you are capable from now on to think, and work as much as a man. And when you see your pay is less than a man in the same position, then you have to scream into your house and say ‘no no no no, he is the head program director and I am program director, we should have the same pay!’.

Debora Kayembe

”

INTERVIEW WITH DEBORA KAYEMBE



Debora Kayembe was called to the Congolese Bar Association in 2000, she was a member of the Institute of Translation and Interpreting from 2010 until 2020, and she joined the language services of the office of the Prosecutor at the International Criminal Court and the International Criminal Court Bar Association (ICCBA) in 2016.

She served as Scottish Refugee Council board member from 2013 to 2016, joined the Royal Society of Edinburgh (RSE) Young Academy of Scotland representing refugee minorities, and seats as an expert lawyer to the RSE Working group for Africa. Debora founded Full Options Scio in 2017.

In August 2019, history was made at the Royal Society of Edinburgh: she became the first African to have her portrait erected at the wall of the society, honoring her achievements and contributions to the Scottish Society.

In July 2020, Debora launched the Freedom Walk campaign, a civil rights movement which aims to campaign on behalf of Citizens by promoting social reforms, racial justice and community harmony. She is petitioning to the Scottish Parliament in favour of anti-racist education in Scotland.



COULD TELL US AND OUR READERS MORE ABOUT YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND?

I went to school in Africa in the Democratic Republic of Congo. I did not do kindergarten. I spent my first years with my dad at home. He was a single father, so he kept me until I was ready to go to primary school. I went to primary school, secondary school, then I went to university where I studied law, especially international law and human rights. Once I finished, I was welcomed at the Office of Human Rights through OCHA, the Office of Coordination of Humanitarian Affairs in Congo, so I was one of the first persons to be accepted as an intern there.

During those times, Congo was just surviving the war, the Second Great War in the Congo and the war was after Kabila's father Laurent's execution in his home and his son Joseph Kabila took over. The country went through very difficult times, through a post-civil war moment, where massacres were perpetrated against women, the most dangerous ones you could have imagined. And as an intern, my role was to be formed as a humanitarian advisor, look at the humanitarian catastrophe that was happening in the Congo and see how the UN could intervene to make the Congo a much better place where you can live. There were two massacres: the massacre of Kasika and the massacre of Kunde-Lungu, where women were executed alive, buried alive because they were just landowners of Congolese lands.

And then there was Ebola. Ebola came back again and then, those three crises, I was in the middle of it. And being an intern, it touched me very much to see how the UN was only doing the job of observing and making studies instead

very much to see how the UN was only doing the job of observing and making studies instead of acting and helping the Congolese people. Because they said this wasn't the European prerogative, but it was the Congolese prerogative to decide what they want to do with the situation. But my role as an intern was just to observe, to establish the facts, to see exactly what happened, how these women end up to today, the way they were killed and that's it. No action, no protections. So from there I had to go to the bar to qualify as a lawyer. Once I was qualified as a lawyer, I was then called, at that time, by the Commission of Human Rights to become this special voice of the president. This was my first major position, and I was 26 years old at that time when I took that role.

YOU TALKED A LOT ABOUT THE INVESTIGATION THAT YOU CONDUCTED AS THE SPECIAL ADVISER. COULD YOU MAYBE TELL US A LITTLE BIT MORE ABOUT WHAT EXACTLY YOU DID THERE AND HOW THAT IMPACTED YOUR CAREER?

The context of this investigation was that, because Joseph Kabila, the new President of Congo wanted to copy exactly what happened in South Africa, when Mandela left prison. They wanted a reconciliation based on the fact that the crime that was committed in the country could have been avoided, or those who committed the crime should respond for their actions, to be held accountable for their actions. That's why they created this Independent Commission.

We have the Independent Commission for Reconciliation, the Independent Commission on Human Rights, the Independent Commission on Elections, so all these Commissions were set up in order to look at the country the way it was and try to transition to reconciliation. So, when I

was appointed Special Envoy to the president of the Commission, I had a lot with me because of the background I had. In the past, I worked for the UN, I witnessed the massacre the way it has happened. Many of these members of the President's Commission did not know that I knew what happened, so I approached the president to say: 'listen, everyone talks about reconciliation here but if we want to reconcile it between ourselves, we need to know exactly what happened and who committed the crime in order to prevent that to happen again'. So, my note to the president was: 'shall we go to eastern Congo and establish exactly what happened there, why the massacre happened?'. And the president was quite impressed by that, because many people did not know about those crimes. I knew about this crime because I was at the UN when this crime was committed. So he said 'let's go and find out'.

It was a dangerous trip because, at that time, the Congo was separated in two sides. Eastern Congo, no one can travel there. To travel to Eastern Congo from West Congo you have to go to Uganda and get back to your own country with a different passport. How dangerous it was just to travel like that. So, we traveled to Bunia, where we spent four days investigating. During those four days, I met young girls being raped, young girls of 7, 10 or 12 years old being raped three times per day.

Three times per day. It was just the fact that a mother could ask her daughter to go pick up some water into the river and on her way to a river could be stopped by a man and get raped. On her way back, she'd be stopped by another man and get raped. You have the impression of where is humanity in this place? And then in

that place, you have the UN peacekeepers there, their troops, you have all these sorts of very armed persons who are supposed to protect the land. But their role was not to protect, just to protect their own interests. And that was shocking for me. Once I established these reports and I brought them to the eyes of the president, my recommendation was that the population of Ituri and Bunia no longer wants the UN peacekeeper military in their source. They want them to leave. That was one. Secondly, there was gun trafficking. All those guns that were prohibited in the Second World War, but they were still being stolen and trafficked in that part of the Congo to continue the war in those Great Lakes places, without control. And there was the stealing of the Congolese national resources, natural resources. Just like that, without any control. And then I said no one could possibly achieve this without the complicity of those who are in power in Kinshasa. No one can do that. So the responsibility has to be shared. There are foreign armies, militias in Congolese sources. They're doing what they're doing with the support of those in power in Kinshasa. And that was the reason why I had to leave.

AFTER THAT, YOU HAD TO MIGRATE TO THE UK, RIGHT?

Yes, yes.

WHAT HAVE BEEN THE BIGGEST CHALLENGES THAT YOU HAVE FACED AS AN AFRICAN IMMIGRANT IN THE UK?

One of the biggest challenges that I have faced as an African immigrant was racism, but in my mind, I could never imagine a country like the United Kingdom being so ignorant of other people around the world and the stories of other

people around the world. That was one. And secondly, immediately, I didn't see racism. I thought these people are not interested in what's happening in other places in the world, maybe it's that. But the more I get deep into the society, I realize the discrimination and the hostility that exist in the country. And that is purely based into the past story of colonization and slavery, which is now crowned by racism. I came to the UK as a black woman. Every time they saw me, they saw a black woman, a black African woman and the bias immediately here was: she's uneducated, she's never been to school. That is the bias immediately. She's uneducated, she's never been to school. On top of that, I was raised poor, grew up poor. No, that's not true. I was born in a wealthy family in Africa, and I went to school. Then I realized some of the girls I met in the UK did not spend as much time in education as I spent time in education. So it wasn't a confirmation of culture, which is quite shocking you know.

"You tell someone 'I'm a fully qualified lawyer', but your education is not recognised yet. Why can you not recognise the fact that I am fully educated?"

Why can you not recognize that? When you come to my country and you say to me 'I'm a fully qualified Doctor', I have to accept you. Why can you not do the same with me? That was the first I faced. One of the other things I faced was the asylum system in the UK. One of the most horrible I've never seen, degrading immediately. I mean I remember that I was a pregnant woman

and I was put on the bus, a big bus in which I almost nearly gave birth. 10 hours travel from England to Manchester. And at that time, they gave me a room. There was no electricity in the house, there was no TV in the house. You get to the house, you live like that... No! I mean there was no respect, no dignity in your asylum system. And I don't know, somehow it's ordinary people who thought they saw something in me and they came around me to try and shield this unjust way I was treated. They came and they tried to cover it up. You see someone coming to your house saying 'today I'm gonna help you to put the curtains in your home', 'Deborah, I have a cable for the TV and I know someone who's throwing this TV away so can I give you this TV so you can watch TV?'. That was the way. It was so humiliating, so degrading the asylum system here. And the other challenge was that, even when you are an asylum seeker, you have no right to work. So, you're not working, even though you are intelligent, even though you have the capacity, you cannot work. You are not allowed to. So, two years later, I am a refugee. I have refugee status. That means I can live in the UK. I bring forward my qualification, but it's not recognized. We don't want that here. We don't know this kind of education you had in Africa. It's not valuable here. How do you explain that? How do you explain that you're the one who put the education in Africa, then I come back to use the education, worked in Africa, and it's not worth anything here?

The challenge is so big that it goes into your mind. Then, you need to choose to continue to fight because you are a human being and you have two fights: the fight of being human, and to be respected as human, and the fact that you have an education and you need to defend that education. That was my challenge as an African

immigrant.

AFTER SUCH A CHALLENGING PERSONAL AND PROFESSIONAL JOURNEY, WITH ALL THIS RACISM THAT YOU ENCOUNTERED, THE RECOGNITION OF YOUR DIPLOMA, I READ THAT YOU HAVE RECENTLY BECOME THE FIRST BLACK WOMAN AND THE FIRST AFRICAN IMMIGRANT TO BE NAMED RECTOR OF THE UNIVERSITY OF EDINBURGH, WHICH IS ONE OF THE UK'S MOST PRESTIGIOUS INSTITUTIONS. YOU HAVE ALSO FOUNDED TWO NGOS, NAMED FULL OPTIONS AND FREEDOM WALK IF I AM CORRECT. HOW DO ALL THESE FUNCTIONS YOU OCCUPY CONTRIBUTE TO YOUR FIGHT AGAINST RACISM?

Let us start with the beginning. Being Rector, that's a miracle. It's a miracle. Until now, I don't know how it came about. It's a miracle that many generations who try to understand and find out. You know, in this life you have moments that only the almighty God knows why he makes it happen. And I'm guessing I was graced by that, to be part of this huge miracle. Because when you look at my profile, I am not from a Commonwealth country, or I wasn't educated in the UK and I am a black woman raised in Africa. So, this is the person today who runs this prestigious university, which is a masculine, white predominant institution, and, it has to be said, the glory of white supremacy. It has to be said. So, being Rector, until now, I haven't found my way about it, but I am the Rector and that's a good thing. I founded Full Option.

So the organization, the NGO is Full Option, and Full Option is really an organization that promotes human rights and peace, because it goes with the pair. If you are fighting for human rights and people get the right in the good way,

in the inappropriate way, then peace is going to be around. As for the Freedom Walk Campaign, that was a campaign that depends on Full Option, because it's really a campaign of lobbying for, let's call it political activism, you know. We really work on politics, with the freedom of campaign, we're going to parliaments to lobby for social reform and reclaim and we are saying this in our lives, everywhere and around the world, we need to live respecting each other, regardless of background. The Freedom of Walk Campaign is much more a community movement that brings all communities together in the question where injustice has been implemented to the system and try to break it. One of the biggest projects we did with the Freedom of Walk Campaign was to petition in the Scottish Parliament in a favor of addressing anti-racist education in Scottish education. Because what we realized is that many of the teachers, and this is very common, are not properly trained to teach this matter of racism. So the campaign brought a petition to the Scottish Government just to say 'please, we want this time to look at our curriculum'. Initially to decolonize the curriculum because it is still teaching the children that it was right to pick up people from their own country, to put them on the boat and to exploit them.

You have to teach the children that is the wrong way of seeing things, decolonization. And then racism. It has to be taught, but don't deform the story. Tell the truth, why this racism took place. Was it an advantage for all of us to be racist?



This kind of education does no longer exist right now. But racism, that's why we have children born in 1982, still looking at the other person with racism, while the racism finished long ago. It is education. So, to promote that, schools have to prepare teachers to teach those sensible subjects in a dignified way, that is the work of the Freedom Walk Campaign. These two functions go together, and together, it fights racism. That's how my life, years and years, is about fighting racism in different forms. Because sometimes it came in the form of education, sometimes it came in the family, in the community. And I started this NGO and this program to stop the work of hatred because the truth here, it is hatred is nothing less than hatred.

HOW HAS THE CORRUPTION PRESENT IN CERTAIN AFRICAN COURTS AND GOVERNMENTS IMPACTED THE RELATIONSHIP BETWEEN AFRICAN STATES AND THE ICC?

The culture of corruption is very common everywhere in the world. That I am going to be very clear about it. And in Africa, it's cancer. It is bad because now, in a country like Congo, people no longer believe in the courts. People no longer believe the outcome of a court decision, because corruption is in a system where no one feels that it's right to go to court to get justice. Such behavior has been following us all over to our international courts. Why? Because when the behavior in a country is not fixed properly, and you bring those same people to judge them in a different place of environment, their behavior is still in the people. So, it continued to contaminate.

Corruption in the African continent has been there, and the government has continued to

perpetuate this behavior, and that is why a court like an International Criminal Court is not really doing their job properly. Because they inherited the corruption that exists already in those systems. So if you ask me today, until this date since the creation of the International Criminal Court, have we seen less corruption in Africa? The answer is no. Have you seen enough justice given to victims? The answer is no. What we have seen is political injunction into judges and prosecutors and they are now taking the whole essence of the court away from its purposes. That is the result of corruption. We need to fight corruption in our countries and through our international courts.

GOING BACK ON SOMETHING YOU SAID ABOUT JUSTICE FOR VICTIMS, ANOTHER CRITICISM THAT HAS BEEN BROUGHT UP IS THAT CURRENTLY TRANSNATIONAL JUSTICE INITIATIVES UNDERTAKEN BY INTERNATIONAL INSTITUTIONS SUCH AS THE ICC ARE IMPLEMENTED BY FOCUSING ON THE PERPETRATORS INSTEAD OF FOCUSING ON THE HEALING AND THE COMPENSATION OF THE VICTIMS. HOW DO YOU THINK THAT A BALANCE COULD BE FOUND BETWEEN STANDARDS OF CRIMINAL JUSTICE ON ONE SIDE, AND THE BROADER SOCIAL JUSTICE AGENDA FOR VICTIMS IN AFRICA ON THE OTHER?

First of all, let's just go to the perpetrators instead, because you said it's implemented focusing on perpetrators. How many perpetrators do you know at the ICC have been convicted for their crime justly? How many? I haven't seen any. You see them coming to court, spending years in a luxury prison and then, when the sentence comes, they choose where to go.

The Liberian president came to the UK and

months later, he was free! He walked away! So even in the role of what people think implementing and focusing on perpetrators is excellent, no it wasn't excellent. It was not good enough. I have not seen the International Criminal Court healing the victims or repairing the victims until today. Since the creation of the International Criminal Court almost 20 years ago, I have not seen them. The problem is that you have the case in court taking years and years and years, and in the case of the Democratic Republic of Congo, the victims even passed away. The victims, they all passed away. Their case is still in court, it has not even been heard. So where is the justice here? Well, I think the balance will be to split the International Criminal Court in two courts, one focusing on the perpetrators, arresting them, interrogating them on one part, and creating another institution for reparation. You need to separate them. Together, the evidence is that it is not working. You know, this International Criminal Court has just become a name. And it has become a political game of many Western countries in order to scare African leaders, you know. And then, those African leaders, you need to understand even the process for the cases to come to the International Criminal Court. It is the government who is a member of the ICC, who brings the cases to the ICC. The ICC independently does not choose the case. So where is the justice here? You know, even the way the ICC is set up today, is not set up in the purpose of giving true justice, but a partial justice in the favor of the country that is paying his money to the institution. Something here is not right! You cannot possibly give neutral justice to people in this manner. So the balance here would be to give less responsibility to the International Criminal Court, doing only the role of running justice to the perpetrators, and take the role of healing and compensation to the

victims to another institution. Then perhaps we can get to some kind of measure. Right now, this institution is biased on women cases, biased on women cases, very slow.

