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ARTICLE

The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?

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Abstract
Since 2009, there has been a serious antiparathesis between the African Union (AU) and the International Criminal Court (ICC), which, according to the AU, has principally concerned unjustified ICC prosecutions against African dignitaries. This has led certain African ICC parties to announce their withdrawal from it, while the AU adopted the so-called 'ICC Withdrawal Strategy' in January 2017. This article analyses the background to and the content of the antiparathesis, it examines the consequences of the African parties' withdrawal from the ICC as regards the large-scale impunity in Africa, and it proposes the creation of ICC regional circuit chambers as a possible solution to realign relations between the AU and the ICC. Specifically, the proposal suggests the creation of several ICC regional circuit chambers, each being responsible for the alleged crimes committed in the territory of ICC parties belonging to a specific continent. Pertinent solutions to the institutional and practical issues arising from this proposal are offered.

Keywords African Union · International Criminal Court · Withdrawal · International criminal justice · International tribunals · Impunity

1 Introduction

The present article examines aspects of the friction which has developed between the African Union (AU) and the International Criminal Court (ICC) during the last 10 years and suggests an institutional solution to alleviate the impasse.[1] In January 2017, the standoff intensified when the AU Assembly, on the one hand,

[1] Already in 2009 the AU Assembly expressed its deep concern at the ICC Prosecutor's indictment against the Sudanese President al Bashir and asked the AU Commission to convene a meeting of the African ICC contracting parties to exchange views on the ICC's work in relation to Africa, in 'light of the processes initiated against African personalities', AU Assembly, 'Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan', Assembly/AU/Dec. 221(XII), 3 February 2009, paras. 1 and 5.

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adopted the so-called 'ICC Withdrawal Strategy', a political instrument that is controversial even for African states, and, on the other hand, hailed the then purported withdrawal of three member states from the ICC Rome Statute[2] as a victory for its narrative depicting the ICC as a racist, imperial white man's court 'hunting' African dignitaries.[3] Presumably to avoid being accused of perpetuating impunity for the myriad of violations of humanitarian and human rights law in Africa and to show that the ICC's work in Africa was redundant, as is later explained, the AU has introduced an International Criminal Law (ICL) Section at the African Court of Justice and Human Rights (ACJHR). But, until today, African states have not turned rhetoric into action, as none of them has ratified the instrument establishing the ICL Section.[4] But importantly they have also stayed away from the instrument merging the African Court on Human and Peoples' Rights with the African Court of Justice to create the ACJHR.[5] The situation has been described in the following terms:

> There appears to be a lack of commitment among the Member States to establish the African Court of Justice and Human Rights, which in turn suggests their reluctance to accept the Court's jurisdiction.[6]

Even though the drive towards a collective withdrawal from the ICC has thus far been rather short-lived, the gist of the AU–ICC antiparathesis persists. Indeed, it is a matter that dominates the meetings of the AU Assembly, while two subsidiary organs have been created specifically tasked to deal with the ICC.[7] Therefore, finding a viable solution continues to be a matter of urgency. The present article proposes such a solution: to radically transform the unitary ICC by forming what will be referred to as 'regional circuit ICC chambers', with one of them operating exclusively for and in Africa.

[2] Concluded 17 July 1998, entered into force 1 July 2002, 2187 UNTS 3. Art. 127(1) thereof provides for a right of denunciation subject to 1 year's notice. Currently, 33 African states are contracting parties.

[3] AU Assembly, 'Decision on the International Criminal Court (ICC)', Assembly/AU/Dec. 622 (XXVIII), 31 January 2017, paras. 8 and 6, respectively. Generally, see Mutua (2017). The President of Kenya has referred to the ICC as a 'tool for manipulation and neo-colonialism of African States', see Latiff (2013).

[4] See n. 51 below and the corresponding text.

[5] See n. 41 below. Generally, see Naldi (2010).

[6] See 'AU Reforms Report: Building A More Relevant African Union', 15 January 2017, p. 17. The Report was the result of a review of the AU led by the Rwandan President P. Kagame, as mandated by the Assembly in July 2016. Further, see 'The Imperative to Strengthen Our Union', Report on the Proposed Recommendations for the Institutional Reform of the African Union by H.E. Paul Kagame, 29 January 2017, at p. 8 noting that the non-ratification of the Protocol establishing the ACJHR indicates a lack of commitment towards it.

[7] Namely, the Commission on the Implementation of the Decisions of the Assembly on the International Criminal Court ('ICC') and the Open-ended Committee of Ministers of Foreign Affairs on the International Criminal Court.

