

Regional v. Universal Jurisdiction in Africa: The Habré Case

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1. Africa and the International Criminal Court

Since their independence in the 1960s, African states and regional organizations have contributed to the development of international law at both universal and regional levels. In some instances, African regionalism has complemented the universal body of international law; in other words, it has adapted the latter to the African context. In a few cases, African regionalism has separated from the universal approach to international law, as illustrated by the recent trend in international criminal law.¹ Despite their contribution to the adoption of the Statute of the International Criminal Court ('ICC') and its early operation, African states have entered into conflict with the Court because of its focus on Africa and the trial of two African heads of state, namely President Omar H.A. Al Bashir of the Sudan and Uhuru Kenyatta of Kenya.

In addition, the African Union ('AU') has also developed a contentious case with the European Union ('EU') about the "abuse of universal jurisdiction" by Western courts towards Africans, in particular their leaders. Confronted with a request by Belgium to Senegal to extradite Mr. Hissène Habré, a former Chadian head of state, and at the request of the Senegalese government, an AU Summit held in Banjul (the Gambia) proclaimed the doctrine of AU jurisdiction over core international crimes perpetrated in Africa. The AU has since taken several steps to give effect to this doctrine.

This policy brief reviews these steps, including at normative, procedural and institutional levels. It also examines the subsequent case-law and doctrinal developments, and evaluates the implications of the implementation of this doctrine for the use of universal jurisdiction by non-African courts, as well as the impact of the emerging African 'regional jurisdiction' on the ICC's operation in Africa.

¹ See, for example, African Society of International Law, *L'Afrique et le droit international pénal*, Pedone, Paris, 2015.

2. Habré, Belgium, Senegal and the African Union

The United Nations ('UN') Committee Against Torture was seized in 2001 by seven victims of torture under Habré's reign (1982-1990), and rendered a decision requesting Senegal either to try Habré or extradite him to another state party to the UN Convention Against Torture.² Based on this decision, a Belgian judge, acting for one of the victims who had Belgian nationality, requested Senegal to extradite him to Belgium for prosecution. The Senegalese government, reluctant to extradite an African to a Western country, submitted the case to the AU for review.

By its Decision 127(VII) of July 2006, the AU Conference of Heads of State and Governments decided that the Habré case fell within its jurisdiction, in accordance with Articles 3(h), 4(h) and 4(o) of its Constitutive Act, which prohibit genocide, war crimes and crimes against humanity.³ While recognizing the lack of a regional judicial body to deal with this case, the Conference requested Senegal to take the necessary steps for Mr. Habré's trial, "in the name of Africa". This contributed to the development of a concept to which this author refers as the doctrine of the AU's 'regional jurisdiction' over core international crimes perpetrated in Africa.⁴

For practical and procedural reasons the Senegalese government again referred the case to the AU. The reasons included a judgement by the Community Court of Justice of the Economic Community of West African States ('ECOWAS Court') on 18 November 2010⁵ that, in

² UN, *Selected Decisions of the Committee Against Torture*, Geneva/New York, 2008, p. 107.

³ For the 11 July 2000 Constitutive Act of the African Union, see <http://www.legal-tools.org/doc/496299/>. The ICC Legal Tools Database contains an "African Union Collection" with the relevant AU documents on the ICC, international criminal law and transitional justice.

⁴ See, for more detail, Mutoy Mubiala, "Vers une justice pénale régionale en Afrique", in *International Review of Penal Law*, 2012, vol. 83, pp. 547-557.

⁵ ECOWAS Court of Justice, *Hissei Habré c. République du Sénégal*.

prosecuting Habré on the basis of a penal law adopted after the commission of the alleged torture, Senegal violated the right to a fair trial guaranteed by the African Charter on Human and Peoples' Rights and other relevant instruments to which it is party.⁶

In the meantime, Belgium seized the International Court of Justice of its dispute with Senegal. On 20 July 2012, the Court issued its judgement ordering Senegal to take the necessary measures to try Habré or extradite him to Belgium for trial. On 22 August 2012, following the ICJ judgement,⁷ the AU and the Government of Senegal signed an agreement establishing a hybrid court, the African Extraordinary Chambers ('AEC') in the Senegalese Judicial System, to try the suspected authors of international crimes committed in Chad during the period from 8 June 1982 to 1 December 1990, corresponding to Habré's rule. This Agreement was ratified by Senegal on 28 December 2012 which subsequently promulgated a law integrating it into national law. Based on these instruments, the AU Commission proceeded to appoint the magistrates of the AEC, including the president of its Trial Chamber, Judge Gherdao Gustave Kam, a national of Burkina Faso. The other magistrates, prosecutor and registrars were from the Senegalese judicial system.