They are not even healing anybody. I have never heard them healing anyone. That is something I know. That is my experience. I know there is a project on compensation to the victims. They talked about seven years ago, and no one has been starting anything. So, this is where we are.

IS THERE ANY OTHER SOLUTION TO HELP IMPROVE THE RELATIONSHIP BETWEEN THE COURT AND THE AFRICAN CONTINENT IN GENERAL?

I think some African countries that are struggling financially, African countries that are struggling economically, should withdraw from the International Criminal Court, because it is a lot of money for no reason. You know, I really don't want African countries to withdraw from it. You have people paying money to the International Criminal Court, which is substantial money to pay, and their case has never been heard in court. It's a waste of money, it's a waste of energy. So I think those African countries should prioritize doing reparation and healing the victims locally in the countries, instead of them trying to get visas and traveling to the International Criminal Court.

And this is to say those victims or witnesses who would travel from their country to the ICC for testimony of getting reparation do not get the visa to stay there. After the case is finished, they are abandoned. So, for me, today; if there is an advice for African countries, please withdraw from the ICC. Don't stay with them. That is my advice. And how the ICC could be truly an independent Court. Stop listening to the

injections of Western countries. I mean, there are a lot of injections from presidents. I remember one of the prosecutors said François Hollande was after him on the Ivory Coast case, pushing him to have the Ivory Coast president arrested. You arrest somebody if you don't have any evidence against that person? You know, diplomacy here is playing instead of how true justice is supposed to be. So, the relationship between Africa and the ICC has to be a relationship of respect, understanding and good governance. These three do not exist until now, and they have to work together to make it better, otherwise to be honest, the ICC has no reason to exist.

DO YOU SEE ANY DISADVANTAGES FROM WITHDRAWING FROM THE ICC?

The disadvantage is that international law is slow and expensive. These African countries are poor. They can't even provide for their own people. Why would you spend so much money on granting justice in a Court that takes years to render justice, instead of feeding your own people? Why would you go to a court who is not impartial? The Prosecutor of the International Criminal Court, several times, testified that she has to receive injections from western countries in order to help African presidents taken to court. What are we doing here you know? Justice is justice, and it's supposed to be impartial. And justice is rendered to people in order to compensate and to heal, and to run the peace in the community. Tell me one single country in Africa where peace was installed.

All over Africa, tell me one just name. One? It does not exist. It is the machine to feed people money, not to grant justice to the people who are really suffering. So for me, the reform, if there is any reform, is to close it and to create

local tribunals in the country, where victims can be able to travel inside the country to testify about a case that happened in their country. Receiving them traveling from the Congo to the Netherlands where they face visa problems, accommodation problems, which is not the ICC problems. So something here is not working properly.

YOU MENTIONED SOMETHING ABOUT THE ICC NOT BEING IMPARTIAL. THE ICC HAS ALSO BEEN CRITICISED FOR TARGETING AFRICAN COUNTRIES AND NOT FOCUSING ON OTHER COUNTRIES, SUCH AS FOR EXAMPLE VENEZUELA. WHAT DO YOU THINK OF THAT CLAIM?

Again I agree with what is being said, and I also echo this with the interview that Mrs Masuda, the Prosecutor, said during the Ivory Coast crisis. She said she had a lot of questions from François Hollande to have the Ivory Coast President arrested. As Prosecutor, did she have evidence of the crime that the president committed? No. She had the man arrested, he spent four years in prison, only to be acquitted at the end. So what are we doing? What are we doing? No! What we need to do here is what is really the role of the ICC. That is the ICC still stick on the role initially given to it when it was created. Even though it still has its role, is this workable? Why when the crime is committed in a small village in the Congo, you judge the people who committed this crime in Europe? Do you have enough evidence? Did you collect enough evidence?

And when these people come to Europe, they stay in luxury. They are luxury, I'm telling you. There are luxury prisons compared to the horrible things they have done in DRC. And then years later, they choose where to go to

spend the rest of their life, and most of them choose to go to the UK after they give money. This is corruption. That is corruption and they end up in the UK, they find QC and three months later they are free. And the victims? No, no compensation. Where is justice here? There is no justice here. I am calling again to African countries that think that they are wasting the time in the ICC, to withdraw from it and run the justice to the only people inside their own countries. That is the best justice to do.

TO LINK THIS INTERVIEW TO INTERNATIONAL WOMEN'S DAY, AFTER HEARING YOUR JOURNEY AS A WOMAN, WHAT ADVICE WOULD YOU GIVE TO OTHER WOMEN WHO WANT TO GROW IN THE FIELD OF INTERNATIONAL LAW?

Yes, international law is very expensive, and it's free for many years. When you work in the field of international law, you end up in places where you have to work so hard to confirm yourself, and you do not get paid for that. That is something that has to be said. It is an expensive law, and you get paid less until you reach where I am now. Not to worry about money, maybe 27 years after that. So, what I am saying I am encouraging the girls to do, is aside of your career for international law, do something that can give you money, so you do not worry about your career for international law. It is a fantastic discipline. International law is a discipline of peace, it is a discipline of connecting people in the discipline of humanitarian work and in the discipline of human rights, but it does not give you money straight away.

So for that, and in my case, I had to run an interpreting and translation business that sustained me all these years in order to have this flourishing international law career. So I encourage the girls who want to go into the field

of international law to do a side job that can give them the money, and concentrate on their career in international law. Don't go far on education immediately. When you finish your first part of education and you get your higher diploma in international law, try and find a job. And then perhaps do the PhD later on, or being doctor or professor later on, so you do both. You do the practice, you do the education at the same time. That will render you stronger and better. And on this International Day, I am breaking the bias, breaking the bias about women victim of rape, breaking the bias about woman who have gone through horrible, horrible times of war, losing their family, losing their sons during the war and break into mental illness. Mental illness can recover. Someone will go into a different time, or mentally she can recover, and be a plaque talent in the society. So what is important now is to stop judging people because they survived war. Stop judging people because they are black or they are person of color. Stop assuming that every single person of color you see in front of you is uneducated. That is simply not true. There are many educated women of color contributing to education. So break the bias is the message, and also do not think that because you spent too much time in education, it makes you less women than any other woman. It makes you the queen. Because you are capable from now on to think, and work as much as a man. And when you see your pay is less than a man in the same position, then you have to scream into your house and say 'no no no no, he is the head program director and I am program director, we should have the same pay!'.

Break the bias on judging these women. So that is the reality, the message I am sending to every woman. Your education is your power. You know, being a mama, a mother to children

is an amazing grace. As I am mother to two children, it is an amazing grace. So, the woman, the way she is, is perfect in the work she is doing. She is a mama, raising the children, she is raising the next queen, the next king, the next boy who is going to clean the McDonald's. She is the mother of that. And being a mama, with the woman who runs the university like I run the university, I am the woman. There is no difference, but just everywhere we go, break the bias. Break it.



HOW DO YOU COMBINE YOUR CAREER AND YOUR FAMILY LIFE?

I think being a mother of two is the most difficult task of my life, you know. I have a boy and I have a girl, with two different personalities and two different perspectives of life. I am telling this to every woman in our lives. There is a moment when you are a mother, there is a moment when you live in your community, and there is a moment when you are a wife to someone, there is a moment when you are a divorced person. That is a part of our life. We have to go through. But again, it cannot stop us from achieving our dream. It cannot stop us to let people treat us with disrespect and being undignified. What is important for every woman and for me in my life: running a business, going through my career. It is not to waste my time on things that are not necessary for me. So I focus on my target and I always do what I think I can achieve. Something I think I cannot achieve, I let it go. I am telling this to every woman: do not waste your time. I mean, women have many problems.

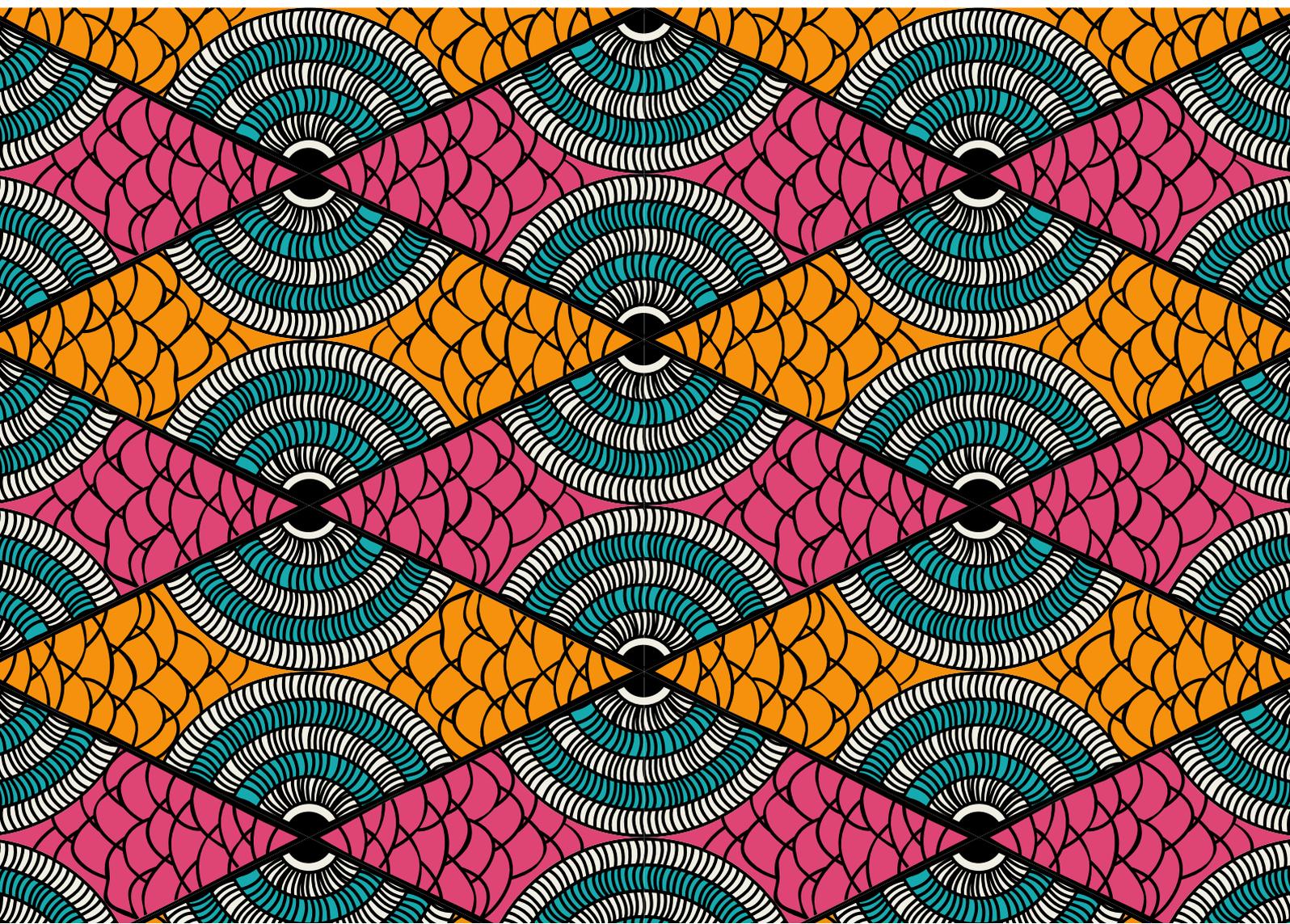
They have problems. I am a woman of 45 now, I am going to fight menopause. Because again I have been to the hospital, seeing the doctor, women have their own problems. Because they have this role of giving life and looking after them, it is heavy on us. That is why I am calling women to concentrate their lives on something which is essential. Do not waste your time on anything that does not make sense. You understand that? So spend your time on doing what is important, what is essential and what is good for you.

HOW DO YOU RELAX?

I have to say, these days I have little time to relax. But over the years, although I am still very busy and working very hard, I would relax when I had the opportunity to take my children on a family trip. So this was my place of relaxation. During these school years, you have the breaks, and that time I focused on taking the children out of the house, and places all around the world. I take them to America, we haven't been to Africa yet, but I take them all over Europe, just to have some time with them relaxing. So I have consulted my life much more on sharing this family life, like I knew this may be the only time I am spending with them, because my life was going in the direction that we might not have that anymore. So the relaxing time ahead for me is that, and the other relaxing time for me is watching movies. I spend a lot of time watching inspirational movies, court case movies that changed the world. I spent time watching them and fighting movies, you know the Last Kingdom? I watched all the fights that started in the military strategy, I watched that all the time. This is where I found my relaxation time.

"The challenge is so big that it goes into your mind. Then, you need to choose to continue to fight because you are a human being and you have two fights: the fight of being human, and to be respected as human, and the fact that you have an education, and you need to defend that education. That was my challenge as an African immigrant."

- Debora Kayembe



“Think of yourself as an instrument for the positive change you want to make.”

-Angela Mudukuti



Interview with Angela Mudukuti

Angela Mudukuti is a Zimbabwean human rights lawyer specialised in international criminal law. She is currently the Senior Legal Adviser at the Global Justice Center. Angela has worked for a number of organisations including the International Criminal Court (ICC), Open Society Foundations, Human Rights Watch, Wayamo Foundation, the Southern Africa Litigation Center (SALC) and the International Institute for Criminal Justice and Human Rights under the supervision of Prof. Bassiouni.



Focusing on strategic litigation, advocacy, and capacity building, her work experience includes training prosecutors and investigators to enhance domestic capacity to tackle international crimes; working on universal jurisdiction and precedent-setting cases before South African courts including seeking the arrest of the former President of Sudan during his visit to South Africa.

She has written and published on international criminal issues in books, journals and newspapers and has been featured in the media including the Financial Times and Al Jazeera. She sits on a number of editorial committees including the Oxford Journal of International Criminal Justice and *Opinio Juris* and has a master's in law (international criminal law, transitional justice and international crime prevention) and a bachelor's of law.



FILM NEGATIVE



FILM NEGATIVE

FILM NEGATIVE

Your legal career has taken you on an impressive journey, from the ICC in the Prosecutor's Office to the Southern Africa Litigation Center and the Siracusa International Institute for Criminal Justice and Human Rights in Italy under the supervision of the phenomenal Cherif Bassiouni. We are curious about your journey, how it started. What motivated you through it all?

I was always interested in international criminal law and human rights from a very early age in life. Growing up in Zimbabwe, which is a former British colony, as a child and as a black woman in that country in those times, you typically experienced a lot of racism and sexism. I wanted to put myself in a position where I could defend those who nobody was defending. Be a voice for the voiceless and help people who looked like me. I wanted equality, I wanted fairness, I wanted everybody to be treated the same and I saw law as a way to do that, particularly human rights law. So I followed that path. I studied law, I did a master's in international criminal law, which truly felt like the right step in the right direction. And that is how it all started. My profession is something I love and feel very passionate about. I find it humbling, inspiring, challenging, but I think these are wonderful characteristics for any profession and any job.

Could you kindly tell us about your educational and professional background, a bit more specifically?

I did my undergraduate law degree at the University of Pretoria in South Africa, and then I did the master's, which was a joint program with Cape Town and also Humboldt University in Berlin in Germany. After that I began as an intern at the International Criminal Court, in the Office of the Prosecutor. After my internship, I

was retained by the Court and stayed with the Office of the Prosecutor. It was a fascinating experience. I learnt a great deal and saw international criminal justice at the highest levels. After that I joined Professor Cherif Bassiouni at the Siracusa Institute, where we were focusing on Libya. We wrote a report documenting the human rights violations perpetrated during the conflict in 2011 and we did an analysis of the human rights violations perpetrated by both Gaddafi forces and the opposition forces in terms of international human rights law, international criminal law and international humanitarian law to determine what crimes had been committed in that context.

