

Africa, the African Union and the International Criminal Court: Irreparable Fissures?

By **Marshet Tadesse Tessema and Marlen Vesper-Gräske**
FICHL Policy Brief Series No. 56 (2016)

1. Introduction

The establishment and coming into force of the International Criminal Court ('ICC') were well-received in Africa with a high level of expectations to fill the impunity gap. African countries not only played a key role in the negotiation process and framing of the Rome Statute, but also quickly championed the establishment of the Court by ratifying the Statute, with Senegal becoming the first State Party. From 54 Member States of the African Union ('AU'), no less than 34 are currently States Parties to the Rome Statute. Africa is indeed the largest regional group in the Rome Statute system. Besides, so far only African countries triggered the Court's jurisdiction through self-referrals and surrendered several suspects to the Court. Moreover, the first Review Conference of the Rome Statute was hosted by an African country, Uganda, in 2010. Against this background, it has to be noted that the Court had managed to garner huge support from African states.

Poignantly, the tremendous initial support and co-operation of African states with the Court started waning following the Court's issuance of an arrest warrant for the Sudanese President Omar H.A. Al Bashir. This development reached its low-point when the Court issued summons for the current President of Kenya, Uhuru Muigai Kenyatta, and his Deputy, William Samoei Ruto, whose cases collapsed in the meantime.¹ African states reacted in a very critical way, even in a hostile manner through the highest continental decision-making organisation, the AU. During the summit held in Addis Abeba in May 2013, the chairperson of the AU, Prime Minister of Ethiopia, Hailmariam Desalegn, stated that "the process the ICC is conducting in

Africa has a flaw. The intention was to avoid any kind of impunity, ill governance and crime, but now the process has degenerated into some kind of race hunting".²

The Assembly of the AU held an extraordinary summit on 12 October 2013 to discuss the future of Africa's relationship with the ICC. Following the summit the Assembly passed a decision in which it requested that "no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office".³ In addition, the Assembly demanded the suspension of the *Kenyatta* and *Ruto* cases until they complete their tenure and instructed Kenyatta not to appear before the Court until the UN Security Council ('UNSC') responded to the deferral request.

It was against this background that the South African-German Centre for Transnational Criminal Justice⁴ held an international conference on the theme "Africa and the International Criminal Court" in Cape Town, South Africa, on 22 and 23 November 2013.⁵ Among the prime questions that were reflected on during the conference were: What fomented the anger against the Court and drastically made it the subject of harsh attacks from African leaders and the AU? Are the accusations by the AU substantiated claims? Is the ICC inappropriately targeting Africans and ignoring

² See <http://www.reuters.com/article/2013/05/27/us-africa-icc-idUSBRE94Q0F620130527>. The URLs referred to in this brief were last accessed on 23 March 2016.

³ AU, Decision on the African's relationship with the ICC, Ext/Assembly/AU/Dec. (Oct. 2013) (<http://www.legal-tools.org/doc/edad86/>); see also Annex 2 in Werle *et al.* (eds.), *Africa and the International Criminal Court*, 2014, p. 274, No. 26.

⁴ The Centre is a joint programme of Humboldt-Universität zu Berlin and the University of the Western Cape. For more information, visit <http://www.transcrim.org/>.

⁵ For details on the conference, see Vesper-Gräske, "Conference Report: 'Africa and the International Criminal Court' by the South African-German Centre for Transnational Criminal Justice", in *ZIS* 3/2014, pp. 145 ff., available at http://www.zis-online.com/dat/artikel/2014_3_807.pdf.

¹ The Prosecutor dropped the charges on 5 December 2014 (<http://www.legal-tools.org/doc/b57a97/>), and in March 2015, the Kenyatta case was terminated by the ICC. On 5 April 2016, ICC Trial Chamber V(A) vacated the charges against Ruto and Joshua Arap Sang, see *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016 (<http://www.legal-tools.org/doc/41dc5f/>).

atrocious crimes elsewhere? Are there ways to rectify the strained relationship between the Court and the AU?

The conference resulted in the publication of a book titled *Africa and the International Criminal Court*, edited by Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (Asser Press, 2014), which comprises all contributions made to the conference.⁶ This policy brief outlines the content of the book and highlights some of the issues in the relationship between Africa and the Court.

2. Outline of the book *Africa and the International Criminal Court*

The book is divided into three parts. Part I focuses on the prosecutions by the ICC in Africa. Part II deals with alternative ways of prosecuting international crimes in Africa not executed by the ICC. Part III depicts the difficult relationship between the AU and the Court.