2 The Friction Between the AU and the ICC: An Overview

The wide-ranging AU-ICC antiparathesis between the AU and the ICC, including the decision of certain African states to withdraw from it, has been recorded in many academic article, book, collected volume,[8] and even news magazine.[9] Indeed, given that African legal affairs have traditionally attracted little attention outside the continent, it is noteworthy how this incident has generated so much interest. The AU is complaining that the ICC targets only Africa and its dignitaries and that this is unfair because crimes falling within its ambit have been committed elsewhere in the world as well but (allegedly) it has done precious little to address them.[10] Presently, ten out of the eleven situations under ICC investigation involve African states.[11] The AU has also taken the view that peace and stability as well as negotiated political solutions within the continent might be undermined as a result of ICC prosecutions and the ensuing arrest warrants.[12] To counterargue the AU submissions since, by far, most situations involving the use of force, war crimes, crimes against humanity, etc. occur in Africa, it is only logical that the bulk of the ICC's work concentrates on Africa. Moreover, it should not be overlooked that certain African states have themselves referred situations to the ICC Prosecutor for investigation.[13]

Arguably, the AU has never come to terms with the fact that the ICC has moved against African states which are non-contracting parties to the Rome Statute, namely Sudan in 2005 and Libya in 2011. Following the demise of Colonel Gaddafi's regime, the AU's complaints have concentrated on the ICC proceedings against the Sudanese President Omar Al Bashir and the belief that as a serving head of state he was entitled to full and unconditional immunity from arrest and surrender.[14] However, given that in April 2019 Al Bashir was removed from office by the military, was arrested, and the intention of the regime in power (the so-called 'Transition Military Council') is reportedly to put him on trial for the crimes that he is accused of,[15] the question which arises is what justification will the AU now invoke to continue preventing his surrender to the ICC. As regards the AU's protests pertaining to the ICC proceedings against Libya but effectively against Colonel Gaddafi himself, they beg the question if the AU would have complained had his regime not ruled Libya at the time. It is submitted that the criticism levelled against the ICC was on account

[8] To avoid repetition, see the bibliographic references below.

[9] See e.g. Miyandazi et al. (2016).

[10] See Falkowska and Verdebout (2012).

[11] For details, see https://www.icc-cpi.int/Pages/Situations.aspx.

[12] See Omorogbe (2017), pp. 46–47.

[13] Generally, see Magliveras (2017), pp. 295–296.

[14] Assembly/AU/Dec. 622(XXVIII), n. 3 above, para. 2.

[15] See 'Sudan will prosecute Bashir but won't hand him over, military says', *CNN*, 13 April 2019, at https://edition.cnn.com/2019/04/12/africa/sudan-army-bashir-intl/index.html. Note that in June 2019 the participation of Sudan in all AU activities was suspended until the effective establishment of a Transitional Authority to be led solely by civilians, see AU Peace and Security Council, 854th Meeting, Communiqué, AU Doc. PSC/PR/COMM.(DCCCXLIV), 6 June 2019, para. 12.

of Gaddafi's grand stature in continental political and economic affairs.[16] As is later explained, the AU has said very little on the ICC prosecuting Saif al-Islam Gaddafi, the heir apparent to Libya's deposed regime. At the same time, the serious violations of humanitarian law and the grave human rights breaches, which were perpetrated either by Gaddafi supporters or by rebel forces in the course of 2011, and those committed in the civil war being waged in Libya,[17] have apparently never been discussed in earnest by the Assembly and the Executive Council, the two principal AU political organs. For example, the Ordinary Assembly Session of July 2017 considered only the 'persistent security situation in Libya, which continues to prolong the suffering of the Libyan people'.[18]

Moreover, the AU's contention that the Arrest Warrants against Al Bashir undermined international law and were an affront to the 'dignity, sovereignty and integrity of the continent' are rather misplaced.[19] Indeed, the principle that the ICC is unable to move solely on its own motion against states, non-contracting parties to the Rome Statute, still holds true and there is no indication that the ICC will deviate from it. Arguably, the ICC should have been more proactive even in situations where its jurisdiction was not clear (e.g. in Palestine)[20] and, in the situation in Afghanistan, it should have perhaps avoided declining the opening of investigations on the sole ground that the interests of justice would not be served.[21] But the AU can hardly deny that in the situations over which, in one way or another, the ICC has been seized, very serious crimes have been committed, that the alleged perpetrators must

[16] On Colonel Gaddafi's standing in Africa, see Huliaras and Magliveras (2011).

[17] See UN Human Rights Council, 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya', UN Doc. A/HRC/17/44, 9 June 2011; UN Human Rights Council, 'Report of the International Commission of Inquiry on Libya', UN Doc. A/HRC/19/68, 28 January 2014; UN General Assembly, 'Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya, Report of the Office of the United Nations High Commissioner for Human Rights', UN Doc. A/HRC/31/47, 15 February 2016; and UN Human Rights Council, 'Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, Report of the United Nations High Commissioner for Human Rights', UN Doc. A/HRC/37/46, 21 February 2018.

[18] AU Assembly, 'Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa', Assembly/AU/Dec. 695(XXXI), 2 July 2018, para. 18.

[19] AU Assembly, 'Decision on the Report of the Commission on the Meeting of African States Parties to the ICC Statute of the International Criminal Court (ICC)', Assembly/AU/Dec. 245(XIII), 3 July 2009, para. 12. Note that the League of Arab States (LAS) also rejected the Arrest Warrants against Al-Bashir, see Arab League Council, 'Doha Summit Statement Regarding Solidarity with the Republic of Sudan in rejecting the decision of the First Pre-Trial Chamber of the International Criminal Court against the Sudanese President Omar Hassan Ahmed Al-Bashir', Doha, 30–31 March 2009, at http://www.iccnow.org/documents/Arab_League_Summit_2009_-_SummaryFV.pdf. However, LAS never became as preoccupied with the ICC as the AU.