I then joined the Southern Africa Litigation Center in Johannesburg, South Africa, where I ran the International Criminal Justice Programme. We were focusing on strategic litigation, advocacy, and the main goal was to implement international criminal law, but within the domestic frameworks of the countries we were working on. We had a regional focus. Also, another truly enriching experience and it was great to see international criminal law and how it can be implemented at the domestic level, because that's how the system is supposed to work. National jurisdictions are supposed to have judicial primacy and then the ICC should be a court of last resort.

It was fantastic to work at the domestic level and see all the potential and possibilities the domestic justice has to offer. After that I joined the Wayamo Foundation in Berlin, in Germany, where we were focusing on capacity building, specifically training investigators and prosecutors on how to better investigate and prosecute genocide, war crimes and crimes against humanity within the confines of their domestic system. Yet again I was looking at

the system holistically and trying to understand how we can improve the domestic system so that the ICC can remain as a court of last resort. I was very privileged to work with many investigators and prosecutors from various African countries including Nigeria, Tanzania, Kenya, Rwanda, Uganda. It was also a good opportunity to learn from the prosecutors and investigators, but also apply all the skills and knowledge that I had acquired.

After that I joined the Open Society Foundation, where I worked the Open Society Justice Initiative, conducting a lot of advocacy and research on ICC-related issues. I was also with Human Rights Watch, where again, I focused on ICC-related issues. And currently, I am with the Global Justice Center and I am a Senior Legal Advisor there. So that, in a nutshell, is my journey and some of the highlights along the way.

How is Africa contributing to the development and improvement of international criminal law? And what role does Africa play in the betterment of this field of law? What would you say?

I think it is very difficult to talk about the continent in such a general and vague manner. Because different countries have different approaches and different governments within the same country can also have varying approaches. However, the immense contribution made by numerous African experts must be mentioned. Whether they work for civil society organisations, whether they work for the Court itself, or for other courts and tribunals, they are well-versed, highly experienced African experts from the continent who bring that knowledge and expertise to the world of international criminal justice.

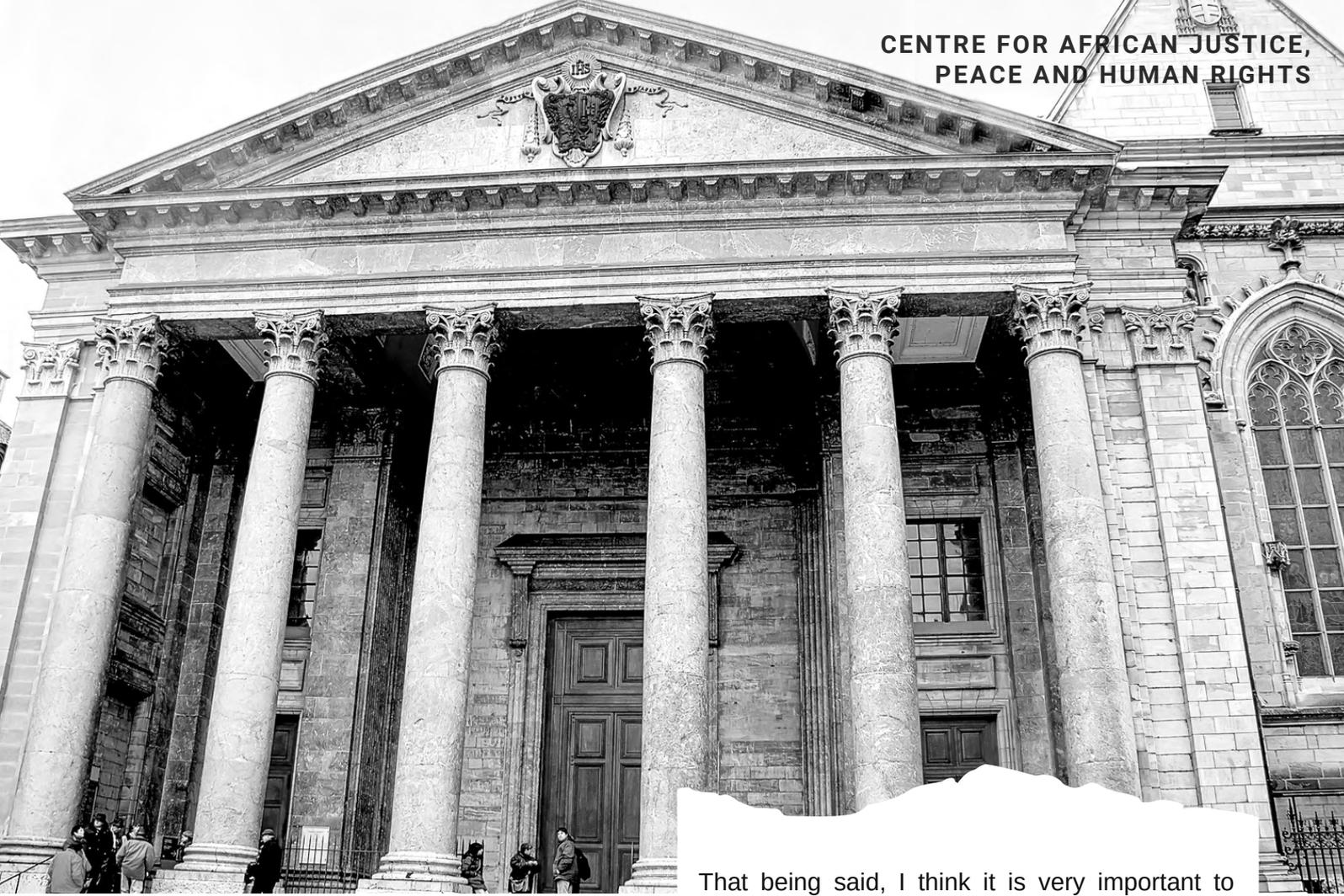
What about international hybrid tribunals?

I would like to ask you if you could maybe tell us how you think they impact the criminal justice in the African states specifically.

I think they are a very interesting model that has been used in several countries including Sierra Leone, and the Central African Republic. They could be useful in other contexts as well but the question should always be what is the best model for the context in question? Should we rather have domestic trials and ICC trials, or should we have a hybrid mix? Hybrids are a trend that we are seeing more and more. It is not the most affordable way to go about it. These courts can cost a lot of money. However, it is a nice fusion of local expertise and international expertise, so it definitely has its merits. But I do think you would need to look at each situation specifically and determine what is best for that situation in question. There is no one-size-fits-all, and perhaps domestic trials plus ICC trials are best. Or perhaps a hybrid court is best. But then you have to ask yourself what kind of hybrid court, because they can also take different forms and different shapes. So, a detailed assessment of the specific situation is absolutely crucial before you decide whether a hybrid system is best for justice in a specific country.

I would also like to address that the main goal of the ICC is to end impunity globally through the application of international criminal justice. In your opinion, how has the Office of the Prosecutor contributed to this end, and how has this contributed to the relationship between the ICC and Africa through its work over the years?

The ICC has a very demanding mandate, and as you said to "end impunity." But how it has gone about that, of course, is the question in many ways. It is a difficult and broad question



because we have to consider the different Prosecutors that we have seen over the years. Prosecutors differ in style, approach, priorities and methods of work. We also have to bear in mind the context during their respective times in office as this has a huge impact on decisions that are made and cases that are pursued. Since the Court's inception, there have been a lot of African cases and of course, there are people who have alleged that the ICC is targeting Africa. Now, that, I feel is a very simplistic perspective on the issue. I think it is far more nuanced and far more complicated than that. And that unfortunately, the details and nuances are lost when people are instrumentalising that perspective for their own, usually political goals. However, it is important for the Court to act within the bounds of its mandate and have a geographically diverse docket.

That being said, I think it is very important to separate these issues and to look at them in detail to acknowledge that we have a lot of self-referrals, and also to acknowledge the limits of the ICC system - the ICC does indeed have severe jurisdictional limits. There are three ways in which a case can come before the International Criminal Court: referrals, United Nations Security Council referral and proprio motu option. You also have to look at the politics of the United Nations Security Council. How do matters that come through the Security Council end up before the Court, and why, and what are the political undercurrents and context? Consider all of these factors when assessing the relationship between the Court and African states. Also remember that relationship with the ICC differs depending on which states you are talking about. Some African states have been strong supporters of the ICC from the beginning, other African states, have changed course, and some continue to be strong supporters.

The African Union and the ICC have had a

difficult relationship and there is plenty of literature on that topic but again I prefer to avoid generalising and rather acknowledge the nuances, pay attention to the details of each and every situation, and the evolution of the relationship between African states and the ICC, between the African Union and the ICC.

Keeping in mind the intricacies that come with discussing this topic, how do you see the future of the ICC and Africa, as well as the relationship with the African Union? And what reforms do you recommend to maintain and strengthen it, since there are tensions as you have mentioned?

I think it's very important to approach the issue with the spirit of complementarity and cooperation. I think both sides, both the ICC and the African Union and African states should cooperate. Because what we're ultimately trying to do here is make sure there is justice and accountability for crimes that shock the conscience of humanity. And we need to work together to do that, so both parties or all parties need to come to the table with that bridge in mind. That is the first thing. The second thing is, I think there needs to be respect and acknowledgment of the genuine concerns raised by some African states. The ICC needs to consider these, take them seriously, and look at what can be done. And of course, not all of them are not legitimate. Some of them are politically motivated, but I think there should be an acknowledgment of what the issues are, why they exist, and how we can move past this point. I also think it is very important for the many African states to have good domestic courts, because as I said in the beginning, the ICC should be a court of last resort. But for as long as our domestic justice systems are not in the shape that they need to be, we will always have this problem and complementarity will be hard to realise. So I think there is a lot of work

that needs to be done in that respect as well. And I think processes like recently we had the Independent Experts Review, where a group of experts were tasked with reviewing the ICC, and there was an opportunity for states to contribute to that to put in writing what their concerns are. I think African states should be more proactive when those opportunities arise. They need to take part in all of these discussions. I think there just needs to be more participation from everybody on these issues. I am mindful of some of the constraints. For example, a lot of these discussions happen in New York or in The Hague, and if you are a small African mission with very few members of staff, who already have a lot on their plates - then your ability to participate as a nation is limited. So, there is of course also a capacity question, which also needs to be addressed. But I would say, in general, a spirit of cooperative participation in actively reviewing what the issues are, and then just a mutual respect for the mandate of the Court, but also the concerns of African states.

Throughout your professional career, you have worked on numerous notable cases at the ICC, including seeking the rest of Omar al-Bashir. In your perspective, how have the warrants for arrest against Omar issued by the ICC impacted this relationship between the African leaders and the International Criminal Court?

Mr. Omar al-Bashir was the President of Sudan at the time, and the African Union and many African leaders did not like the idea of a head of state being on trial. That did not sit well with many of them, which is why it was so difficult to secure his arrest, as we saw in South Africa where we tried to have him arrested and the South African government let him go. We have also seen that in Kenya. We have seen that in numerous other countries. So, of course, it was a very politically sensitive topic, but at the end



FIGHT TODAY
FOR A BETTER
TOMORROW

of the day, it is a court, not a witch hunt so you should go and stand trial. And there is a presumption of innocence- you are innocent until you are proven guilty and that principle should always apply. But it is absolutely crucial that Mr Bashir to go and make his case at the ICC, and for states to facilitate that, particularly states who have signed and domesticated the Rome Statute. States have committed themselves legally to cooperate with the Court failing to arrest someone who is wanted by the ICC is a breach of your cooperation obligations. Because without state cooperation, it is very difficult for the Court to do its work. The ICC does not have trials in absentia, an important principle in my view, so those who are accused must answer and states parties have an obligation to cooperate.

The al-Bashir case did have a massive impact on this situation, but at the end of the day, justice and accountability are the most important things, and states that have made commitments need to stand by them. Otherwise, the system does not work.

Actually following this interesting

response and conversation, following the case of Omar al-Bashir, it is claimed that there is a diplomatic impasse between the International Criminal Court and the African Union. So, as a consequence, the African Union demanded mass withdrawal from the ICC. While many African states have only initiated withdrawal proceedings, the probabilities that that would happen again are substantially high. So, according to your vast expertise, what would be a major repercussion of African states withdrawing from the ICC permanently?

I think at this point I would not say that the chances of that are high. I think that moment has come and gone. There was a time when it was at its peak, but I do think we have passed that moment. I do not think it is as imminent a threat as it was a few years ago. Firstly the ICC has a more geographically diverse docket and also we have seen some important changes under the leadership of Prosecutor Fatou Bom Bensouda that have improved strained relationships. Now there is a new Prosecutor, which also holds new potential for changes or developments in that relationship.

We will have to see how that goes. So, I would not say that the threat is as imminent as it was,

and I think also many African states have other priorities at the moment, whether it is the global pandemic or other challenges that they are facing continentally. Also, I think sometimes it is blown out of proportion, the extent to which withdrawal was possible. I think we saw a few withdrawals for sure, Burundi and of course the Philippines, but that is outside of the African continent. So, it is not to say that this is impossible, but it is to say that right now, it is less of a threat. We also need to remember that there is no such thing as mass withdrawal. Sovereign states have to withdraw, not the African Union. The AU cannot force its members to withdraw, that's not how it works- sovereign states have to make decisions and withdraw themselves from the system. That is again far more nuanced than the blanket mass withdrawal that as was portrayed in the media or in certain circles.

Would you say that there are potential advantages for African states in withdrawing from the ICC? If that would happen, what would be the positives of it?

I don't think there are any. I don't think there are any positives from that at all. I think the International Criminal Court is a very important institution. And again, as I said in the beginning, we have to understand that it is a court of last resort, and that we do need functioning domestic courts, and that justice should be done as close to home as possible. But we also need the International Criminal Court because it is not always possible to do justice domestically.

And so, these systems have to function in a complementary fashion. That is how it was designed, and it is absolutely crucial because when there is no domestic justice, we currently do not have a regional African Criminal Court and (an African court, which criminal jurisdiction does not exist at this moment) and so where

would victims go? Now, if they cannot get justice domestically, and they cannot get justice regionally, then they have the international arena. That is the only remaining option, so it is very important to keep that avenue open. It is very important for the victims and survivors of egregious to have options for justice. It is also very important for the Court's legitimacy. The Court needs universal buy-in the more members the better. I think people forget that it again does not work if you do not have state cooperation as I mentioned before. And we want African states to remain part of the system, we want African states to be part of the constructive changes that do need to happen at the ICC. It is not a perfect institution, and there are some changes that need to be made, and African states can be a part of that discussion. They can participate in the improvement of the ICC. Abandoning the system achieves nothing. In fact, it takes us many steps back, and it does not take us forward. I would absolutely say there is no benefit to that, and I would hope that African states would remain as constructive engagers in the system rather than trying to work from outside of the system.

I think you have beautifully stated why it is important for African states to not withdraw from the ICC. Would you say there is something more you would like to add, now that I have asked the question more specifically or was this everything in nutshell?

The issue of representation is very important. Currently at the ICC we have an imbalance that is detrimental to the Court's legitimacy. When you look at the staff composition most of the leadership positions are held by people from the group they call the WEOG group (Western Europe and other states- namely global north states like New Zealand, Canada, Australia). You cannot have a court that seeks to universal

and only have leadership from the global north. Diversity and representation are essential. I think it is very important to have a balance between the global North and global South, and that will change everything as far as the way the ICC operates, its internal workplace culture and the way investigations and cases are approached by investigators, analysts, lawyers and judges. That is another reason African states should not withdraw from the ICC because the way the hiring system works at the moment is that they do, more often than not, give preference to people from State Parties as opposed to people from non-State Parties, especially states parties that make bigger financial contributions. State Parties that make financial contributions like to see that their nationals are working within these institutions, and it is the same with many UN entities. This is clearly unfair but this is the reality. So, one direct consequence of withdrawing from the ICC is that you then reduce the chances and the probability of people from the global South, from Africa working at the Court and making it a more diverse and representative environment. We do not want that.