On 30 May 2016, the AEC Trial Chamber sentenced Habré to life for the perpetration of international crimes including crimes against humanity, war crimes, forced disappearances and torture.⁸ The legality of the AEC trial was raised not only in its proceedings, but also before the ECOWAS Court of Justice and the Senegalese Constitutional and Administrative Courts which confirmed the legality of Habré's trial before the AEC.

3. Habré Before the African Extraordinary Chambers

Since the beginning of the proceedings,⁹ Habré and his lawyers objected to the legality of the trial, denying, in particular, any jurisdiction of the AEC over the former. To this end, they activated the ECOWAS Court of Justice, and the Constitutional and Administrative Courts of Senegal. In its decision on Habré's request dated 5 No-

vember 2013,¹⁰ the ECOWAS Court rejected it, ruling that it has neither jurisdiction to interpret international agreements signed by states, nor the power to suspend them. On 2 March 2015, the Constitutional Court also held that the Agreement establishing the AEC did not violate the Senegalese Constitution and considered the latter as an international or hybrid court founded on the basis of the Agreement.¹¹ On 12 March 2015, the Administrative Court, pursuant to the Constitutional Court's decision, dismissed Habré's claim of abuse of power by the Senegalese Government's decision, authorizing the AU Commission Chairperson to appoint Senegalese magistrates as ACE members.¹²

For its part, the AEC Trial Chamber based its jurisdiction on the Agreement between Senegal and the AU aimed at complying with international commitments relating to the prosecution of the authors of international crimes, and whose provisions were duly integrated in the Senegalese legal order. It is surprising that the AEC judges did not refer to the ICJ's judgement ordering Senegal to take the necessary steps to either try or extradite Habré to Belgium. They constantly referred to their Statute as the foundation of their *ratione materiae* jurisdiction on international crimes. *Ratione personae*, the AEC Chamber declared itself competent to try Habré, irrespective of his quality as a former head of state at the time when the crimes were perpetrated.¹³

The above decisions have given case-law legitimacy to the 'African regional jurisdiction' principle as proclaimed by the AU leadership and concretized, for the first time, by the Agreement establishing the AEC in the Senegalese judicial system. There have been other AU initiatives, including normative and institutional developments, in the implementation of this emerging principle.

4. The 2014 Malabo Protocol Extends Jurisdiction to International Crimes

The adoption of the 2014 Malabo Protocol¹⁴ extending the African Court on Justice and Human Rights' mandate to international criminal law as well as the AU Political Framework on transitional justice in Africa¹⁵ constitute two important benchmarks in the implementation of the

gal, Arrêt n° ECW/CCJ/JUD/06/10, 18 November 2010 (<http://www.legal-tools.org/doc/cb76bb/>).

⁶ In its decision, the ECOWAS Court suggested the establishment by the AU of an *ad hoc* court for the proposed trial.

⁷ International Court of Justice, *Belgium v. Senegal* (Questions Concerning the Obligation to Prosecute or Extradite), Judgment, 20 July 2012 (<http://www.legal-tools.org/doc/18972d/>).

⁸ African Extraordinary Chambers ('AEC'), *Ministère public c. Hisssein Habré* ("Habré Case"), Judgment, 30 May 2016, p. 536 (<http://www.legal-tools.org/doc/98c00a/>).

⁹ On the work of the AEC, see Mbacké Fall, "The Extraordinary African Chambers: The Case of Hissène Habré", in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, Asser Press, 2014, pp. 117-131.

¹⁰ ECOWAS Court of Justice, *Hisssein Habré c. République du Sénégal*, Arrêt n° ECW/CCJ/RUL/05/13, 5 November 2013, p. 16 (<http://www.legal-tools.org/doc/f970ec/>).

¹¹ Conseil constitutionnel (Sénégal), *Affaire n° 1-C-2015*, Decision, 2 March 2015 (<http://www.legal-tools.org/doc/0e1a59/>).

¹² Cour suprême (Sénégal), *Chambre administrative, Hisssein Habré c. Etat du Sénégal*, Arrêt n° 21, 12 March 2015, pp. 4-5, cited by *Habré Case*, p. 9, see *supra* note 8.

¹³ *Habré Case*, p. 11, see *supra* note 8.