[20] Generally, see the contributions in Part I of Steinberg (2016).

[21] Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019. While P-T C III held that 'An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure', ibid., para. 90, arguably it did not answer the question of what would be the consequence when those, who have allegedly perpetrated the crimes under preliminary investigation, deliberately destroy or suppress facts, evidence and information.

be prosecuted and that (finally) justice must be served. Even though the AU is mandated to combat impunity,[22] and despite reiterating this commitment,[23] arguably it has exhibited a sense of denial.[24] Therefore, to an objective commentator, the ICC, despite its problems and flaws,[25] appears as an able transnational criminal justice mechanism.

3 The 'ICC Withdrawal Strategy': Much Ado About Nothing?

The tactics of the AU Assembly *vis-à-vis* the ICC have not always met with approval by the whole membership and, while it is not always openly admitted, there have been divergences in opinion.[26] Presently, 21 African states are non-contracting parties to the Rome Statute and, therefore, the antiparathesis with the ICC is not a matter (at least directly) that concerns the entire membership. The AU plan to develop a comprehensive strategy against the ICC, ultimately leading to the (untested in international law and international relations) collective withdrawal from the Rome Statute has led to opposition by several member states. This opposition has been manifested, *inter alia*, by entering reservations to the relevant Assembly decisions[27] and by advocating their continued support to the ICC in various fora, including the UN General Assembly (71st Annual Meeting)[28] and the ICC Assembly of States Parties (ASP) (Fifteenth Session, The Hague, 16–24 November 2016).[29]

The opposition was intensified during the January 2017 Ordinary Assembly Session when 16 member states[30] (a number not easily discarded) entered reservations to Decision 622(XXVIII), which approved the so-called ICC Withdrawal Strategy

[22] Cf. Art. 4(o) of the AU Constitutive Act, adopted 11 July 2000, entered into force 26 May 2001, 2158 UNTS 3, stipulating that the rejection of impunity is one of the Organisation's principles.

[23] E.g. Assembly/AU/Dec. 622(XXVIII), n. 3 above, para. 2.

[24] Generally, see Magliveras (2016a, b).

[25] E.g. the unfortunate handling of the situation in Kenya, an ICC party since March 2005, gave credence to the AU requests for the immediate termination of proceedings against the Kenyan President and Deputy President; see, *inter alia*, AU Assembly, 'Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court', Assembly/AU/Dec. 493(XXII), 31 January 2014; Assembly, 'Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC)', Assembly/AU/Dec. 547(XXIV), 31 January 2015; and Assembly, 'Decision on the International Criminal Court', Assembly/AU/Dec. 590(XXVI), 31 January 2016. The ICC Prosecutor withdrew the charges due to insufficient evidence, see Magliveras and Naldi (2017), pp. 131–133.

[26] That on this matter the Assembly resolutions paint a picture of overall agreement among the membership could very well be a fallacy, see Mills (2012).

[27] E.g. AU Assembly, 'Decision on the International Criminal Court', Assembly/AU/Dec. 616(XXVII), 18 July 2016, para. 5(iii)(b), to which four members attached reservations. See further, Keppler (2012).

[28] For an overview, see Lansky (2016).

[29] For the statements made by African contracting parties during the ASP General Debate on 16–17 November 2016, see https://asp.icc-cpi.int/EN_Menus/asp/sessions/general%20debate/pages/generaldebate_15th_session.aspx. See further, Keppler (2016).

[30] They are named in fn. 1 of Assembly/AU/Dec. 622(XXVIII), n. 3 above.

('Strategy') and asked member states to consider implementing it.[31] Nigeria was particularly vocal in its disagreement[32] castigating the Strategy's idea of collective withdrawal because the decision to secede is always an individual one.[33] It has been argued that the Strategy's acceptance could partly be explained by the ICC actions, which have placed African states parties in an 'awkward political position, undermining their diplomatic activities and peace mediation efforts and creating tensions among States'.[34] Presumably, the same argument could be made for the decisions of any international court, while no evidence has been adduced that any ICC actions have deliberately led to these problems.

However, this line of thinking does not address the question of whether the AU, as an intergovernmental organisation, was legitimised in adopting a policy which, intentionally or not, aims at undermining another international institution with a different remit. It should be accepted that international organisations lack a general and unrestricted competence allowing them to act in any field. On the contrary, their actions are confined by the aims and purposes laid down in the constitutive instrument. Given that AU Assembly decisions do not stipulate their legal basis, it is of some importance to investigate the Strategy's legal nature.

The most appropriate designation of the Withdrawal Strategy is to regard it as an 'African common position' within the meaning of Article 3 of the AU Constitutive Act laying down its objectives. In particular, paragraph (d) thereof stipulates that the Organisation shall '[p]romote and defend African common positions on issues of interest to the continent and its peoples'.[35] While it might be counter-argued that the Strategy cannot be treated as an 'issue of interest' across Africa, not least because it does not concern the entire membership, since the AU constitutes an independent legal order, presumably, it has the right to interpret and apply the Constitutive Act as it thinks fit and depending on the prevailing circumstances on each occasion. Moreover, as regards its resolutions on the ICC, the Assembly has held that '[t]here is an imperative need for all Member States to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the Constitutive Act'.[36] More recently, the Assembly has called on the entire membership 'to oppose

[31] See *Withdrawal Strategy Document*, Draft 2, Version 12.01.2017, at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. See also, 'AU collective withdrawal plan from ICC suffer setback', *The Guardian* (Nigeria), 27 January 2017, at http://guardian.ng/news/au-collective-withdrawal-plan-from-icc-suffer-setback/.