The same should be said about the worrying gender imbalance at the ICC, currently 10 out of 11 directors at the ICC are men. We need more women need to in senior leadership. We want a balanced system. We want a Court that functions in a way that is fair and balanced. We also want staff representation that is fair and balanced.

I understand. Would you say that it is more challenging for someone from the global South to reach such positions in the ICC and other similar organisations where we are facing the same western access to it, because of geographical proximity and many other reasons? Would you say this is more difficult and are there other factors that play into the situation?

And what that does is just privilege the people who already have the money to take an unpaid internship in Geneva or New York. These are incredibly expensive cities to live in. So, it starts there, it starts there, and then the filter continues, for example if institutions only take people from Ivy League schools, or Oxford, or Cambridge for example. Did everybody have access to those institutions?

"There is definitely a structural inequality, and it starts very early on. It starts with access to education, it starts with access to internships. For example, there are so many unpaid internships and if you're coming from the global South and you want to intern at the UN in Geneva or New York, it is impossible if the position is unpaid."



Not necessarily. So, the structural inequality starts early on, and continues for as long as institutions prefer to take those from wealthy global north states. It is far more challenging as a person from the global South, and I can speak from personal experience - there is a lot of discrimination as well. People assume because you are from the global South, you are less qualified or not capable, which of course is nonsense. But that is unfortunately the perception that some people have, and so it is very important to break down these barriers.

It is very important to give equal opportunities. It is important to pay your interns. It is important to make sure that you are looking further than just your Ivy League schools, or Oxford and Cambridge. There is talent everywhere, and you need to give that talent a fair chance.

Yes indeed. It is crucial, as you just said. And you are a wonderful example that it is possible. You can make it, you can reach a certain position.

What advice do you have for women who aspire to specialise and contribute to the field of international criminal law, to be you or to make it like you?

First of all, that you do not give up. Understand that it will be very hard, that you will be expected to work ten times harder than your white male counterpart for less recognition. So, be prepared for that, and understand that despite that - it is possible to reach your goals. Understand that you are paving the way for people who will come after you, so all your efforts are not lost. Understand that you are part of a much bigger picture, which may sound like a lot of pressure but you can handle it!

I would say network, go to events especially now a lot of events are online. Go to events, find out who is doing what you aspire to do.

Write to them on LinkedIn, follow them on Twitter. Twitter is a fantastic resource for international criminal law experts. Also try and get your name out there. Write, publish articles, write blogs, tweets on international criminal justice issues. Just try and develop your own visibility as well and try to find allies. People who can help you, people who can support you, people who can mentor you as well. There are a lot of women, myself included, we mentor a lot of up-and-coming women who want to be in ICL. So, find and reach out to those people, and ask for advice and guidance. Because we are all willing to help, we know how hard it is. And so, the least we can do is give back, and lots of us are doing that already. So, get in touch with people. Do not be afraid to send a blind email or a blind LinkedIn message. Sometimes it is the only way to reach out to people.

Stay focused. Do what you love, do not give up on it, and it will happen. It will happen.

If you are determined, and you work for it, indeed.

So my last question to you, how do you keep a balance with your professional life and your private life?

It is very important to have a balance, because you are no good to anybody if you are burnt out. So you have to look after yourself, to enable yourself, to do the best work that you want to do. You have to be your best self to help survivors and victims get justice, so think of it that way. Think of yourself as an instrument for the positive change you want to make. And if you are not your best, then it is very hard to do your best work. So, self-care is very important, boundaries are very important. So, yes you work hard, you work a lot, but try not to work set boundaries e.g. try not to work on weekends and try to create a schedule for yourself.

Having a good and healthy exercise routine brings me balance. I love exercising. Exercise is very important to me. Find a sport you like and make sure it is part of your weekly activities. Getting enough sleep is also very important. I know it is not easy, especially at the beginning where you feel like you have to do everything, but understand that you have to look after yourself.

Do things that are fun, and not work-related. Try and find what those things are for you, what are your hobbies, what do you enjoy, and make some time for those things. It is very very important to look after yourself, because if you do not, you will not last. You will burn out and that does not help anybody. So, try and carve out space every day, or every week, for your own self-care. You have to look after yourself.



Interview with Adejoké Babington -Ashaye



Dr. Adejoké Babington-Ashaye is an international lawyer with extensive experience in public international law, international criminal law and investigations, human rights law, international administrative law, and the international settlement of disputes. Her international legal professional experience includes the World Bank and the International Court of Justice, and she recently appeared as amicus curiae before the International Criminal Court's Appeal Chamber in the Dominic Ongwen case. A former investigator at the International Criminal Court, Adejoké conducted investigations into war crimes, crimes against humanity, and genocide in the situations of Darfur, Kenya, and the Central African Republic. Through UNODC and the Wayamo Foundation, she has provided technical support and capacity building for national prosecution and investigation of international crimes and terrorist activities. She is an editor and co-author of *International Criminal Investigations: Law and Practice* (Eleven International Publishing, 2018), and has contributed to the UNODC training modules on Gender Dimensions of Criminal Justice Responses to Terrorism and Counterterrorism in the International Law Context.

Her academic and professional qualifications include a LL.M. in public international law from the London School of Economics and Political Science (LSE), a Master of International Public Policy (MIPP) and a Doctor of International Affairs from Johns Hopkins School of Advanced International Studies, as well as being a qualified Attorney in the State of New York. In addition to forging a career as a public international law specialist, Adejoké is also a musician activist. She released her debut album in 2016 and fuses her passion for social justice and music as a member of SongRise - a women's social justice a cappella group based in Washington, DC.

Could you please tell us more about your educational and professional background?

Regarding my educational background I hold the following degrees: Bachelor of Law (University of Buckingham), Master of Law in Public International Law (London School of Economics) and a Master of International Public Policy (Johns Hopkins University). I also just completed the defence of my doctoral thesis at Johns Hopkins University.

My professional work experience of over 18 years includes working as Senior Counsel at the World Bank, an Associate Legal Officer at the International Court of Justice, and as an investigator at the International Criminal Court. I have conducted human rights policy research at the Carr Center for Human Rights Policy, Harvard Kennedy School of Government, campaigned for the entry into force of the Protocol on the Rights of Women in Africa, and investigated human rights violations in Nigeria's Niger Delta region. I'm a qualified Attorney in the State of New York and I provide capacity-building training for national prosecutions of international crimes. My publications include *International Criminal Investigations: Law and Practice* (ed), Eleven International Publishing (2018).

However, I must stress that all I've stated above are only fractions of who I am. I truly believe that we are more than one "thing", and it is important to develop our diverse talents for we never know which one will enable us to make the greatest positive impact in the world.

So, in addition to being a lawyer, I am a singer-songwriter, and my eponymous debut album was released in 2016. Check it out at www.adejokemusic.com.

Where did your vocation to work in Human Rights and international law come from?

I was raised to believe no one was better than me and I was better than no one. I was taught to treat everyone equally regardless of their status in life. My parents instilled a sense of self-worth in me by never ceasing to remind me that we were descended from a line of kings and kingmakers in the Yoruba kingdom (my paternal grandfather was a king). I was never impressed by someone's wealth, status, race, or influence.



"I love sharing this story about my father when, as a young man starting his career in 1970s London, his manager took him around the office to introduce him to other colleagues. Refusing to try to pronounce my father's name (Adebajo), the man said to my father, 'Can I call you John?' Without missing a beat my father quipped, 'Sure, if I can call you Kunta Kinte.' The man went on to pronounce my father's name clearly at all introductions. We were not to be messed with. That was how I was raised."

With these principles of respect and equality ingrained in me I was incensed whenever I encountered injustice. Growing up under military rule in Nigeria, one of my early memories of abuse of power occurred when I was around 8 years old. I witnessed two soldiers dragging and beating a crying woman because she had – allegedly – been rude to them. I recall standing there with other residents in the neighborhood paralysed by fear of the soldiers and their guns. Even though the civilians outnumbered the soldiers, we were disempowered and couldn't act. I knew then that I wanted to fight for social justice, but I did not know how.

Later, living in Tanzania in 1994, my school educated students on the ongoing crisis in Rwanda. We were encouraged to bring clothes to help families fleeing genocide. I knew I had to help even though I did not fully understand the crisis as a child. These are some of the building blocks of my desire to work in human rights. The principles enshrined in the different human rights conventions reflected how I was raised, and I felt at home in this field of law. I saw international law as a vehicle through which to help people like the woman brutalised by the soldiers and the families fleeing genocide in Rwanda. As a result, my career – whether working at international organisations or volunteering my knowledge through capacity building training programs – is characterised by the pursuit of justice and equity.

As an African woman, what challenges did you face while practicing law in international organisations?

I have encountered sexism interlaced with racism. Sometimes these are subtle and amount to micro-aggressions which are like death by a thousand cuts. For example, I was once mistaken for the “female companion” (read prostitute) of my older Caucasian male investigator colleague while we were on mission in an African country because of what such an image immediately evokes. A European Ambassador once refused to shake my outstretched hand when my ICC team and I met him at a refugee camp in another African country because he assumed I was a refugee. I subsequently educated the Ambassador on his biases: why would you come to a refugee camp and not shake hands with refugees? Why would you assume that the only African person standing with representatives of the ICC was a refugee? I recall being told by a colleague in the Netherlands that the only black person he knew growing up was Zwarte Piet! Such a statement was problematic on many levels including the obvious: Zwarte Piet is a caricature of people of African descent.

Other subtle forms of racism include people expressing surprise at how “eloquently” I speak or feeling comfortable enough to state that I was not like other Africans as though there was one type of African from the mythical “country” of Africa. These micro-aggressions are bewildering particularly when they come from well-educated individuals operating in international law and human rights. I have been in spaces where diversity and inclusion were touted but not pursued. My story is not unique, and we must amplify the voices that unapologetically call out racism and sexism in international bodies.

Until we eliminate systemic inequalities and

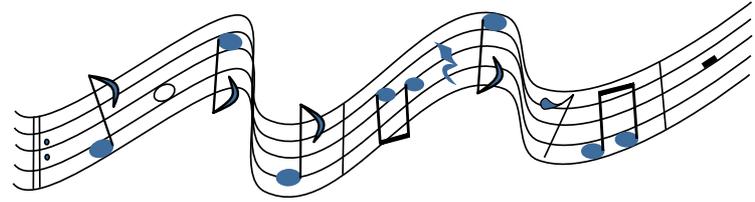
address unconscious biases even in the minds of those doing human rights work globally, this is an issue we will continue to face. For more enlightenment on this topic see 'Savages, Victims and Saviours' by Prof. Makau Mutua.

Do you have any advice for people, particularly women, hoping to work in international criminal law in the future?

First, it is important to have at least a foundational knowledge of international law. Of course, you can always specialise in international criminal law, but a solid knowledge of international law would be useful especially if you want diversity in your legal career. Second, develop excellent research and legal drafting skills regardless of what you are currently doing. These skills, coupled with time management, analytical and logical reasoning, are skills that will serve you well in a career in international criminal law. Third, strive for excellence not perfection. I say this because perfection can sometimes be the enemy of the good. Excellence means going the extra mile and doing more than the minimum. Excellence follows you and becomes “reputational gold”. Perfection can keep you stuck in frustration and procrastination. Finally, please remember that you are worthy and deserve to sit at that table, be in that room, share your opinions and make your mark. Whether you are starting your career, facing a mid-life crisis, seeking to pivot, or considering other opportunities, talk to others who are at different stages of the process and believe in yourself.

— “ —

We need more women – particularly African women – in key positions to shape the evolution of this important body of law.



” —

You are part of a women’s social justice a cappella group called SongRise. Could you tell us more about how you inspire social change through music?

To quote Nina Simone, “an artist’s duty is to reflect the times.” There is something special about music – it can be thought-provoking and soul-stirring all at the same time. At SongRise we are intentional about bringing attention to various social justice issues to diverse audiences. The world is very politically divided at this moment. But what you may find is that politically divided people share the same musical interests. Why not use music to educate, inspire, and prompt even the smallest act of change such as donating to a worthy cause? Our repertoire is diverse. For instance, we sing about police brutality in a song called *I Can’t Breathe* which recognises the last 7 words of Eric Garner who was killed because of an illegal chokehold for selling cigarettes in New York. We highlight the impact of domestic abuse through our a cappella rendition of a Tracy Chapman song *Behind the Wall*, and we bring awareness to the Bhopal disaster of 1984 still claiming lives to this day through the song *Breathe Fire*.

So, we use our music to encourage perseverance, raises awareness, break down barriers and inspire action. Whether we are singing at rallies, protests, or on the steps of the US Supreme Court, advocacy can come in different forms – starting with a single musical note on a pitch pipe.

In your opinion, how can the relationship between the ICC and African states be strengthened?

I will start out by sharing that while there is understandable focus on the soured relationship between some African States, the African Union and the ICC, there are African states, Botswana and Senegal to name a few, that remain avid supporters of the Court and its mission and these relationships should also be strengthened and highlighted. Unfortunately, some voices are louder than others and these voices fuel the false perception that Africa is a monolith. So, I would say let us make note of the African states with thriving relationships with the ICC.

Regarding the other African states, underneath the positioning, threats of withdrawal, name calling, and political agendas are valid concerns that must be addressed and if unaddressed will continue to fuel the misconception that the ICC is targeting Africans.

Do you think that improving this relationship is important today? Why or why not?

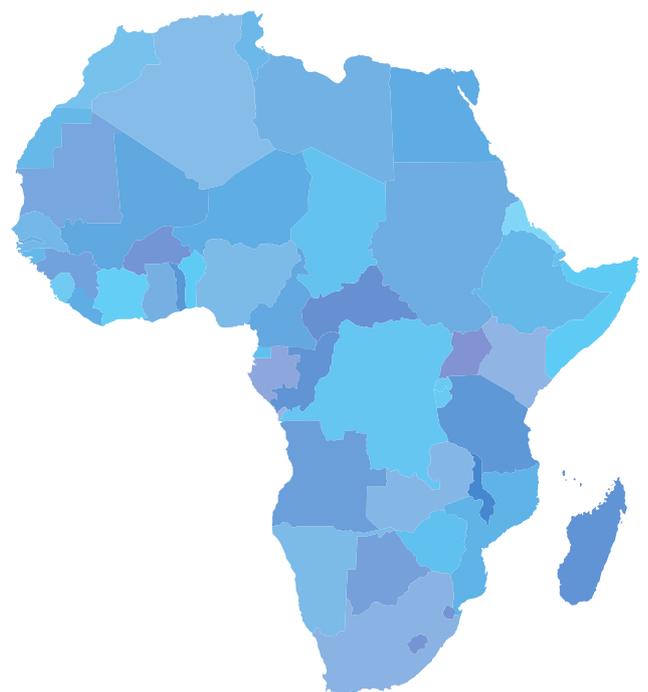
Absolutely! We must not forget that African states were instrumental in getting key provisions in the Rome Statute during the negotiations, and some constituted part of the first wave of signatories. Failing to improve the relationship would be detrimental to international justice not only because of those affected by atrocity crimes but also to the development of justice that is deemed truly international. The Court cannot afford to sideline regions.

In your view, what are the pro's and con's of the move towards regionalisation via the Malabo Protocol?