Following the introductory chapter, Judge Sanji Mmasenono Monageng (First Vice-President of the ICC) depicts the ICC as a non-political body that is in charge of interpreting and applying the Rome Statute (Chapter 2). According to her, its duty is to work within its given legal framework. Any deficiencies of this legal framework should be rectified by the Assembly of States Parties. Monageng underscores that the current proceedings before the Court are conducted entirely in accordance with the Rome Statute, which includes any proceedings against sitting heads of state. The criticism by some African states astonished her, bearing in mind that the ICC is doing exactly what it was created for by its Member States, including African countries. In Chapter 3 Ekaterina Trendafilova (ICC Judge) deals with select issues in the African context, that is, the admissibility of cases before the Court, the immunity of heads of state, and the co-operation of states with the Court. With regard to these issues the *Al Bashir* case plays an important role. Trendafilova supports the view that by way of the UNSC's referral in 2005,⁷ *Al Bashir* lost his immunity. She argues that the referral not only triggered the jurisdiction of the Court, but also the entire peace and security framework of the Rome Statute, including the loss of immunity as laid down in Article 27(2) Rome Statute. René Blattmann (former Vice-President and Judge at the ICC) deals with procedural problems in the *Lubanga* case, the first trial judgment of the Court in which he himself was sitting as a judge (Chapter 4). He highlights the challenges in connection with the disclosure of potentially exculpatory evidence and sheds light on the decisions of the Chamber to order the stay of proceedings twice during this trial. In Chapter 5 Shamila Batohi (Senior Legal Adviser to the ICC Prosecutor) illustrates a Prosecutor's view on the activities of the Court in

Africa. She justifies the focus on Africa by referring to the fact that the jurisdiction of the Court covers the most serious crimes and argues that the magnitude of human rights violations committed as well as the quantity of victims in Africa leave the Prosecutor with little choice but to investigate.

Part II of the book starts with a chapter by Gerhard Kemp (Professor of Law at Stellenbosch University, South Africa) which analyses the domestic implementation of the Rome Statute by African states (Chapter 6). He presents different ways of implementation and refers to legislative initiatives taken by African states. As a progressive example, he points to the South African ICC Act of 2002, by which South Africa became the first African country incorporating the Rome Statute into its national law. The following Chapter 7 by Sam Rugege (Chief Justice of the Rwandan Supreme Court) and Aimé Muyobohe Karimunda (Senior Lecturer, University of Rwanda) is dedicated to the Rwandan approach for dealing with the legacy of the 1994 genocide. The authors state that, in general, domestic and international jurisdiction must not be regarded alternatively, but in a complementary way. According to them, the work of the International Criminal Tribunal for Rwanda played an important role in the post-conflict state of the country. However, at the same time the traditional *Gacaca* courts were indispensable for coping with the immense caseload (1,958,643 cases). As a consequence, the authors advocate a multi-institutional approach for dealing with post-conflict situations. Mbacké Fall (Chief Prosecutor at the Extraordinary African Chambers in the Courts of Senegal) illustrates the case of Hissène Habré, who is tried by the Extraordinary African Chambers (Chapter 8). The Chambers were created by an agreement between the AU and Senegal in 2012. Thus, Fall contends that this involvement in the prosecution of Habré turns it into a case conducted in the name of Africa. The chapter by Temitayo Lucia Akinmuwagun (Federal Ministry of Justice, Abuja, Nigeria) and Moritz Vormbaum (Senior Researcher at the Law Faculty of Humboldt-Universität zu Berlin) deals with the "Jos crisis" in central Nigeria (Chapter 9). This conflict continues since many years and has resulted in thousands of deaths. The authors analyse this conflict from the perspective of international criminal law and eventually claim that the Nigerian government's prosecutions as well as the international investigations have been insufficient so far. In Chapter 10, Florian Jeßberger (Law Professor at the University of Hamburg) focuses on the role of the principle of universal jurisdiction in the prosecution of international crimes in Africa. Jeßberger argues that the AU and many African states, indeed, support the idea of universal jurisdiction in general. However, it seems to remain "the law in the books" and is scarcely applied in practice. As an exception Jeßberger refers to the case of Hissène Habré in Senegal.

Part III of the book starts with Chapter 11 by Tim Murithi

⁶ For more information, see http://www.asser.nl/publications.aspx?site_id=28&level1=14485&id=12801.