[32] See 'Africa: Nigeria Opposes Mass ICC Withdrawal', *allAfrica*, 27 January 2017, at http://allafrica.com/stories/201701270605.html; and 'Nigeria: Again, Nigeria Pledges to Remain in ICC', *allAfrica*, 2 February 2017, at http://allafrica.com/stories/201702020376.html.

[33] See Kuwonu (2017).

[34] See Köchler (2017), p. 9.

[35] E.g. AU Assembly, 'Decision on the Common African Position on the Post-2015 Development Agenda', Assembly/AU/Dec. 503(XXII), 31 January 2014; and AU Executive Council, 'The Common African Position on the Proposed Reform of the United Nations: the Elzulwini Consensus', Ext/EX.CL/2 (VII), 8 March 2005.

[36] AU Assembly, 'Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court', Assembly/AU/Dec. 493(XXII), 31 January 2014, para. 12(ii).

any decision of the [ICC] Appeals Chamber that is at variance with the AU Common position'.[37] The reference was still pending at the time of the judgment of the Appeals Chamber in the appeal proceedings brought by Jordan against the Pre-Trial Chamber II judgment holding that Jordan was obliged to arrest and surrender Al Bashir while being in its territory in March 2017.[38] The judgment was delivered in May 2019.[39]

Based on the above references, it could be argued that an African common position has probably been formulated *vis-à-vis* the ICC and the Withdrawal Strategy forms part of it. However, this is not without problems. Suffice it to note that if a dissenting member state wanted to challenge the Strategy's legality on the ground that it was *ultra vires*, it would not have been possible. And this because the African Court of Justice that is envisaged in Article 18 of the Constitutive Act has not been operationalised yet,[40] while the Protocol on the ACJHR Statute has not yet entered into force.[41]

At the time of the Strategy's adoption, there were three member states, namely Burundi, the Republic of South Africa, and The Gambia, which had either notified or announced their withdrawal from the Rome Statute.[42] Other African states parties had also expressed a general feeling towards leaving the ICC.[43] Despite the small number of African ICC contracting parties initiating the withdrawal process, for the AU it was probably enough to regard the Strategy as not a theoretical exercise but as a trend leading to an ever larger number of states permanently parting ways with the ICC. The Assembly did not hide its jubilation about this development and called these three states, with the fanfare which characterises its resolutions, 'pioneer implementers' of the Strategy.[44] If the AU wanted some good news in its fight against (real or imaginary) foes and if it wanted a policy that finally seemed to work, no doubt the Strategy appeared to be the perfect development at the right time. Presumably most African leaders believed that the Strategy justified all the resources

[37] AU Assembly, 'Decision on the International Criminal Court', Assembly/AU/Dec. 738(XXXII), 11 February 2019, para. 7.

[38] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-309, 11 December 2017.

[39] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, 6 May 2019.

[40] Established under the Protocol on the African Court of Justice, adopted 11 July 2003, entered into force 11 February 2009. It still attracts ratifications [Burkina Faso on 19 December 2016, Liberia on 23 February 2014 (it deposited the instrument of ratification on 7 March 2017)]. For an analysis, see Magliveras and Naldi (2006).

[41] Adopted 1 July 2008, (2009) 48 ILM 337. Currently, seven out of the 15 required ratifications have been secured, while 32 member states have signed it. For an analysis, see Naldi and Magliveras (2012), p. 387.

[42] See Ssenyonjo (2017).

[43] E.g. in protest against the ICC prosecuting the Kenyan President and Deputy President, n. 25 above, the National Assembly passed a motion of withdrawal, which was never acted upon, see Gatehouse (2013).

[44] Assembly/AU/Dec. 622 (XXVIII), n. 3 above, para. 6.

and all the energy devoted to the antiparathesis with the ICC.[45] But one cannot but wonder whether the AU is doing so at the expense of other continental priorities requiring its urgent attention.[46]

Subsequent events proved that the jubilation was rather premature. As regards The Gambia, whose former President Yahya Jammeh had announced in November 2016 the intention to withdraw,[47] it completely changed course when a new President, Adama Barrow, was elected in mid-January 2017. He immediately decided to terminate the withdrawal process.[48] In the case of the Republic of South Africa,[49] in February 2017 the High Court decreed that the ICC withdrawal notice[50] was unconstitutional and, therefore, invalid, because the government had failed to consult the National Assembly.[51] The government obeyed the ruling and revoked it on 7 March 2017,[52] while the Repeal Bill was withdrawn from the National Assembly a week later.[53] In April 2017, the government officially withdrew the withdrawal notice submitted to the UN Secretary-General.[54] Finally, Burundi, an ICC party since September 2004, insisted on its course of action[55] and officially withdrew on 27 October 2017, the first ever contracting party to have done so.