¹⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

¹⁵ AU, "African Union Transitional Justice Framework (ATJF)", Addis Ababa, 2016, pp. 19-20 (draft available at <http://www.legal-tools.org/doc/bcdc97/>).

'African regional jurisdiction' principle. To address the conflict or misunderstanding resulting from the alleged "abuse of universal jurisdiction" over Africans and their leaders by European courts, the AU and EU established an expert working group which recommended to the AU to implement its Summit's Decision 213 (XII) of 4 February 2009. This Decision requested the AU Commission to examine ways to extend the mandate of the African Court of Justice and Human Rights ('ACJHR') to review international criminal law cases, in close consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.¹⁶ On 27 June 2014 (in Malabo, Equatorial Guinea), the AU Conference of Heads of State and Government adopted the Protocol amending the 2008 Sharm-el-Sheik Protocol establishing the African Court of Justice and Human Rights, extending its mandate to international criminal law.¹⁷

The 2014 Malabo Protocol integrates in its Articles 28A-28M several crimes included in the ICC Statute (genocide, crimes against humanity and war crimes) into the regional legal framework. In addition to the regionalization of these international crimes, the Protocol has also codified and developed a set of regional crimes. These include the crimes of unconstitutional change of government, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.

Regarding institutional arrangements, the 2014 Malabo Protocol provides for the creation of an International Criminal Law Section ('ICLS'), in addition to the General Affairs Section (a kind of regional International Court of Justice), and the Human and Peoples' Rights Section (which will replace the actual African Court on Human and Peoples' Rights). The organization and procedure of the proposed ICLS is largely inspired by the ICC, including a pre-trial chamber, a trial chamber and an appeals chamber (Article 19*bis*). It includes an Office of the Prosecutor (Article 22A), an assistant Registrar leading the staff working for the ICLS, under the leadership of the Court's Registrar (Article 22B) and a defense office.

According to Article 46A*bis* of the 2014 Malabo Protocol, "no charges shall be commenced or continued before the Court against serving AU Head of State and Government, or anybody acting or entitled to act in such capacity, or other senior officials based on their functions, during their tenure of office". This provision includes a clause of immunity of the heads of state and government,

against the prevailing norm on this matter at the universal level. It is a response to the failed efforts by African states to see the ICC apply such immunity to the heads of state under prosecution.¹⁸ However, this provision contradicts Article 27 of the ICC Statute. The granting of amnesty to sitting heads of state or to their representatives would constitute an important set-back in the fight against impunity in Africa.

5. The AU Political Framework on Transitional Justice

The AU Political Framework on transitional justice in Africa proceeds from the AU's efforts to address the consequences of its conflict with the ICC, triggered by the ICC Prosecutor's very early request for an arrest warrant against President Bashir. It is in the context of this conflict that the AU established a High Level Panel of Eminent Personalities (led by the former South African President Thabo Mbeki) to assess the situation in Darfur and to make recommendations on ways to effectively and globally address the issue of accountability, on the one hand, and to ensure peace, dialogue and reconciliation, on the other. Inaugurated in February 2009, the Panel submitted its report¹⁹ to the AU Commission on 8 October 2009 which subsequently transmitted it to the AU Peace and Security Council for review and approval. The latter adopted the report at its 207th meeting, on 6 November 2009 in Abuja (Nigeria).²⁰

Beyond Darfur, the recommendations of the Panel were made for the entire African continent. After its endorsement by the AU Peace and Security Council, the draft Political Framework on Transitional Justice in Africa²¹ has been reviewed at several regional consultations and meetings. As it stands, the Framework includes the principles governing transitional justice in Africa and the strategy and action plan for their implementation. Among the principles – of particular interest here – is the rule relating to complementarity between national, sub-regional/regional courts and the ICC. The Framework provides that "the principle of complementarity envisages a system in

¹⁸ See, *inter alia*, Chacha Bhoke Murungu, *Immunity of State Officials and Prosecution of International Crimes in Africa*, doctoral thesis on file with the author, University of Pretoria, May 2011; Martyna Falkowska and Agata Verdebout, "L'opposition de l'Union africaine aux poursuites contre Omar Al Bashir. Analyse des arguments juridiques avancés pour entraver le travail de la Cour pénale internationale et leur expression sur le terrain de la coopération", in *Belgian Review of International Law*, 2012, vol. 45, pp. 201-235.