I have no issue with regionalisation of international criminal law and justice. I often say that the future of international criminal justice is domestic, and I believe this is the appropriate trend. After all, the ICC was designed to be a court of last resort. Thus, a trend that moves towards localising international criminal justice and developing domestic and regional capacity to address international crimes is going in the right direction. Does the Malabo Protocol provide that? Yes and no. Yes, because the Criminal Chamber's jurisdiction extends over a wider variety of important crimes such as corruption which is of a "serious nature affecting the stability of a state, region or the Union". It is important to have a regional court that can address such crimes which fall outside of the ICC's mandate. On the other hand, the Malabo Protocol includes a provision that may very well undermine what the Protocol is designed to achieve.

Article 46Abis of the Malabo Protocol on

immunity for heads of states and senior officials. has attracted a lot of controversy and debate. I have written about this comprehensively elsewhere. Suffice to say here that international law does not preclude the recognition of the inviolability of heads of states or governments before international courts and tribunals. However, Article 46Abis of the Malabo Protocol goes a step further and possibly extends personal immunity to individuals hitherto unprotected by such immunity under international law. While immunity does not necessarily equate to impunity, the African Court has jurisdiction over crimes the majority of which are likely to require, at the very least, the acquiescence of state agents. There are therefore legitimate questions on the extent to which the African Court is a viable option for the protection of victims of international crimes in Africa. In light of the fact that jurisdiction of the African Court was extended to international crimes to address the alleged "targeting" of African leaders by the ICC, it seems ironic that, due to Article 46Abis, the ICC remains the main option for victims in the case of incumbent heads and senior officials in Government.



How do internationalised hybrid tribunals affect criminal justice in Africa?

Internationalised hybrid tribunals are no longer novel, and with the recent establishment of the AU Hybrid Court for South Sudan, it is clear that this option for transitional justice is here to stay. Internationalised hybrid tribunals can positively impact criminal justice in Africa by providing an avenue for victims to seek justice which may be unavailable in their national systems for a variety of reasons. They also reflect a political compromise in an age where dissent towards the ICC is rife. Positively, they can contribute to the development of international criminal law. For instance, the Special Court for Sierra Leone was the first international(ised) court where sexual violence was prosecuted as an act of terrorism. This was possible because of the unique and hybrid nature of the Court's statute which included provisions of international criminal law and the application of the Geneva Conventions to which Sierra Leone was a Party. In addition, proximity to the affected communities can provide victims with a sense that justice is accessible.

At the same time care must be taken to avoid a proliferation of hybrid tribunals that effectively circumvent permanent institutions such as the ICC, or negatively impact the development the national judicial system as a result of diverting resources to a time-bound hybrid tribunal. Hybrid tribunals must build domestic capacity and their establishment must be victim-centered.

"It's that simple, if you love what you do, you have as good a chance as anything to make success of it. I mean, I can share with you things that I've done but those will differ from individual to individual. The one constant, the one absolute non-negotiable if you want to be successful at what you do, is to love what you do. Because when you love what you do, no matter how hard it is or how hard it becomes, you continue doing it, because you love it. No matter how tired you are, you continue doing it because you love it."

- Dire Tladi



Reassessing the Relationship between the International Criminal Court and the African States

Written by Dr. Oriola O. Oyewole



Dr. Oyewole is a Nigerian lawyer with a PhD in international criminal law, LL.M. in international law and LL.B. She is a member of Centre for Access to Justice and Inclusion.

The fragmentation of law and pluralism in the international community reflects the absence of a well-defined supreme authority, threatening the international rule of law. Furthermore, the lack of a centralised accountability mechanism within the international community precipitated the establishment of Nuremberg and the Tokyo tribunals in response to the gross violations of human rights and international humanitarian law. These tribunals entrenched individual responsibility and accountability for crimes against peace, war crimes and crimes against humanity.[1] Subsequently, the United Nations Security Council, through resolutions established the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in response to severe violations of human rights and international humanitarian law in Yugoslavia and Rwanda, respectively.[2] Nevertheless, these tribunals have been criticised for accentuating victor's justice,[3] and marginalising victims' interests which highlighted gaps in their functions. The legacies of these tribunals necessitated the quest for an International Criminal Court (ICC), especially a permanent institution.

[1] Madoka Futamura, *War Crimes Tribunals and Transitional Justice* (First Edition, Routledge 2008) 3.

[2] The UN Security Council unanimously adopted Resolution 808(1993) 22 February 1993 to address "grave breaches of humanitarian law...committed on a massive scale and in a systematic fashion." The following year, the UN Security Council adopted resolution 955(1994) to establish ICTR, it is noted that Rwanda had specific needs by virtue of its situation when compared to Yugoslavia. ICTR's situation tends to lean towards genocide rather than war crimes; UN Security Council Resolution 808 S/RES/808 (22 February 1993); Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, UN Security Council S/25704 (3 May 1993) para 35.

[3] Ralph Zacklin, 'Failings of Ad Hoc International Tribunals, The Symposium: The ICTY 10 Years On: The View from Inside-A Tentative Appraisal' (2004) 2(2) JICJ 541, 541-545.

The Rome Conference was the springboard for the emergence of the Rome Statute. Hence, the relationship of African states with the ICC is traceable to the Rome Negotiations, as this was the platform that espoused Africa's avidity for a centralised and permanent Court following the United Nations' failure to prevent the foreseeable Rwandan genocide.[4] The Rome Negotiations demonstrated the ICC as a product of social constructivism through the interactions of different states and non-state actors pursuing their varying interests via the drafting of the Rome Statute and the subsequent establishment of the permanent Court.[5] It is noted that African states at this conference wanted an institution that would first prevent and deter severe crimes and maintain international rule of law. The states created the treaty by submitting some of their powers. Nonetheless, the question posed by the creation of a permanent criminal court remained a political one that might threaten national sovereignty.[6] The treaty established the institutions and amassed a degree of control over states - an interplay of identity, politics and legitimacy.

It was believed that a permanent International Criminal Court would preclude the reoccurrence of problems and challenges that afflicted the tribunals.[7] Hence, it appeared that establishing a permanent court would expedite investigations and prosecutions.[8] Nonetheless, the question posed by the creation of a permanent criminal court remained a political one that might threaten national sovereignty.[9] The realist interests (also known as the realist theory) hold the view that

sovereign states are the primary actors of the international legal system.[10]

Plausibly, the interaction between these primary actors is inevitably dictated by an imbalance of power which reinforces that some states are more powerful than the others. For instance, given the USA's exceptionalism, reservations and influence about the Rome Statute, one would wonder about the unequal stratification amongst states.

Arguably, the imbalance of power remotely filters into ICC's relationship with most African states. This premise explains why some commentators have criticised the ICC for bias against African states. African states as a group, identify and interact given their common ideas - a strategy for unifying, promoting shared interests. Each State enjoys sovereignty and the right of non-interference in the affairs of another.[11] Hence, each State operated within its sphere. The main weakness of this structure was the lack of orderliness.

Although each State had a monopoly on its domestic affairs, it also had the freedom to use force externally in order to protect itself. This inadvertently led to the balance of power due to confrontations amongst states.[12] This balance of power restructured the pre-existing anarchic system. States pursue their own self-interests because they are rational.[13] Therefore, states establish the international criminal justice system based on their selfish interests and need for control, done through their consent. Arguably,

[4] General Romeo Dellelaire believed he could have saved "hundreds of thousands" with a stronger UN mandate; See US former president, Bill Clinton's comments on failure to intervene.

[5] John Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52(4) IO 855, 855-885.

[6] Cherif Bassiouni, 'The Time has come for an International Criminal Court' (1991) 1 ILCLR 1, 6-10.

[7] Michael Scharf, 'The Politics of Establishing an International Criminal Court' (1995) 6 JCIL 167, 168-169.

[8] Leila Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29 CILJ, 665; Michael P. Scharf, 'Results of the Rome Conference for an International Criminal Court' (1998) 3(10) ASIL <<https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court>> accessed 05 August 2020.

[9] Cherif Bassiouni, 'The Time has come for an International Criminal Court' (1991) 1 ILCLR 1, 14.

[10] Geoffrey Robertson, *Crimes Against Humanity; The Struggle for Global Justice* (First Edition, Penguin Press 2012) 13.

[11] United Nations Charter (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(1) and (7).

[12] Ruggie (n 5).

[13] *ibid.*

states create international criminal tribunals to legitimatise their goals and for a degree of control.

Interestingly, these tribunals and courts became more powerful than these states - 'norms do not hold power, power hold norm.'^[14] One implication of this is that states are made subject to the jurisdiction and powers of these tribunals and courts. Relating this to the ICC, one may argue that ICC is an outcome of fragmentation in international law because its regime is entirely different from other regimes in international criminal justice. The ICC is a self-sufficient legal regime that has emerged by incorporating the liberal principles of national criminal law and human rights with some modifications.^[15] Teitel opines that this merger has challenged the foundation of the longstanding notions of the international rule of law- sovereignty.^[16] States submit part of their sovereignty vis-a-vis consent to the Rome Statute. This submission, in turn, gives ICC power over the states because it transcends the sovereignty of states while coincidentally relying on these same states for its existence and operation.^[17] It is worthy of mention that ICC operates on the principle of complementarity, therefore, it does not have primacy over domestic jurisdictions. In addition, a larger percentage of State Parties to the Rome Statute are African states.

"Critically, the relationship between the ICC and the African states exhibits a hybrid of legality, politics and power play."

Power asymmetry also complicates their interactions. In 2010, the arrest warrant of the Sudanese President, Omar al-Bashir not only put into question sovereignty of states and immunities but also begs the question of over-concentration and selectivity on African matters. African states were in a dilemma of fulfilling their obligations to the Rome Statute as State Party and State Party to the African Union (AU). The AU notified some of its members not to cooperate in executing ICC arrest warrant for Omar al-Bashir. ^[18] The same scenario played out in the ICC case against Uhuru Kenyatta. The AU's support for immunity for sitting heads of state is in contravention of Article 27 of the Rome Statute. The division is further propelled by allegations of neo-colonialism against the ICC.^[19]

It is important to note that the International Criminal Court requires the cooperation of states in order to effectively carry out its mandate. Which simply means its operations may be positively or negatively impacted by external forces as much as international factors. While it might seem that ICC' frantic concentration on African states appears to leverage on their vulnerability, economic status and lesser power stance, state cooperation still remains an important item for its operations. Power dynamics in the international justice system may also dictate the relationship between the ICC and African states. It is noteworthy that there is a division amongst the African states and the ICC. Some support its mandates while a few have reservations.

[14] Ruggie (n 5).

[15] Ruti Teitel, *Transitional Justice* (OUP 2002) 17.

[16] *ibid.*

[17] Nerida Chazal, 'The Rationale of International Criminal Justice: Idealpolitik and the International Criminal Court' in William de Lint, Marinella Marmo and Nerida Chazal (eds), *Criminal Justice in International Society* (First published 2013, Routledge 2016) 19-23.

[18] Max du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC over the Nashir Saga' in Evelyn A. Ankumah (ed) *The International Criminal Court and Africa: One Decade On* (First Edition, Intersentia 2016) 245.

[19] Ramon Grosfoguel, 'The Epistemic Decolonial Turn: Beyond Political Economy Paradigms' (2007) 21(2) CS 211, 214.

In conclusion, the connection between ICC and African states demonstrates the huge expectations the latter had of the former, the ICC was seen as the *messiah* to re-entrench the rule of law. It is no gainsaying that the ICC has contributed to the rule of law and transitional justice. Nonetheless, forces like politics and power play within the international community seem to inadvertently affect its functions. Be that as it may, it is noteworthy that the ICC is relatively new in the criminal justice system, it is a work in progress and besides its mandates, there are a lot of external factors influencing its operations.



The International Criminal Court's Perceived Lack of Credibility within African States

Written by *Anna Olivia Kho*

To establish and affirm legitimacy in the international legal scene, which is central to its smooth functioning, the International Criminal Court (ICC or "the Court") presents itself as a "neutral and unbiased international legal body". In a keynote written by then-Second Vice-President of the ICC in 2011, the Court is described as "the first permanent, general, future-oriented court that is based on the general principle of law 'equality before the law, equal law for all'" with emphasis on its status as a "purely judicial, neutral and non-political institution".[1] However, the Court's legitimacy has been subject to criticisms since its establishment: notably, its lack of proper enforcement powers and low (and slow) conviction rates. The object of this article is to showcase the issues raised by African states: in recent years, many of them have repeatedly criticised the ICC for focusing their cases mostly in Africa. The issue is all the more sensitive due to the Western origins of international law. Indeed, many authors believe that modern international law has – and is – being used as a tool to uphold the colonial world order and "[weaponise] the dispossessed".[2]



After completing her bachelor's in French law and political science, Olivia Kho obtained a master's degree in international and transnational criminal law. She is especially interested in developing nations and their membership to the ICC.

[1] H.E. Judge Dr. jur. H. c. Hans-Peter Kaul, 'International Criminal Court, The International Criminal Court – Current Challenges and Perspectives' (8 August 2011) <<https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>> accessed 24 March 2022.
[2] Azeezah Kanji, 'The Mission to Civilize (Colonial) International Law' (*Al Jazeera*, 18 February 2022) <<https://www.aljazeera.com/opinions/2022/2/18/the-mission-to-civilise-colonial-international>> accessed 24 March 2022.

This article proceeds by first explaining the origins of such distrust from these states; then, a presentation of how this decline of African states' credibility vis-à-vis the ICC impacts their willingness to cooperate with the Court will be provided. Finally, it is important to nuance these different stances due to the complexity of the issue. Instead of viewing the problem as black and white as it is generally common in today's world – on one hand, denouncing the ICC as a “neo-imperial colonial tool” or on the other extreme, praising it as the global “bodyguard” of human rights[3] – it is exceedingly more complex than that. This article thus explores the origins and forecomings of this rocky relationship.

Origins: allegations of bias and case-picking

Upon observation of the past and current activities of the ICC, it is undeniably true that the majority of them are focused on the African continent. To this day, 10 out of 16 investigations are taking place in African states (Democratic Republic of the Congo; Uganda; Darfur, Sudan; Central African Republic (CAR) (I); Kenya; Libya; Côte d'Ivoire; Mali; CAR (II); Burundi).[4] Out of the 11 preliminary investigations (both ongoing and closed), 3 are the subject of African states (Guinea and Nigeria are both ongoing; the preliminary investigation in Gabon has been closed).[5] Finally, the entirety of the Court's 30 official cases are against African nationals.[6]

These facts and figures explain why accusations of bias towards African states have gained

traction in recent years. Some major events occurred that further fueled this movement, such as the ICC's issuing of an arrest warrant for former Sudanese president Omar al-Bashir in 2009: this was the first time an arrest warrant had been issued for a sitting head of state, and referred by the United Nations Security Council (instead of member state referral like all of the previous cases).[7] The indictments of Kenya's heads Uhuru Kenyatta and William Ruto, despite the growing number of conflicts in other parts of the world, fueled further hostilities towards the ICC. This culminated in a resolution issued by the African Union (AU) in 2017 calling for member nations to withdraw from the Rome Statute in an act of regional solidarity.[8]

Procedural consequences and the “mass withdrawal” of 2017

The resolution published by the AU on February 1, 2017 came after a debate on the subject at its annual summit meeting in Addis Ababa, after consensus on unfair targeting by the ICC of African states and thus, undermining their sovereignty. Some States opposed this withdrawal: Nigeria and Senegal, for instance, voiced concerns over the risk of an increase of human rights violations in African states. Meanwhile, the AU and its supporters pushed for a strategy of regionalisation of international law, notably the creation of a special African war crimes court.[9]

[3] Emily Rowe, 'The ICC-African Relationship: More Complex Than a Simplistic Dichotomy' (2021) XI Issue 2 IRR 51.