If the Burundi government's reason for withdrawing was to prevent the ICC from investigating and, subsequently, prosecuting those allegedly responsible for the myriad of atrocities perpetrated in the country, it failed. Article 127(2) of the Rome Statute stipulates that a party which has withdrawn shall not be discharged from the obligations, including cooperation with the ICC, and the fact that it has withdrawn shall not prejudice the continuation of proceedings on matters already under

[45] In October 2013, the Assembly was convened in extraordinary session to discuss principally an anti-ICC strategy. Calls for an impending mass ICC withdrawal failed to materialize, but it was decided, arguably without a proper legal basis, 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': AU Assembly, 'Decision on Africa's Relationship with the International Criminal Court (ICC)', Ext/Assembly/AU/Dec. 1, 12 October 2013, para. 10(i). See Chigara and Nwankwo (2015), pp. 245–246.

[46] Generally, see Sipalla (2017).

[47] C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification).

[48] See 'Gambia elections: President-elect Adama Barrow's life story', *BBC News*, 19 January 2017, at http://www.bbc.com/news/world-africa-38185428.

[49] On the reasons leading to the attempted withdrawal, see nn. 75–78 below and the corresponding text.

[50] The Instrument of Withdrawal was delivered to the UN Secretary-General on 19 October 2016, Note No. 568/2016, C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification).

[51] South African High Court at Pretoria—Gauteng Division, *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, Case no. 83145/2016, Order, 22 February 2017, [2017] ZAGPPHC 53. While the withdrawal was notified on 19 October 2016, ibid., the legislative instrument to repeal the Implementation of the Rome Statute of the International Criminal Court Act (Act 27 of 2002), namely the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B23-2016), was tabled before the National Assembly much later, on 3 November 2016.

[52] C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification).

[53] See 'Rome Statute repeal bill withdrawn from Parliament', *news24*, 14 March 2017, at http://www.news24.com/SouthAfrica/News/rome-statute-repeal-bill-withdrawn-from-parliament-20170314.

[54] Generally, see Woolaver (2011).

[55] C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification).

consideration. This is in line with the general principle of the law of international institutions that the fulfilment of obligations and duties assumed before withdrawal continues even after it has been effected. To put it otherwise, a withdrawal does not release states from already assumed obligations. It follows that Burundi must continue to offer its full assistance to the ICC as regards alleged crimes falling within the ICC's purview. In October 2017, the ICC Prosecutor was authorized to commence investigations into alleged crimes committed in Burundi or by nationals of Burundi outside Burundi between 26 April 2015 and 26 October 2017.[56]

4 Withdrawing from the ICC Does Not and Will Not Solve the Ethos of Impunity in Africa. The (Limited) Role that African Judicial and Quasi-Judicial Organs Can Play

Until today the policy of *en masse* withdrawal from the ICC has not had any tangible results, other than making headlines in the world press and bestowing a measure of pride for the AU. While in the foreseeable future no dramatic developments are expected, the fact remains that several African states (not necessarily ICC states parties) are overtly hostile towards it. In the long run, the ICC's ambition to achieve universality might be compromised. And this is something which the ICC ought to address if it is ever to become a truly global criminal justice mechanism in the area of humanitarian law violations. On the other hand, that African states are highly sceptical of multilateral judicial institutions is nothing new and their mistrust of the International Court of Justice in previous decades is no secret.[57] What, however, is rather puzzling and could legitimately question the resolve of African states to combat impunity is that, given the often weak domestic judiciaries and their apparent inability to handle complex cases, they have been suspicious towards continental judicial institutions as well.

The example of the African Court on Human and Peoples' Rights ('Human Rights Court') stands out. Twenty-one years after the adoption of the Protocol establishing it, 30 (out of the 55) member states have ratified it, while only seven contracting states have recognized its competence to hear complaints lodged by individuals and NGOs. Thus, an untenable situation exists: while at a domestic level African states appear to be unwilling or unable to address gross human rights violations, a considerable number of them have stayed away from the African Human Rights Court and the vast majority of those which participate therein it prevent individuals from having access to it. Equally problematic is the attitude of African states towards the so-called Malabo Protocol, which was concluded in 2014 and creates the International Criminal Law (ICL) Section of the ACJHR. The fact that so far it has attracted only 15 signatures and no ratifications questions the African states'

[56] Pre-Trial Chamber III, Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017.

[57] Generally, see Imoedemke (2015), Warioba (2001), p. 44.

resolve to address impunity.[58] On the other hand, the fact that many an African state is still ruled by self-centred autocratic regimes could explain this paradox.