⁷ UNSC resolution 1593, 31 March 2005 (<http://www.legal-tools.org/doc/4b208f>).

(Institute for Justice and Reconciliation, Cape Town). The author analyses the development of deterioration between the AU, African countries and the ICC from the viewpoint of a political scientist. According to Murithi, it is of major importance that the Court accepts that its work indeed has a political impact. In Chapter 12 Juliet Okoth (Law Lecturer at the University of Nairobi, Kenya) deals with the question of deferrals of situations before the Court by the UNSC on the basis of Article 16 Rome Statute. Okoth welcomes the recent decision not to follow the AU's application for a deferral of the Kenyan situation. According to her, this will raise the threshold for applying Article 16 Rome Statute in future. Sosteness Materu (Law Lecturer at the University of Dar es Salaam, Tanzania) scrutinises the relationship between the AU and the ICC in light of the Kenyan situation (Chapter 13). Materu contrasts the views of leading African politicians with the opinions of the African people. He doubts that the AU is voicing the concerns and demands of Africa as a whole.

3. Reflections on Africa and the ICC

One of the issues dealt with in the book is the alleged bias of the ICC against Africa. It is, in fact, true that the 32 defendants from the 21 cases all originated from Africa. However, the Court is not the one to blame. The accusation of selectivity can be distilled by showing how the situations ended up before the Court.⁸ Out of the nine situations before the Court, only in the Kenyan situation did the Office of the Prosecutor start the investigation by its own initiation. But even in this situation, the Kenyan government paved the way for the intervention of the Court by failing to investigate and prosecute the alleged crimes – quite literally the government of Kenya invited the Court's intervention. All other situations appeared before the Court not by *proprio motu* initiatives, but rather by mechanisms outside of the Court's formal control. The solid majority of the situations were referred by States Parties (Uganda, Central African Republic situation I and II, Democratic Republic of Congo, and Mali). Two other situations (Darfur/Sudan and Libya) were triggered by the UNSC, and one situation was brought before the Court by a declaration under Article 12(3) of the Rome Statute (Ivory Coast). Hence, the Court cannot be blamed for "targeting" Africans. Accusing the Court of being discriminatory in its selection of situations seems to be a misplaced claim.⁹ On the other hand, were evidence to emerge that leading members of the ICC Office of the Prosecutor, perhaps the first ICC Prosecutor himself, had actively solicited self-referrals

from States Parties or a UNSC referral, then it would be appropriate to reconsider this question, in light of the new facts then available.¹⁰

It is undeniable that there are other situations elsewhere in the world – apart from the African continent and Georgia – which deserve investigations and prosecutions, but which the ICC cannot deal with because it lacks jurisdiction. Debunking the Court for not investigating the crimes committed in Syria and in several other non-States Parties is perhaps a result of misunderstanding of the legal infrastructure of the Court. Unless a non-State Party itself or the UNSC refers the situation to the Court, it has no jurisdiction over crimes committed in non-States Parties. Therefore, blaming the Court for the referrals made by the Security Council or for matters that the Security Council failed to refer shows lack of understanding of legal realities.

Another basic concern is that victims' voices were ignored for years by African leaders. Whereas the AU even called an extraordinary meeting to discuss how to react to the ICC's issuance of summons against African leaders, sadly nothing was mentioned on how to respond to the victims' quest for justice. Instead, the AU limited itself to pass resolutions attacking the Court and instructed Member States not to co-operate with the Court. Thus, nothing palpable has been done at the national level to respond to the cry of victims. Several alleged perpetrators of these crimes still remain at large.

Furthermore, the perceptions of Africans towards the Court have been misleadingly portrayed as hostile by the AU and African political elites. It does not necessarily reflect the view of ordinary Africans and victims of heinous crimes, who are rather supportive of the Court. In fact, ordinary Africans need the ICC more than people do in other parts of the world as the Court, despite the political challenges, is striving to end impunity. Therefore, even if all the cases brought to the Court thus far stem from Africa, the beneficiaries of these investigations and prosecutions are also Africans. The justice so far produced by the Court is a justice for African victims and affected communities. The tireless work of hundreds of lawyers, investigators, analysts, translators and administrators at the Court is in effect an investment in the quality of African society now and in years to come. Needless to say, this does not mean that the Court in its 13 years of operation is free from flaws.

The addenda to the book include, besides a catalogue of AU Decisions on the activities of the ICC relating to African states, several recommendations by a number of young African lawyers, who participated in the conference, on how the currently strained relationship could be improved.