[4] 'Situations and cases', 'Investigations' section (ICC) <<https://www.icc-cpi.int/>> accessed 24 March 2022.

[5] *ibid* 'Preliminary Investigations' section.

[6] *ibid* 'Cases' section.

[7] Maxine Rubin, 'Points of Tension between African States and the International Criminal Court' (*Kujenga Amani Social Science Research Council*, 27 August 2019) <<https://kujenga-amani.ssrc.org/2019/08/27/points-of-tension-between-african-states-and-the-international-criminal-court/>> accessed 24 March 2022

[8] Michelle Nel and Vukile Ezram Sibiya, 'Withdrawal from the International Criminal Court: Does Africa have an alternative?' (*ACJR*, January 2017) <<https://www.accord.org.za/ajcr-issues/withdrawal-international-criminal-court/>> accessed 24 March 2022.

[9] Constance Johnson, 'African Union: Resolution Urges States to Leave ICC' (*Library of Congress*, 2017) <<https://www.loc.gov/item/global-legal-monitor/2017-02-10/african-union-resolution-urges-states-to-leave-icc/>> accessed 24 March 2022.

As of today, this movement is still present, though in practice very few states have actually gone through with withdrawing:

- The first State Party to effectively leave the ICC was the State of Burundi, who announced its withdrawal on 7 October 2016. [10]
- On 19 October 2016, the South African government sent a notice of withdrawal to the United Nations Secretary-General. However, the withdrawal was blocked due to a ruling from the High Court ordering that it be revoked on the basis that the President withdrew in a manner that was unilateral, thus breaching South African constitutional law.
- On 25 October 2016, the Gambian Information Minister announced the State's withdrawal from the ICC, which ensued amongst the AU's resolution (like Burundi). For context, according to a report by Amnesty International, The Gambia failed to cooperate with African regional judicial mechanisms by refusing implementation of three binding decisions by the ECOWAS Court of Justice. Additionally, it showed non-cooperation with the African Commission on Human and Peoples' Rights.[11]

Conclusions

When examining the numbers and statistics, the heavy focus on African states by the Court is

undeniably true. Some authors argue that the ICC hostility by African states originates not from a rejection of international justice, but rather from "the continuing power plays by the more powerful nations in the international community". [12] Moreover, it even reflects the interest of some leaders to protect themselves from the Court's scrutiny.[13]

On the other hand, there are arguments which could negate those raised by the AU. Former ICC Prosecutor Fatou Bensouda believes there may be good reasons for the Office of the Prosecutor (OTP) to have opened investigations only in Africa. According to the Statute, the Court's jurisdiction is very limited (in terms of temporality; personality of the accused; subject-matter jurisdiction; and the principle of complementarity).[14] On top of that, not only are the situations in Africa of such significance in that the gravity of the cases require ICC interference (the sheer number of victims, and the inability or unwillingness of many States to properly investigate these cases). But the investigations into African situations have actually been opened at the request or with the support of African states.[15]

Finally, it is relevant to note that the majority of states outside the African region that are under scrutiny are not parties to the Court, yet most of these states include the majority of the world's (non-African) conflict-ridden regions.[16]

It is therefore difficult to determine whether the ICC's activities reflect an unfair bias against

[10] Robert Cryer, Darryl Robinson and Sergey Vasiliev, 'An Introduction to International Criminal Law and Procedure' (CUP 2019) 168. See also: Trésor Kibangula, 'CPI: Nkurunziza promulgue la loi portant retrait du Burundi du Statut de Rome' (*Jeune Afrique*, 18 October 2016). <<https://www.jeuneafrique.com/366454/societe/cpi-nkurunziza-promulgue-loi-portant-retrait-burundi-statut-de-rome>> accessed 24 March 2022.

[11] 'Gambia: Withdrawal from ICC a drastic blow to countless victims globally' (*Amnesty International*, 26 October 2016).

<<https://www.amnesty.org/en/latest/press-release/2016/10/gambia-withdrawal-from-icc-a-drastic-blow-to-countless-victims-globally/>> accessed 24 March 2022.

[12] McNamee T, 'The ICC and Africa: Between aspiration and reality: Making international justice work better for Africa. Discussion Paper' (*Brenthurst Foundation*, February 2014) <http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commissioned_Reports/Brenthurst-paper-201402-ICC-and-Africa.pdf> accessed 24 March 2022.

[13] Frankie Wong, 'Criticisms and Shortcomings of the ICC' (*Access Accountability*, 26 September 2019).

<<https://accessaccountability.org/index.php/2019/09/26/criticisms-and-shortcomings-of-the-icc/>> accessed 24 March 2022.

[14] Fatou Bensouda, 'Is the International Criminal Court (ICC) targeting Africa inappropriately?' (*Human Rights & International Criminal Law ICC Forum*, March 2013 - January 2014) <<https://iccforum.com/africa>> accessed 24 March 2022.

[15] Laurel Hart, 'The International Criminal Court: biased or simply misunderstood?' (*UNA-UK*, 28 October 2018) <<https://una.org.uk/magazine/2018-1/international-criminal-court-biased-or-simply-misunderstood/>> accessed 24 March 2022.

[16] International Federation for Human Rights, 'Gambia and South Africa to remain in the International Criminal Court' (*RefWorld*, 24 February 2017) <<https://www.refworld.org/docid/58b3ff284.html>> accessed 24 March 2022.

African states, or are simply a result of a number of factors and contingencies unrelated to those voiced by the AU. Perhaps the solution to restore Africa's trust in ICC does not reside in focusing on whether the Court is biased against Africa and halting the investigations in the region. All this may do is skive away from the more fundamental issues surrounding international law and the political problems plaguing African states. Keeping the aforementioned in mind, the CAJPHR's goal of capacity-building, the main vision of this magazine, revolves around the understanding that the majority of African states are yet to embrace international criminal law on several levels such as institutional, educational, and societal.

On a more positive note, there are signs pointing to a possible restoration of the ICC-Africa relationship. For one, political changes in countries like South Africa and The Gambia indicate a switch to more governments that are amenable to the ICC. In the case of South Africa, the government's political colors clearly affect the State Party's membership to the ICC in that the South African High Court played a key position in remaining part of the Rome Statute.

The same line of reasoning can be taken for the situation of The Gambia: a change of government, with newly elected President Adama Barrow, was the turning point of this case when he decided to reverse the withdrawal from the ICC and remain a Member State.[17]

Another event which could suggest Africa's increasing, albeit slow, regaining of trust in the

ICC is the removal of al-Bashir from power: months of mass protests in Sudan led to a coup d'état in April 2019. This was the result of years of economic decline and eruption of civil wars, human rights abuses, war crimes and perpetration of corruption following al-Bashir's 20-year presidency. This is a big step to improving the ICC's relationship with Africa, as al-Bashir was charged by the Court with crimes against humanity, war crimes, and genocide for his actions in the Darfur conflict in 2003.



[16] International Federation for Human Rights, 'Gambia and South Africa to remain in the International Criminal Court' (*RefWorld*, 24 February 2017) <<https://www.refworld.org/docid/58b3ff284.html>> accessed 24 March 2022.

[17] 'Sudan coup: Why Omar al-Bashir was overthrown' (*BBC News*, 15 April 2019) <<https://www.bbc.com/news/world-africa-47852496>> accessed 24 March 2022.

Reflections on an Imperfect Match: The International Criminal Court's Current Problems vis-à-vis Africa

Written by Axel Helgi Ívarsson



Axel Helgi Ívarsson is a master's student in international security and law, and holds a bachelor's in international studies. He is currently writing his master's thesis on far-right violence in Europe.

The International Criminal Court (ICC or the Court) has faced criticism since it entered into force.[1] Alleged of being biased against African states[2] and described as "grossly ineffective",[3] the ICC, nevertheless, remains and continues its work across the globe. The Court is not without its issues, which include, inter alia, resource constraints and non-cooperation by states.[4] In light of this, observers have in recent years called for a "reality check" and reform at the ICC.[5] Perhaps the most concrete evidence of the problems that exist at the ICC come from the final report of the Independent Expert Review of the International Criminal Court and the Rome Statute System. The report is a detailed review of three clusters: governance; judiciary; and preliminary examinations, investigations, and prosecutions. It lists hundreds of recommendations "aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole". [6]

This brief article seeks to reflect on some of the

Court's problems identified in the report and how those problems relate to the African member states of the ICC.

Many findings in the report concern the internal workings of the Court and these matters have been further addressed in several posts by scholars and practitioners.[7] Moreover, to stay within the theme, the report's findings and recommendations illustrated in this article concern the Court and its external relations. The Court, or more specifically the Office of the Prosecutor (OTP), relies on the assistance of outside entities to conduct "effective and efficient investigations".[8] These entities include States Parties, intergovernmental organisations, and civil society. The expert report finds that the Court needs to maintain engagement with 'international, inter-regional and regional

[1] Jack Goldsmith, 'The Self-Defeating International Criminal Court' (2003) 70 UCLR 89, 89.

[2] Karen Allen, 'Is This the End for the International Criminal Court?' (BBC News, 24 October 2016) <<https://www.bbc.com/news/world-africa-37750978>> accessed 22 February 2022.

[3] Emma Anderson, 'EU Urges US to Reverse Sanctions against ICC Staff' (POLITICO, 3 September 2020) <<https://www.politico.eu/article/eu-urges-us-to-reverse-sanctions-against-icc-staff/>> accessed 22 February 2022.

[4] Jane Stromseth, 'Is the ICC Making a Difference?' (Just Security, 6 December 2017) <<https://www.justsecurity.org/47717/icc-making-difference/>> accessed 22 February 2022.

[5] Keith Raynor, 'A Reality-Check: The Need for Reform and a Culture Change at the ICC' (Justice in Conflict, 17 June 2019) <<https://justiceinconflict.org/2019/06/17/a-reality-check-the-need-for-reform-and-a-culture-change-at-the-icc/>> accessed 23 February 2022. See also Zeid Raad Al Hussein and others, 'The International Criminal Court Needs Fixing' (Atlantic Council, 24 April 2019) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>> accessed 23 February 2022.

[6] Assembly of States Parties, 'Review of the ICC and the Rome Statute System, ICC-ASP/18/Res.7' (6 December 2019) 2 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf> accessed 20 February 2022.

[7] Douglas Guilfoyle, 'The International Criminal Court Independent Expert Review: Questions of Accountability and Culture' (EJIL: Talk!, 7 October 2020) <<https://www.ejiltalk.org/the-international-criminal-court-independent-expert-review-questions-of-accountability-and-culture/>> accessed 23 February 2022; Michael G. Karnavas, 'The ICC-ASP Independent Expert Review: Scrutinizing the Past/ Proposing the Future' (Michael G. Karnavas Blog, 6 January 2021) <<http://michaelgkarnavas.net/blog/2021/01/06/independent-expert-review/>> accessed 23 February 2022; Gabriele Chlevickaite, 'A Sea Change or Business as Usual? The Review of the International Criminal Court Continues' (Justice in Conflict, 29 November 2021) <<https://justiceinconflict.org/2021/11/29/a-sea-change-or-business-as-usual-the-review-of-the-international-criminal-court-continues/>> accessed 23 February 2022.

[8] Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report' (2020) para 752 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 19 February 2022.



organisations [...] with the aim of helping relevant states better understand the purpose and value of the Court and thereby building support for its activities".[9]

One criticism of this finding is that it frames mutual engagement with regions as one-sided. [10] Professor Kamari Clarke points out that "that it is about the ways regions can support the Court, as opposed to the Court also engaging dialogically with the needs of regions that are concerned with justice and approaches to justice".[11] In relation to Africa, this involves using "African justice forms on African terms", as mentioned by Clarke.[12] More dialogue between the Court and African states regarding the nature of their relationship is needed.

The Court's relations with civil society organisations (CSO) require improvement. The expert review addresses this issue particularly for the Court's situation countries.[13] During visits from the ICC's staff, CSOs voiced concerns that their input was not as fundamental as information collected from political representatives.[14] CSOs play a key role in international criminal justice. Besides "traditional" roles of agenda-setting and advocacy, they also identify and represent victims, supply legal briefs and evidence, thus akin to a type of "delegated authority".[15] Conversely, the report also identifies that local civil society organisations lack understanding of the Office of the Prosecutor's mandate.[16] This point has been backed up by another study, which recommends the OTP to "clearly delineate

its role and responsibilities, particularly with victims and affected communities, in relation to other ICC organs".[17] Thus, improving communication channels between civil society organisations and the OTP and sharing expertise and best practices should be prioritised.[18]

Finally, it must be noted that a long-term difficulty for the ICC has been the gap that exists between expectations towards the Court to deliver justice and what is realistic for the Court to effectively deliver based on available resources.[19] This connects to another problem of the ICC, namely that of selectivity, both in terms of where investigations are opened (the alleged African bias) and which cases to prosecute.[20] On these two matters, the ICC prosecutor, Karim Khan, has opted for a pragmatic approach, stating that "if we keep promising that we can do everything, when we have got these resources, we are lying [...] I am not going to raise expectations even if it means being candid and having criticism".[21] Selectivity is an "inevitable" part of international criminal justice, but that does not make it self-defeating for the ICC.[22] By making the OTP's decision-making process more transparent and consistent it could make the Court's selectivity more understandable to the involved parties and outside observers, rather than regarded as suspicious and met with hostility.[23]

[9] *ibid* para 379.

[10] Wayamo Foundation, 'Precarity or Prosperity: African Perspectives on the Future of the International Criminal Court' (Wayamo Foundation, 2020) 35 <<https://africanperspectives.wayamo.com/wp-content/uploads/2020/12/Wayamo-KAS-African-Perspectives-on-the-Future-of-the-ICC-WEB-3.pdf>> accessed 19 February 2022

[11] *ibid*.

[12] Wayamo Foundation (n 11).

[13] 'Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report' (n 8) para 381.

[14] *ibid* para 384.

[15] Kjersti Lohne, 'Global Civil Society, the ICC, and Legitimacy in International Criminal Justice' in Cecilia M Bailliet and Nobuo Hayashi (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2017) 458.

[16] 'Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report' (n 8) para 383.

[17] Amanda Ghahremani and Raquel Vazquez Llorente, 'Ten Recommendations to Prosecutor Karim Khan to Improve His Relationship with Civil Society during Preliminary Examinations: Perspectives from the Situation Countries' (*Opinio Juris*, 15 November 2021) para 7 <<https://opiniojuris.org/2021/11/15/ten-recommendations-to-prosecutor-karim-khan-to-improve-his-relationship-with-civil-society-during-preliminary-examinations-perspectives-from-the-situation-countries/>> accessed 24 February 2022.

[18] 'Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report' (n 8) para 383; Stromseth (n 4).

[19] Margaret deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 MJIL 265, 271

[20] Karim A.A. Khan, 'Reuters - LIVE: International Criminal Court Prosecutor Karim Khan Holds a Briefing' (*Reuters*, 2021) 2:20:241 <<https://www.youtube.com/watch?v=JEvD9jNylgU>> accessed 20 February 2022.

[21] Benjamin Nutt, 'Reframing the ICC Selectivity Debate? The Importance of Consistency and Transparency' (*Justice in Conflict*, 24 April 2018) <<https://justiceinconflict.org/2018/04/24/reframing-the-icc-selectivity-debate-the-importance-of-consistency-and-transparency/>> accessed 24 February 2022.

[22] Nutt (n 21).

[23] *ibid*.

The Malabo Protocol and the Move Towards Regionalisation

Written by Mariana Baptista



Mariana Baptista specialises in international criminal law, and has an LL.B. and a postgraduate certificate in international humanitarian law and human rights in conflict situations. She also obtained an LL.M. in public international law.