The importance of the ICL Section lies in the fact that it is mandated to prosecute and try individuals accused of, *inter alia*, the worst violations of humanitarian law and human rights, including genocide, war crimes, crimes against humanity, terrorism, and trafficking in human beings. It follows that, if and when it comes into operation, the ICL Section should become a competitor to the ICC. Indeed, this appears to be the principal ground for its creation: we, African states, have no need of the ICC because we have our own, comparable, international criminal court. But, so far, this has been rather empty rhetoric. Presumably most African states have refrained from the ICL Section for the same reason they have objected to the ICC: because their leaders may at long last be forced to answer for the very serious crimes that they are accused of. This being the situation, for the victims in many African states the ICC remains the only international criminal justice institution from which they may expect justice and restitution. Thus, withdrawing from the Rome Statute would leave them without protection and, additionally, the prevailing ethos of impunity would linger.[59]

The above considerations should not underestimate the role that the African Commission on Human and Peoples' Rights (the 'Commission') can play in dealing with human rights and humanitarian law violations. However, the Commission is a *quasi*-judicial organ and may not have the necessary powers, authority and capacity to deal with all relevant cases. The Commission was particularly vocal during the popular revolt against the Gaddafi regime in 2011: to stop attacks directed against the civilian population, it filed an interim measures application before the Human Rights Court against Libya requesting that the regime be ordered to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons'. The application was granted and, although it was legally binding, it was not complied with.[60] Judging from the Commission's intervention in the civil war in Libya and the Court's prompt response to human life being at risk in the country, it has been argued that it would be 'wrong to think of a common African position that homogeneously defines the continent's position on human rights and impunity'.[61]

It would be counterargued that a single incident is not enough to overturn decades of consistent African practice upholding impunity, while subsequent events showed that it was (unfortunately) an isolated case. Thus, in August 2012, the Commission asked the Court to adjourn proceedings until conditions in Libya permitted the collection of the necessary evidence. However, as there was no progress on behalf

[58] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, signed 27 June 2014, not yet in force; it contains the revised ACJHR Statute to take cognizance of the ICL Section. For an analysis, see Naldi and Magliveras (2015).

[59] Adama Dieng, UN Special Adviser on the Prevention of Genocide, has also said that much, see Dieng (2017).

[60] Application No. 004/2011, *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order for Provisional Measures, 25 March 2011.

[61] See Maunganidze and du Plessis (2015), p. 82.

of the Commission, in March 2013 the Court decided to strike the case out[62]; as a result, it never delivered a judgment on the merits. Thus, an excellent opportunity was missed for the Court to address and discuss matters of significance, e.g. what are the consequences of respondent states not obeying and ignoring interim measures orders, and the effect of its decisions *vis-à-vis* the regime which, following the overthrow of the previous government, has assumed power in the respondent state. These issues are pertinent to the civil war in Libya and should arise if the crimes and the human rights abuses committed in Libya since 2011 were ever to be prosecuted and tried.

Two months before the Commission's application was struck out, it instituted fresh proceedings against Libya before the Human Rights Court alleging that certain rights of Saif Al-Islam Gaddafi, protected under the African Charter on Human and Peoples' Rights[63] ('African Charter'), had been violated. The Commission cited, in particular, Article 6 (the right to liberty and security of an individual's person) and Article 7 (the right of every individual to have his cause heard) thereof. The Court, determining that a situation of extreme gravity and urgency existed, demanded that Libya, effectively the government then in power (the National Transitional Council), until the delivery of a final judgment, (a) ensure that he had access to his family and lawyers and (b) refrain from any judicial proceedings which might cause irrevocable damage to him and would violate the African Charter and other relevant treaties.[64] This case also dragged on. However, following Saif al-Islam being sentenced to death by a domestic court on 28 July 2015,[65] the Human Rights Court issued a second Order on 10 August 2015: it held that to execute the death sentence would constitute a violation of Libya's international obligations and ordered the government to take all required measures to secure his life.[66] Finally, judgment on the merits on the Commission's application was given in June 2016: the Court concluded that Libya was in continued breach of the African Charter and demanded that it terminates the illegal criminal proceedings instituted before domestic courts against Saif al-Islam.[67]

Until today, these have been the only two applications brought by the Commission before the Human Rights Court to protect, respectively, the civilian population of a state in continuous turmoil (Libya) and the rights of a specific individual (Saif al-Islam Gaddafi), who, incidentally, is wanted by the ICC pursuant to an Arrest

[62] Application No. 004/2011, Order, 15 March 2013.

[63] Adopted 1 June 1981, entered into force 21 October 1986, 1520 UNTS 217. Except for Morocco, which acceded to the AU in January 2017, all other member states have ratified it.

[64] Application No. 002/2013, *African Commission on Human and People's Rights v. Libya*, Order of Provisional Measures, 15 March 2013.

[65] Reportedly, the Tripoli Court of Appeal has sentenced him to death by firing squad, together with another eight persons, for crimes perpetrated during the February 2011 uprising, see United Nations Support Mission in Libya / Office of the United Nations High Commissioner for Human Rights, 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', 21 February 2017, at https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf.

[66] See Magliveras (2016a, b).

[67] Application No. 002/2013, Judgment, 3 June 2016. Note that in a Separate Opinion, filed on the same day, Judge Fatsah Ouguergouz argued that the Court should have undertaken a far more meticulous evaluation of the evidence adduced by the Commission.

Warrant issued in June 2011.[68] According to the ICC, the Libyan government is under an obligation to arrest and surrender him,[69] a fact confirmed by the ICC Prosecutor in her statements before the UN Security Council.[70] And it is the only situation where the ICC is also involved.[71] There is no doubt that, during the so-called 'Arab Spring' in North Africa, the killings and human rights violations in Libya far exceeded those in other countries. If this were to be the determining factor, how can one explain the fact that the Commission has, neither before nor after Libya applied to the Human Rights Court for interim measures, ordered the prevention of human rights violations in the territory of other contracting states? Was the Commission playing politics with the situation in Libya and have the parallel proceedings before the ICC[72] determined its behaviour?