⁸ See Monageng, "Africa and the International Criminal Court: Then and Now", in Werle *et al.* (editors): *Africa and the International Criminal Court*, 2014, pp. 15-17; *ibid.*, Batohi, "Africa and the International Criminal Court: A Prosecutor's Perspective", pp. 52-53.

⁹ *Ibid.*, Annex 1, pp. 229-232.

¹⁰ See in general Phil Clark, "Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda", in Carsten Stahn and M. El Zeidy (editors): *The International Criminal Court and Complementarity*, Cambridge University Press, 2011, pp. 1180-1203.

They suggest that instead of trying to weaken the Court, it would be appropriate to rectify any defects in the Rome Statute by engaging in a constructive dialogue and by utilising the available legal channels. However, they also recognise that it is diluting the integrity and independence of the Court that a highly politicised organ such as the UNSC, with three powerful non-States Parties, is linked to the ICC. Hence, according to the authors of the recommendations, there is a genuine need to reflect on the UNSC system and its relationship with the Court.

4. Conclusion

As this policy brief has shown, the current relationship between some African states, the AU and the ICC has drastically worsened over the last years and months. However, as most of the practitioners point out in the book which is discussed above, there is reason to remain optimistic and to disapprove of unsubstantiated, politically-motivated claims, but at the same time to reflect sincerely on genuine critiques of the Rome justice system. The mid-term impact of the termination of the *Kenyatta* case remains to be seen. On the one hand, it could reduce the current tension between the Court and African states; on the other hand, it could arguably set a bad precedent for states' co-operation with the Court, even encouraging other African states to seek concessions from the Court by subjecting it to massive political-diplomatic pressure.

The 2015 incident of Al Bashir's clandestine departure from the 25th AU summit in South Africa unfortunately appears to confirm fears for the immediate future. Despite the ICC's arrest warrants¹¹ and an interim order issued by the Gauteng Division of the High Court (Pretoria) upon urgent application by the Southern Africa Litigation Centre, Al Bashir left the country on 15 June 2015, before the High Court could pass a final decision. In the afternoon of the same day, the Court ruled that the South African government's failure to take necessary steps to arrest Al-Bashir was "inconsistent with the constitution of the Republic of South Africa, 1996, and invalid".¹² The Government ap-

pealed against the High Court's ruling. On 15 March 2016, the Supreme Court of Appeal finally dismissed the appeal, and stated that the government's failure to arrest Al Bashir "was inconsistent with South Africa's obligations in terms of the Rome Statute of the International Criminal Court and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful".¹³

Pretoria's regrettable failure to enforce the interim order of its own judiciary and the ICC's arrest warrants indicates that the AU's instruction of non-cooperation with the ICC is gaining force. Additionally, South African cabinet members hinted at the need to review South Africa's ICC membership.¹⁴ Only time will tell about the possible consequences of Pretoria's failure to comply with its national and international legal obligations.

Marshet Tadesse Tessema, LL.B. (Jimma), LL.M. (UWC), is a Doctoral Researcher at the South African-German Center for Transnational Criminal Justice. Dr. Marlen Vesper-Gräske, LL.M. (NYU) is a Postdoctoral Research Fellow at the Law Faculty of Humboldt-Universität zu Berlin and Law Clerk at the Higher Regional Court of Berlin.

ISBN: 978-82-8348-035-1.

LTD-PURL: <http://www.legal-tools.org/doc/17de1f/>.

¹¹ *Al Bashir* is wanted for several counts of core international crimes (war crimes, genocide, and crimes against humanity) by the ICC.

¹² *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & others*, 2015 (5) SA 1 (GP), p. 2. The Court also found it "prudent to invite the National Director of Public Prosecutions to consider whether criminal proceedings are appropriate", para. 39 (<http://www.legal-tools.org/doc/34b2e9/>).

¹³ *The Minister of Justice and Constitutional Development v. The Southern Africa Litigation Centre*, (867/15) [2016] ZASCA 17 (15 March 2016), para. 113 (<http://www.legal-tools.org/doc/d4b22b/>).

¹⁴ See *The Guardian*, 25 June 2015, available at <http://www.theguardian.com/world/2015/jun/25/south-africa-review-international-criminal-court-bashir>.

TOAEP

Torkel Opsahl
Academic EPublisher

Torkel Opsahl Academic EPublisher

E-mail: info@toaep.org

www.toaep.org

All rights reserved by the Torkel Opsahl Academic EPublisher (TOAEP).