In the 12th Ordinary Session of the Assembly of the African Union, the Assembly requested the Commission of the African Union (AU) to examine the implications of the African Court on Human and Peoples' Rights (African Court) being empowered to try international core crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression.[1] In June 2014, the African Union adopted the Malabo Protocol which included, in Annex, an amendment to the Statute of the African Court, creating the International Criminal Law Section. [2] Nevertheless, the Malabo Protocol is yet to enter into force, since, to this day, only 15 African Union members have signed the Protocol, and none have ratified it.[3]

Regionalisation of international law is not a new phenomenon per se, and it has proven to yield positive results in international Human Rights law through the extensive jurisprudence of, for instance, the European Court of Human Rights and the Inter-American Court of Human Rights. [4]

However, the Annex to the Malabo Protocol marked the first step in establishing an inter-African jurisdiction for international crimes. Differently from the phenomenon of regionalisation, hybrid courts have been established on an ad hoc basis to address specific situations, such as Cambodia, Kosovo, and Sierra Leone.[5] In that sense, the move towards regionalisation of international criminal law (ICL) through the establishment of a standing body of law that is particularly tailored to a region is unprecedented.[6]

This particular move comes after a steady deterioration of the relationship between the International Criminal Court (ICC) and the AU, as further explored in this magazine.[7] Following the issuance of the first arrest warrant for Sudanese President Omar al-Bashir in 2009, the AU accused the Court of being a neo-colonial instrument targeting Africa and Africans.[8] Indeed, six out of 16 situations currently being investigated by the ICC's Office of the Prosecutor originated in Africa.[9]

[1] African Union (Assembly), 'Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Doc.' (AU Addis Ababa 2009) Assembly/AU/3(XII) Assembly/AU/Dec.213(XII).

[2] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) art 16(1) of the Annex.

[3] Jessie Chella, 'A Review of the Malabo Protocol on the Statute of the African Court of Justice and Human Rights – Part I: Jurisdiction over International Crimes' (LA Reporter, 4 January 2021) <<https://ilareporter.org.au/2021/01/a-review-of-the-malabo-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights-part-i-jurisdiction-over-international-crimes-jessie-chella/>> accessed 5 March 2022.

[4] Gerhard Werle and Moritz Vormbaum, 'Commentary – The Search for Alternatives: The "African Criminal Court"' (ISPI – Italian Institute for International Political Studies, 28 March 2017) <<https://www.ispionline.it/en/publicazione/search-alternatives-african-criminal-court-16451>> accessed 6 March 2022

[5] Asser Institute, 'Hybrid courts' (Asser Nexus on Conflict and Crime) <<https://www.asser.nl/nexus/international-criminal-law/the-history-of-icl/hybrid-courts/>> accessed 6 March 2022.

[6] Werle and Vormbaum (n 4).

[7] See for example 'African Challenges to the ICC' by M. Olowoselu (55-57), 'The ICC's African Bias' by J. Frivet (58-62), 'The International Criminal Court's Perceived Lack of Credibility within African States' by O. Kho (47-50).

[8] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 24, para 71.

[9] International Criminal Court, 'Situations under investigation' <<https://www.icc-cpi.int/pages/situation.aspx>> accessed 6 March 2022.

While this seems unbalanced, it should be noted that most of these investigations were referred to the ICC by the United Nations Security Council, or through the State referral mechanism.[10] Moreover, the Malabo Protocol fails to address how the future Court would interact with the ICC, [11] which poses significant challenges regarding complementarity for States that are both members of the ICC and of the AU.

The Malabo Protocol criminalises offences that are relevant to the African region. In addition to the core crimes, 11 new offences have been included in the jurisdiction of the Court, such as piracy, terrorism, corruption, money laundering, unconstitutional change of government, as well as illicit exploitation of natural resources.[12] The Protocol also provides new modes of liability, including corporate criminal liability in response to the involvement of private companies in illegally exploiting natural resources during civil conflicts.[13] The crime of unconstitutional change of government is also particularly relevant for African states. Although unconstitutional changes of government are rare in other regions of the world, it is still unfortunately a common phenomenon in Africa. [14] In the post-colonisation era, many African nations experienced military coups and civil wars aimed at gaining or retaining political power,[15] destabilising not only those States, but the region as a whole.[16] The creation of an African Criminal Court also allows States to have more control over the functioning of said Court, tailoring it to the African context. For instance, the Protocol provides immunity for incumbent heads of State or government, or other senior state officials,[17] given that the ICC's waiver of immunity has been frequently contested by African states.

In addition, the prosecutorial immunity could hinder prosecutions for the crime of unconstitutional changes of coup leaders who successfully come into power.[18] That said, the immunity clause could significantly impact the legitimacy and credibility of the future Court,[19] some even consider this clause to be its "Achilles' heel".[20]

While it seems likely that an African Criminal Court will soon exist, it is not clear that this Court will mark the beginning of a regionalisation movement in ICL. However, there are benefits to an African Criminal Court: it would operate with significantly less baggage by being free of narratives of perceived bias, as well as experiences of neo-colonialism and western intervention.[21] Even if the Court is never created, the Malabo Protocol potentially threatens the existence of the ICC that could see several withdrawals from its largest regional group in a time where the ICC has been subject to intense criticism. In conclusion, even though the Malabo Protocol has potential issues, it is nevertheless a commendable feat that it was adopted,[22] bringing the concerns of African states to the attention of the international community.



[10] Werle and Jessberger (n 5) 25, para 72.

[11] Amnesty International, 'Africa: Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court – Snapshots' (*Amnesty International Ltd*, 2017) 10 <<https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0161372017ENGLISH.pdf>> accessed 6 March 2022.

[12] Malabo Protocol (n2) art 28A(1) of the Annex.

[13] Niriksha Sanghvi, 'Development of Unconstitutional Change of Government under the Malabo Protocol – From Prohibition to Over-Criminalisation?' (2021) 13(4) *AJLS* 446, 448.

[14] Werle and Vormbaum (n 3).

[15] Sanghvi above (n 10) 448.

[16] Werle and Vormbaum (n 3).

[17] Malabo Protocol (n2) art 46A bis of the Annex.

[18] Sanghvi (n 12) 468.

[19] Amnesty International (n 10) 4.

[20] Werle and Vormbaum (n 4).

[21] Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol' (2017) 11(1) *IJTJ* 71, 71-74.

[22] Sanghvi (n 12) 469.

African Challenges to the ICC

Written by Mayowa Olowoselu



Mayowa Olowoselu holds an LL.M. in international law. She is primarily interested in the way international criminal law has been used in Africa and in studying the relationship between colonisation and international law.

Africa has posed several challenges to the International Criminal Court (ICC) over the last two decades. Initially Africa was a vocal advocate in the ICC. It was highly involved in the negotiation of the Rome Statute and has become the largest regional group at the Assembly of State Parties.[1] However over time, the relationship has deteriorated and become antagonistic. The ICC and various African actors (actors here meaning states, leaders and organisations) accuse each other of not acting in the best interest of peace and justice in Africa. This article briefly discusses two African challenges to the ICC: the backlash to ignoring head of state immunity and the perception of an Anti-African bias at the ICC.

Head of State Immunity

The first major blow to the relationship between Africa and the ICC arose after the indictment of a sitting head of state, former President Omar al-Bashir of Sudan in 2009. This decision followed a referral by the United Nations Security Council (UNSC), which was contentious as Sudan is not a member of the ICC. The African Union (AU) expressed disappointment with the decision and argued al-Bashir should be protected by the

immunity shared by all heads of state under customary international law.[2] Several African leaders feared if the Court would go after one leader, they were also under threat.

These fears were proven in 2010 with the indictment of 6 Kenyan politicians, including Uhuru Kenyatta and William Ruto who successfully ran for the Presidency and Vice-Presidency of Kenya in 2013, making Kenyatta the first sitting head of state to appear at the ICC.[3]

The arrest warrants for African leaders and politicians incensed the AU, who in turn called for non-cooperation with the ICC[4] based on Article 98(1) of the Rome Statute. Many African states took this seriously, South Africa is an example of one of many African member states

[1] Renee Nicole Souris, 'African Challenges to the International Criminal Court: An Example of Populism?' DPT (2020) 255.

[2] Patricia Hobbs, 'Contemporary Challenges in Relation to the Prosecution of Senior State Officials before the International Criminal Court' (2015) 15(1) ICLR 76.

[3] Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019) 22.

[4] African Union (Assembly) 'Assembly of the African Union Thirteenth Ordinary Session AU 13th Summit of Heads of States' (AU Sirte 2009) Assembly/AU/Dec. 243-267 (XIII) Rev.1 para 10.

that allowed al-Bashir to arrive and leave without attempting to arrest him. President Zuma argued that he had a duty to provide diplomatic immunity to senior officials and stated if he was challenged on this principle South Africa would withdraw from the ICC.

The tensions culminated in 2017 when the AU issued a non-binding Withdrawal Strategy for the mass withdrawal of African states from the Court. While many AU members vilified the ICC, Botswana disagreed with other AU members, stating it would respect an ICC arrest warrant.[5] In hindsight, the Withdrawal Strategy was toothless. The Gambia, South Africa and Burundi adopted the Strategy but only Burundi left the ICC in 2017.

Nigeria, Senegal, Liberia, and Cape Verde issued reservations to the Withdrawal Strategy and have not acted since.

Pro-ICC advocates have portrayed the fear and accompanying backlash of the AU and African leaders as being an expression of self-interest. 'Despots' are concerned that they too could be subjected to international justice and are scrambling to protect themselves. However, African actors have a different perspective. They have argued that the ICC has been overzealous in its desire for an investigation which has ultimately affected peace processes.[6]

The African challenge to the ICC in the conversation about head of state immunity is a debate on peace versus justice.[7]

Perception of Bias

The ICC's refusal to engage in debate on the sanctity of head of state immunity has negatively affected the trust Africa places in the Court. Africa is understandably concerned that the way the Prosecutor and the UNSC chose which countries to investigate was based on what was politically expedient at the time. Former African Union Chairman, Jean Ping, stated that Africa welcomes international justice but will not accept being treated as a laboratory to test international law.[8] Until 2016, every single case, investigation, conviction, and examination was of an African state. Understandably, Africa is concerned that a supposedly universal court has expended most of its finances and time on a single region.

Furthermore, the referral of cases by the UNSC indicates an uncomfortable relationship between the ICC and an organisation that has five permanent members, three of which are not members of the ICC. It raises a question of the fairness of having a small group of nations that has the ability to subject other non-members to investigation, knowing they will never be in the same position.

The ICC's inability, or unwillingness to investigate hegemonic states highlights a failure within the Court itself. It has been suspected that Africa's lack of political and economic clout makes it more susceptible to investigation.[9] Eberechi states that ICC's choice of prosecution "is not only a double standard, but also imperialistic".[10] Clarke has posited that the focus on Africa should draw attention to the structural inequalities already present in the international legal field, specifically the structural inequalities which make it easier

[5] Peter Clotey, 'Botswana, African Union Disagree Over International Criminal Court Warrants' (VOANews, 11 July 2011) <<https://www.voanews.com/a/botswana-african-union-disagree-over-international-criminal-court-warrants-125451843/158470.html>> accessed 25 February 2022.

[6] Lucrecia García Iommi, 'Whose Justice? The ICC "Africa Problem"' (2020) 34 IR 105, 114.

[7] Hobbs (n 2).

[8] BBC 'Sudan Lobbies against Bashir Case' (23 September 2008) <<http://news.bbc.co.uk/1/hi/world/africa/7630071.stm>> accessed 25 February 2022.

[9] Tim Murithi, 'Africa's Relations with the ICC A Need for Reorientation?' in Heinrich Böll Foundation Southern Africa (ed), *A Fractious Relationship: Africa and the International Criminal Court* (2012) 5.

[10] Ifeonu Eberachi, "Rounding Up the Usual Suspects": Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance" 4(1) AJLS (2011) 51, 84.

for African rather than European leaders to be indicted. Many African actors, including pro-ICC advocates, recognise that the legacy of colonialism and imperialism has made Africa weary of international institutions which claim to have their best interests in mind.[11]

Africa has challenged the bias within the ICC, but pro-ICC advocates have waived away these frustrations as simply "misunderstandings of how the court operates".[12] If the challenge of anti-African bias is to be taken seriously, Schneider suggests that the relationship between the UNSC should be approached cautiously 'especially regarding situations in parts of the world that are under-represented in the UNSC'.[13]

Conclusion

Africa has posed two major challenges to the ICC that will affect a friendly relationship in the future. The perception of bias is the biggest threat as this has made Africa weary of whether the ICC truly has justice in mind when choosing to investigate the continent.

[11] Kamari Maxine 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*, 17 March 2013) <<https://iccforum.com/africa#Clarke>> accessed 31 March 2022.

[12] Westen K Shilaho, 'The International Criminal Court and the African Union: Is the ICC a Bulwark against Impunity or an Imperial Trojan Horse?' (2018) 18(1) *AJCR* 119, 119.

[13] Margaret M deGuzman, 'Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment' in Richard H. Steinberg (ed), *Contemporary Issues Facing The International Criminal Court* (Brill-Nijhoff 2016) 335.

[14] How are African states to believe that the ICC will ever sincerely address any other challenge they may pose in the future when they have been so mistreated in the past?

[15] Lea Ina Schneider, 'The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa?' (2020) 1(1) *JICL* 90, 90.



The ICC's African Bias: The Appropriation of a Legitimate Narrative by Perpetrators

Written by Joanna Frivet

Any historian will confirm that biases based on selective truths are harder to debunk than those based on lies.[1] The African Bias in itself, before being aimed at the International Criminal Court, understandably finds its origins in the implied bias that underlies the global slave trade by European nations for nearly two centuries starting from the second half of the 16th Century.[2] However, beyond being a mere extension of the expression of the commercial exploitation of racism to build empires in Europe, it first materialised as a concept in the black epistemic community as applied to a variety of socio-political issues including those faced by the black diaspora in the US to analyse the difference in treatment post the civil rights movement.[3] It is only later, in the '90s, after the Cold War, that it was coined as a concept in decolonization theory identifying prejudicial treatment towards African states by their Western counterparts – racism between states if you will, when no justifications remained for barriers to the exercise of sovereignty by African states. The notion of the African bias as raised by African states against the international community took shape during the Rwanda Genocide. It became a call for attention to the international community to stop the commission of crimes, considering the discrepancies in the treatment between the Rwandan and Bosnian Genocide.[4] While the international community was not ready to address the protection of civilians in both cases, steps were taken in Bosnia that were not adopted in Rwanda.



Joanna Frivet is a pupil barrister in London and has been an international law consultant specialising in international criminal law and transnational crime worldwide.

[1] Michael H. Romanowski, 'Problems of Bias in History Textbooks' (1996) 60 SE 170, 170.

[2] Keith Payne, Heidi A Vuletich and Jazmin L. Brown-Iannuzz, 'Historical Roots of Implicit Bias in Slavery' (2019) 116(24) PNAS 11693.

[3] This conclusion originates from a literature review of all the references to the African Bias since the 1980's, 177.

[4] Sabrina Stein, 'The UN and Genocide: A comparative Analysis of Rwanda and the Former Yugoslavia', in Fulvio Attina (ed), *The Politics and Policies of Relief, Aid and Reconstruction: Contrasting Approaches to Disasters and Emergencies* (Springer 2012) 177 -180.