It will be submitted that for the following reasons the strengths but also the limitations in the interaction and synergies between the Commission, the Human Rights Court and the ICC ought to be investigated and clarified. First, the aversion of certain African states, contracting parties to the Rome Statute, towards the ICC. This has already led to one withdrawal (Burundi), and, as explained above, there is a clear risk that the populations of withdrawing states would be left without any (transnational legal) protection. Second, while the Commission does exercise supervision over all AU member states (except Morocco), its powers and capabilities are limited.[73] Third, the Court may not intervene of its own volition in a situation where human rights have allegedly been violated in a member state but needs to be triggered by the Commission, by other member states exercising diplomatic protection over their nationals who are the alleged victims or by the alleged victims themselves.[74] Fourth, what Africa requires is not simply the promotion of fundamental freedoms but also the institutional protection of the rights of victims, which

[68] ICC, Pre-Trial Chamber I, Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', ICC-01/11-01/11, 27 June 2011.

[69] Pre-Trial Chamber I, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014, concluded that the Libyan government had not complied with this obligation. The Decision was notified to the UN Security Council in March 2015, see Pre-Trial Chamber I, Registrar's Report on the referral to the United Nations Security Council and the notification of the Decision on the non-compliance by Libya with requests for cooperation, ICC-01/11-01/11-587, 19 March 2015, but apparently no action was taken.

[70] ICC Prosecutor, 'Sixteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)', 2 November 2018, para. 13; ICC Prosecutor, 'Seventeenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)', 8 May 2019, para. 19.

[71] As regards the various crimes and abuses perpetrated in Libya, the following three judicial entities could exercise jurisdiction: the domestic courts, the ICC, and the Human Rights Court. While the principle of complementarity presumably applies between the former two, the relationship between the latter two is unclear (indeed the Human Rights Court is not a criminal court and may not try individuals but only states).

[72] The UN Security Council referred the situation in Libya to the ICC pursuant to Resolution 1970(2011) of 26 February 2011.

[73] See the Commission's mandate as laid down in Art. 45 of the African Charter.

[74] See Arts. 5 and 34(6) of the Protocol establishing the African Court of Human and Peoples' Rights.

is tantamount to fighting impunity in a prompt and effective manner, as well as developing the necessary conditions to become a conflict-free continent.

5 The Creation of ICC Regional Circuit Chambers as a Possible Solution to Realign African States with the ICC

Even though the drive towards withdrawing from the ICC has rather been deflated, the animosity in the AU-ICC relationship continues. African dignitaries have used harsh words to express their antipathy. For example, when in June 2015 the ICC demanded that the South African government arrest Al-Bashir,[75] who was at the time attending the Twenty-Fifth Ordinary AU Assembly Session in Johannesburg, Amina Mohamed, the then Foreign Minister of Kenya, castigated the ICC because it made African states feel 'totally humiliated'.[76] South African courts gave credence to the ICC request: the government was ordered to arrest Al-Bashir,[77] a ruling which was later upheld by the country's Supreme Court of Appeal.[78] What was in effect a bilateral matter between the government of the Republic of South Africa and the ICC,[79] the AU Assembly turned it into another chapter of its affront towards the ICC. After commending South Africa for ignoring ICC obligations and for complying with its previous resolutions on non-cooperation with the ICC in arresting and surrendering Al-Bashir, the Assembly, rather alarmingly, threatened member states with the imposition of sanctions pursuant to Article 23(2) of the AU Constitutive Act,[80] if they failed to obey the relevant resolutions![81]

[75] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09, 13 June 2015.

[76] According to her, the so-called 'arrest the president' movement distracted African leaders from discussing the important issues affecting the continent, see Escritt (2015).

[77] High Court of Pretoria—Gauteng Division, *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & others*, Case No. 27740/2015, Order, 15 June 2015. An Order by the same Court rendered the previous day had prohibited Al-Bashir's departure from the country, ibid., para. 36. A final judgment was given on 24 June 2015, [2015] ZAGPPHC 402; 2015 (5) SA 1 (GP).

[78] Supreme Court of Appeal of South Africa, *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* (867/15), Judgment, 15 March 2016, [2016] ZASCA 17: it found the government's conduct, namely the failure to take steps to arrest and/or detain Al Bashir, to be inconsistent with ICC obligations and the domestic legislation implementing the Rome Statute. These events triggered the government's unsuccessful attempt to have South Africa withdraw from the ICC, n. 49 above.

[79] The ICC has confirmed that South Africa failed to comply with its obligations, see Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, 6 July 2017.

[80] It stipulates that, should a member state disrespect AU decisions and policies, it may be subjected, on the one hand, to the sanctions under Art. 23(1) thereof, namely a denial of the right to speak at meetings, to vote, and to present candidates for positions within the Organisation, and, on the other hand, to additional political and economic punitive measures to be determined by the Assembly. For an analysis, see Magliveras and Naldi (2018), pp. 122–127.