¹⁹ AU, "Report of the African Union High-Level Panel on Darfur (AUPD)", PSC/AHG/2(CC VII), 27 October 2009 (<http://www.legal-tools.org/doc/69e121/>).

²⁰ AU, "Communiqué of the 539th meeting of the PSC on the activities of the AU High-level Implementation Panel (AUHIP) for Sudan and South Sudan", Abuja, 29 October 2009 (<http://www.legal-tools.org/doc/c385ba/>).

²¹ See AU, "African Union Transitional Justice Framework (ATJF)", see *supra* note 15.

¹⁶ See Mutoy Mubiala, "Africa and International Criminal Justice", in *African Yearbook of International Law*, 2014, vol. 20, no. 1, pp. 37-54.

¹⁷ AU, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7 (I), Rev. 1, 15 May 2014 (<http://www.legal-tools.org/doc/32c33d/>).

which continental, regional and national jurisdictions take the lead in the investigation and prosecution of international crimes".²²

This provision introduces additional complementarity between the international and national levels as compared with Article 17 of the ICC Statute. This 'double complementarity' will be of concern to African states that are parties to both the ICC Statute and the Malabo Protocol. A likely practice of forum shopping could jeopardize the ICC's operations in Africa.

6. Doctrinal Debate

The relationship between Africa and the ICC and the efforts of the AU to develop a regional criminal law and justice system have been debated for some years. As far as the application of universal jurisdiction is concerned, some scholars have predicted its regionalization in Africa.²³ Contrary to this position, this author holds the view that, rather than regionalization of universal jurisdiction, an African 'regional jurisdiction' is emerging. This trend is illustrated by the progressive implementation of the AU doctrine on its jurisdiction over international crimes committed in Africa, including through the jurisprudence of the AEC in the Habré case, the adoption of the Malabo Protocol establishing a regional criminal court (the ICL Section of the ACJHR), as well as the AU Political Framework on Transitional Justice in Africa. In some of their provisions, these instruments contradict the universal jurisdiction principle and important principles governing international criminal justice, namely the principle of complementarity and the non-immunity clause in the ICC Statute.

Concluding their contribution in *FICHL Policy Brief Series* No. 56, the authors rightly anticipated the risk of recourse to the pretext of contradictory commitments by African states, in this case South Africa, to withdraw from the Statute of the ICC.²⁴ This became a reality in October 2016. Less than two weeks after Burundi, South Africa de-

²² *Ibid.*, p. 19.

²³ Marshet Tadesse Tessema and Marlin Vesper-Gräse, "Africa, the African Union and the International Criminal Court: Irreparable Fissures?", *FICHL Policy Brief Series* No. 56, Torkel Opsahl Academic EPublisher, Brussels, 2016, p. 2 (<http://www.legal-tools.org/doc/17de1f/>); see, for more details, Florian Jeßberger, "'On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction?", in Werle, Fernandez and Vornbaum (eds.), 2014, pp. 155-175, see *supra* note 9.

²⁴ Tessema and Vesper-Gräse, *ibid.*, p. 4.

cided to put an end to its ICC membership. This represents a serious challenge to the leadership of the ICC. Regretting this withdrawal, the UN Secretary-General stated that the ICC is "central to global efforts to end impunity and prevent conflict" and that he is "confident that Member States will continue to further strengthen the Court, thus helping deter future atrocities across the globe. He also hopes that States that may have concerns regarding the functioning of the Court seek to resolve these matters in the Assembly of States Parties to the Rome Statute".²⁵

7. Conclusion

The AEC judgment in the Habré case was universally welcomed and lauded as a milestone in the fight against impunity in Africa. It also marked a landmark in the new AU leadership in the development of a regional criminal justice system. In some instances, as illustrated by the Habré case, the regional system could play a positive complementary role. In others, however, the emerging African criminal justice system comes with risks for the existing international justice architecture. The introduction of double complementarity between African states parties and the ICC, and the immunity clause for sitting heads of state and high-level officials and representatives are of particular concern. The immunity clause seems legitimated by the AEC in its Habré judgment. It constitutes a green light for the prosecution of former heads of state as opposed to the application of immunity to sitting heads of state and officials. In this regard, the emerging African regional jurisdiction is likely to reinforce the opposition of African states to the ICC and to contribute to the expansion of the culture of impunity in Africa.

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²⁵ Statement attributable to the Spokesman for the Secretary-General on South Africa's withdrawal from the International Criminal Court, 25 October 2016 (<http://www.legal-tools.org/doc/t795cf/>).