As early as September 1991, when the first evidence emerged that the Serb army attacked civilians, the UN Security Council established an arms embargo on both warring parties, and in 1992, created the first UN-protected areas in Croatia for the Serb minorities. After the fall of Srebrenica in 1995, NATO forces rallied and launched 3500 sorties that destroyed the Serb military infrastructure, forcing Milosevic to the table for the Dayton Accords that would put an end to the conflict in Bosnia.[5]

By contrast, in Rwanda despite the first calls for genocide in April 1994 against the Tutsi population, almost half of whom had become refugees as a direct result of persecution since the 1980s, the UN relied exclusively on diplomacy. In fact, as soon as the violence erupted the UNAMIR's mission changed to the protection of foreign civilians with the aim of escorting them to safety.[6] It was clear that the "international community did not feel a pressing need to save the lives of Rwandans." [7] It is only in early July 1994, after most of the killings had taken place and 10% of the population has been murdered that the French, who had, in fact, supported the Hutu-led government, sent Operation Turquoise to establish safe zones in Rwanda. The conflict only ended when the Rwandan Patriotic Front that had gained ground during the genocide arrived in Kigali in July 1994 and established a coalition government between Hutus and Tutsis ending 4 years of conflict.

Too little was done in both situations. Nonetheless, the difference in the international community's treatment of the two conflicts is difficult, if not impossible to justify. This understandably added wood to the inflammable narrative of the African bias by the Western states. But here the African bias was raised to demand equal protection and justice for African victims in Rwanda.

Fast-forward to 18 April 2008. By then, the newly created International Criminal Court had opened cases in three African situations, all through the voluntary requests of states themselves (also known as self-referral): Uganda (2003), the Democratic Republic of Congo (2004) and the Central African Republic (2005). The Darfur, Sudan situation had in 2005 also been referred to the ICC by the UN Security Council but the ICC Prosecutor was still investigating the crimes.

The Representative of Rwanda at the African Union Meeting of Minister of Justice/Attorney Generals in Addis Ababa, Ethiopia, raised "the issue of Universal Jurisdiction where foreign Judges arrogate to themselves the duty and responsibility to take over control and dominate judicial process in

[5] Sabrina Stein, 'The UN and Genocide: A comparative Analysis of Rwanda and the Former Yugoslavia' in Fulvio Attina (ed), *The Politics and Policies of Relief, Aid and Reconstruction: Contrasting Approaches to Disasters and Emergencies* (Palgrave macmillan 2012) 177-180.

[6] *ibid* 177.

[7] *ibid*.

independent sovereign States for the purpose of political gain.”[8] The Ministers present, approved a declaration stating that the universal jurisdiction by non-African states is a “great affront” to African states and requested the Commission of the AU to conduct a legal study in view of making recommendations.

In the report itself, the AU Commission recommended that the states of the African Union continue to rely on the ICC framework to “check the excesses and whims of individuals states as well as address some of the concerns of potential concerns for abuse”,[9] (through the preliminary examination phase and the possibility to challenge admissibility), and to engage in conversations with the EU and the UN member states on the application of the universal jurisdiction principle. However, at the next AU Assembly, on 30 June 2008, the AU member states took a different approach.[10] During this meeting the Rwandan representative clarified that they had benefited from universal jurisdiction and were not against the principle in itself but merely the abuse of it. [11] The AU’s decision was to request all the UN member states, in particular EU states, to impose a moratorium on the execution of arrest warrants until all legal and political issues have been exhausted.[12] The ICC’s African Bias was born.

Interestingly, a few days before the AU meeting, on 5 June 2008, Luis Moreno Ocampo, the then-ICC Prosecutor, presented his report on Sudan to the UN Security Council[13] clearly expressing that the Sudanese government had failed to investigate and prosecute perpetrators and suggesting that the Government of Sudan that was promoting the then Minister of Interior Ahmad Harun, who was spearheading the commission of a genocide against civilians, would have to face consequences. The then-President al-Bashir of Sudan had been put on notice.



[8] Commission on the Meeting of Ministers of Justice/ Attorneys General, *Report of the Commission on the Meeting of Ministers of Justice/ Attorneys General on Legal Matters* (2008).
[9] Commission on the Use of the Principle of Universal Jurisdiction by some Non- African States, *Report of the Commission on the Use of the Principle of Universal Jurisdiction by some Non- African States as Recommended by the Conference of Ministers of Justice/Attorneys General* (2008).
[10] African Union (Assembly) 'Assembly of the African Union, Eleventh Ordinary Session' (AU Sharm El Sheikh 2008).
[11] *ibid.*
[12] African Union (Assembly) 'Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction' (AU Sharm El Sheikh 2008) Assembly/AU/Dec.199 (XI).
[13] UNSC '5905th Meeting' (5 June 2008) UNDoc S/PV.5905.

At the next African Union meeting, on 1 July 2009, Muammar Qaddafi took the Chairmanship of the group in Sirte, Libya and predictably, the AU adopted a decision calling for the “immediate termination of all pending indictments”.[14] There was no turning back. Al-Bashir, who is now standing trial, and his fellow leaders fearing repercussions for their criminal actions, including the likes of Muammar Gaddafi, who was also at the time the single largest funder of the AU Budget, appropriated a legitimate narrative used to attack prejudicial treatment and demand justice and equality for victims, for political gain to advocate impunity for themselves. The African Bias became part of the narrative and would be repeatedly raised for the coming decades despite its ridiculous implications.



How unfair for African criminal leaders to face justice when other world leaders did not?

Now that the engineers of the ICC African bias have been outed as mass murderers, their motive for doing so is not so outrageous to suggest. However, for the decade or so during which the concept had traction, it seriously handicapped the ability of the ICC to raise concerns and take action in conflict situations in African states. The wave of withdrawals from the Rome Statute by the ICC African state parties or threats thereof were similarly opportunistic appropriation of the same narrative.

As empirical studies in Kenya later showed, those who suffered or witnessed post-election violence in Kenya were far less likely than others to believe that the ICC is biased against Africans.[15] Yet the issue continues to be raised by the media and politicians as and when it suits them.

[14] African Union (Assembly) 'Assembly of the African Union Thirteenth Ordinary Session' (AU Sirte 2009) Assembly/AU/Dec. 243-267 (XIII) Rev.1

[15] Geoff Dancy, Yvonne Marie Dutton, Tessa Alleblas, and Eamon Aloyo, 'What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya' 64 JCR (2020) 1443-1469.

The Prosecution of Omar Al-Bashir and the Relationship between the ICC and the African States

Written by Laura Pes



Laura Pes is a law graduate who specialises in international criminal law and human rights. She currently works for an international organisation based in The Hague.

The International Criminal Court (ICC) aims at prosecuting individuals who have perpetrated international crimes, namely crimes against humanity, war crimes, genocide and aggression.[1] The ultimate goal is “to put an end to impunity for the perpetrators of these crimes”. [2]

Omar al-Bashir has been wanted by the ICC for more than 10 years. According to the counts contained in the Arrest Warrant, he has been charged with war crimes, crimes against humanity and genocide, allegedly committed at least during the period between 2003 and 2008 in Darfur, Sudan.[3] States Parties to the Rome Statute as well as non-State Parties (pursuant to Resolution 1593)[4] have the obligation to cooperate and hand over al-Bashir to the ICC to face trial. Nevertheless, several non-State Parties have failed to arrest al-Bashir while present within their territorial jurisdictions. As a result, the former head of state still remains at large. Currently, the case is at the Pre-Trial stage, as the ICC does not try individuals unless they are present in the courtroom.[5]

Omar al-Bashir was the President of the Republic of Sudan from 16 October 1993 to 11 April 2019. According to customary international law (CIL),[6] heads of state enjoy “full immunity from criminal jurisdiction and inviolability” which protects them “against any act of authority of another State which would hinder them in the performance of their duties”. [7] This being said, there are two questions that arise with respect to the al-Bashir case: whether such an immunity bars the jurisdiction of the ICC; and whether Sudan, not being a State Party to the Statute, has an obligation to cooperate with the ICC.

[1] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 92-9227-227-6 (Rome Statute) art 5.

[2] *ibid* 1.

[3] *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (12 July 2010).

[4] Rome Statute (n 1) art 63(1).

[5] *ibid*.

[6] *Democratic Republic of the Congo v Belgium* (Judgment) [2002] ICJ Rep 3.

[7] *Djibouti v France* (Judgment) [2008] ICJ Rep 177 paras 170 and 174.

The Statutes of the Nuremberg^[8] and Tokyo Tribunals,^[9] the International Criminal Tribunal for the Former Yugoslavia (ICTY),^[10] the International Criminal Tribunal for Rwanda (ICTR),^[11] the Rome Statute of the ICC,^[12] and the Statute of the Special Court for Sierra Leone (SCSL)^[13] contain express provisions establishing that the immunity of an individual cannot constitute a bar to the jurisdiction of these international courts and tribunals. Article 27(2) of the Rome Statute reads as follows:

“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.”

However, since the Rome Statute applies to State Parties that have consented to be bound by its provisions, it is still not clear whether such a norm can restrict immunities of individuals of states that are not parties to the Statute, unless there is a waiver by the relevant state, or a binding resolution of the United Nations Security Council (UNSC).^[14]

The case began in March 2005, when the UNSC, acting under Chapter VII of the UN Charter, referred the situation in Darfur to the Prosecutor of the ICC.^[15] In its Resolution, the Security Council decided that:

*“[T]he Government of Sudan and all other parties to the conflict in Darfur, **shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully**”*(emphasis added).^[16]

Such a Resolution creates an obligation to cooperate upon Sudan and all other parties to the conflict in Darfur, notwithstanding their nature of non-State Parties to the Statute. Indeed, the UNSC Referral would constitute a waiver of Al Bashir’s personal immunity in the ICC proceedings. Such an assertion is based on the fact that UN Member States, and therefore also Sudan, are required to carry out Chapter VII measures pursuant to Article 25 of the UN Charter.^[17] Furthermore, Article 103 of the UN Charter determines that, in the event of a conflict, obligations under the UN Charter shall prevail over all obligations “under any other international agreements”.^[18]

[8] Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (adopted 8 August 1945) (London Agreement) art 7.

[9] International Military Tribunal for the Far East (adopted 19 January 1946) Treaties and Other International Acts Series 1589 art 6.

[10] Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) art 7(2).

[11] Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) art 6(2).

[12] Rome Statute (n 1) art. 27.

[13] Statute of the Special Court for Sierra Leone (adopted 16 January 2002) art 6(2).

[14] Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcolm D. Evans (eds), *International Law* (OUP 2018) 377.

[15] UNSC 'Reports of the Secretary-General on the Sudan' (31 March 2005) S/RES/1593 para 1.

[16] *ibid* para 2.

[17] United Nations Charter (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 25.

[18] *ibid* art 103.

In this respect, when deciding on the appeal raised by Jordan against the Pre-Trial Chamber II decision recognising the failure of the state to comply with its obligations under the Statute, the Appeals Chamber found Sudan to be in the same position as a State Party.^[19] Indeed, the Chamber considered that Sudan could not raise immunity reserved for heads of state, since Article 27 of the Rome Statute does not allow such an immunity to work as a bar to jurisdiction, and that “[t]here is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court”.^[20]

Criticisms have been moved against the ICC for its alleged bias against Africa. The issuance of the Arrest Warrant against al-Bashir has contributed to creating tensions between the ICC, the African Union (AU) and some African states.

In January 2018, the AU decided that the United Nations General Assembly (UNGA) should be approached to seek an advisory opinion from the International Court of Justice (ICJ) on the question of immunity of heads of state and other senior officials, in relation to Articles 27 and 98 of the Rome Statute and states parties’ obligations under international law.^[21] Beyond that, the AU called on African states to not cooperate in the arrest and surrender of al-Bashir to the ICC,^[22] since its requests for deferral of the proceedings against al-Bashir and for the UNSC to withdraw the referral have remained unheard.^[23] Starting from 2010, several African states have failed to comply with their obligations under the Statute.^[24] The reasons behind the non-cooperation rationale adopted by these states can be summarized as follows: (i) al-Bashir enjoys immunities and privileges under CIL; (ii) Article 27 of the Rome Statute, which waives immunity, is not applicable to Sudan as a non-State Party; (iii) the obligations towards the African Union require States to comply with its non-cooperation decision.^[25] In response to these arguments, the following considerations (respectful of both CIL and the Rome Statute) should be taken into account: (i) the Security Council Resolution has waived the immunity from criminal jurisdiction of the head of state and (ii) has created the obligation to fully cooperate upon Sudan. As a result, the latter, being a member of the United Nations, is called to comply with Article 27 of the Rome Statute. Furthermore, (iii) the obligations of the African states towards the AU cannot tamper with the obligations established by the Resolution, which, pursuant to Article 103 of the UN Charter, have primacy over any other obligations.

[19] *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Judgment in the Jordan Referral re Al Bashir Appeal) ICC-02/05-01/09 OA2 (6 May 2019), paras 135-145.

[20] *ibid* para 1.

[21] African Union (Assembly) 'Decision on the International Criminal Court Doc. EX.CL/1068(XXXII)' (AU Addis Ababa 2018) Assembly/AU/Dec.672(XXX) note 14, paras 2(iii), 4, 5(ii).

[22] African Union (Assembly) 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court – Doc. Assembly/AU/13(XIII)' (AU Sirte 2009) Assembly/AU/Dec.245(XIII) Rev. 1 note 6, para 10.

[23] African Union (Assembly) 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court – Doc. EX.CL/670(XIX)' (AU 2011) Assembly/AU/Dec.366(XVII) note 6, paras 3, 6; African Union (Assembly) 'Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) Doc. Assembly/AU/18(XXIV)' (AU Addis Ababa 2015) Assembly/AU/Dec.547(XXIV) para 3; African Union (Assembly) 'Decision on the International Criminal Court, Doc. EX.CL/952(XXVIII)' (AU Addis Ababa 2016) Assembly/AU/Dec.590(XXVI) para 2(iii); African Union (Assembly) 'Decision on the International Criminal Court – Doc. EX.CL/1006(XXX)' (AU Addis Abeba 2017) Assembly/AU/Dec.622(XXVIII) note 7, para 2(ii).

[24] Al-Bashir was not arrested while present in the territories of the following States: Kenya (2010), Malawi (2011), Chad (2011 and 2013), Nigeria (2013), the Democratic Republic of Congo (2014), South Africa (2015), Uganda (2016), and Djibouti (2016).

[25] Lilian Chenwi, Franziska Sucker, 'Lessons from the Al-Bashir Debacle: Four Issues for ICJ Clarification' (2018) 51 VRÜ 240, 240-252.

This being said, in 2020 and 2021, Sudan announced its intention to hand over al-Bashir to the ICC to face trial.[26] However, no timeframe was provided by the state in this respect. It is worth mentioning that, during the summer of 2021, Sudan's cabinet voted to ratify the Rome Statute.[27] Such a development can be crucial for the al-Bashir case and may relax tensions between the ICC and the African states.

[26] Al Jazeera, 'Sudan says will "hand over" al-Bashir to ICC for war crimes trial' (12 August 2021) <<https://www.aljazeera.com/news/2021/8/12/sudan-omar-al-bashir-icc-war-crimes-darfur>> accessed 3 August 2022; BBC, 'Omar al-Bashir: Sudan agrees ex-president must face ICC' (11 February 2020) <<https://www.bbc.com/news/world-africa-51462613>> accessed 3 August 2022.
[27] *ibid.*



EDITORIAL

PROJECT MANAGER

Esther Oppong

PROJECT ASSISTANT MANAGER

Ingrid-loana Murariu

LEGAL RESEARCHERS

Elisa Prijot

Aitana Giltay

Witness Gerald Airo

Alba Montes Reguero

PROJECT ASSISTANTS

Amit Kumar

Maela Anna Ruiz Le Moing

DESIGN

Jessica Patterson De Oliveira

Pereira

CONTRIBUTIONS

Prof. Dire Tladi

Debora Kayembe

Angela Mudukuti

Dr. Adejoké Babington-Ashaye

Dr. Oriola O. Oyewole

Anna Olivia Kho

Axel Helgi Ívarsson

Mariana Baptista

Mayowa Olowoselu

Joanna Frivet

Laura Pes