[81] Assembly/AU/Dec. 590(XXVI), n. 25 above, paras. 3 and 4.

The claim that these resolutions take precedence over the contracting parties' obligations under the Rome Statute was tested in a case brought before the Kenyan High Court[82] and subsequently heard on appeal. The gist of the case was whether the Kenyan government was under the obligation to arrest Al-Bashir when he had visited the country on 27 August 2010 during the promulgation of the new Constitution and as was unequivocally demanded by the ICC.[83] To defend its failure to arrest him, the government relied, *inter alia*, on the Assembly resolution of July 2009 directing all member states to withhold co-operation with the ICC as regards arresting and surrendering Al-Bashir[84] as well as on the immunity that he enjoyed as a serving head of state. The Court of Appeal ruled against the government. It held that a head of state is personally liable if there is sufficient evidence that he authorised or perpetrated internationally recognised serious crimes, that for Kenya the Rome Statute is a norm ranking higher than AU resolutions, and that customary international law imposed an overriding obligation to cooperate with the ICC. As the government had acted not only with complete impunity but also in violation of Kenya's international obligations, Al-Bashir could be arrested.[85]

Given the magnitude of the antiparathesis with the ICC, a solution ought to be found, which, at the same time, will alleviate any (real or perceived) African fears and will allow the ICC to perform its mandate more efficiently, to accelerate its work, and to ensure tangible results. The ICC Assembly of States Parties (ASP) is the proper institutional environment to discuss these matters and give pertinent answers. To do so requires a good measure of mutual trust and common understanding among the current 122 participating states, which is rather difficult to materialize in the ASP, a political body[86] where states are more concerned with striking victories at the expense of other states and fending off attacks from opposing states rather than discussing in earnest the necessary action and measures to make the ICC a more robust, relevant and effective criminal justice institution.

While, clearly, the present situation must be overcome, one cannot be very optimistic that a sufficiently large group of influential contracting parties will take the initiative in the ASP to readjust the ICC and realign it with contemporary realities. However, at least at an academic level, it is important to put forward concrete ideas,

[82] High Court of Kenya at Nairobi, *The Kenya Section of International Commission of Jurists v. The Attorney General et al*, Miscellaneous Criminal Application 685 of 2010, Ruling, 28 November 2011, at http://kenyalaw.org/caselaw/cases/view/77625/. For a discussion, see Kasaija (2012).

[83] See further, ICC, *The Prosecutor v. Omar Hassan Ahmed Al Bashir*, Pre-Trial Chamber II, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Presence in the Republic of Kenya, ICC-02/05-01/09, 27 August 2010.

[84] Assembly/AU/Dec. 245(XIII), n. 19 above, para. 10.

[85] Kenyan Court of Appeal, Civil Appeal No. 105 of 2012 Consolidated with Criminal Appeal No. 274 of 2011, *The Attorney General et al v. The Kenya Section of International Commission of Jurists*, Judgment, 16 February 2018, at http://kenyalaw.org/caselaw/cases/view/148746/. The government also invoked national interests to defend is inaction, namely that it would not execute the arrest warrants as it could jeopardise the friendly relationship with Sudan and threaten the lives and property of Kenyans living in Sudan.

[86] Note that by describing the ASP as a 'political body' it is not disputed that it also possesses legislative functions but the emphasis here is on the predominant role that politics play therein.

which, even if they are not taken onboard, will keep the discussion alive and will not let it fade away. Despite the drawbacks that one can assign to the ICC, the fact remains that it is a useful institution and invariably the only transnational (in the sense of non-regional) court from which victims of heinous crimes may expect that not only justice is served but also that compensation is given.

The following solution to the AU-ICC antiparathesis is presented here: to do away with the ICC's unitary nature[87] and to create what will be called 'ICC regional circuit chambers'.[88] This suggestion,[89] which has drawn inspiration from the circuits (districts) existing in the US federal court system, takes stock of Article 39(2) of the Rome Statute. It stipulates that the judicial functions shall be carried out by Chambers and that the simultaneous constitution of more Chambers is not precluded, if so required to efficiently manage the workload. Thus, the possibility of breaking down its work is, at least in theory, envisaged in the Rome Statute. Each of these regional circuit chambers would correspond and be responsible for alleged crimes committed in the territory of the contracting parties belonging to a specific continent (for purposes of convenience, Oceania will be part of the Asian circuit).[90] Each regional circuit chamber would follow the current institutional structure, i.e. it would comprise a Pre-Trial Chamber, a Trial Chamber, an Appeal Chamber, and an Office of the Prosecutor.[91] Its seat would be in the territory of one of the contracting parties in the respective continent, while its judges, the Prosecutor and the Registrar would also have to be nationals of the contracting parties of that continent. According to Article 36 of the Rome Statute, the ICC has a bench of 18 judges. As this number would prove rather inadequate, under Article 36(2) the provision on a simplified amendment of the Rome Statute would be followed to allow for a sufficiently large bench.[92]

Each ICC regional circuit chamber's Prosecutor will have the rank of deputy Prosecutor. Article 42(2) of the Rome Statute does not lay down the number of deputy Prosecutors (currently there is only one) and, consequently, there is no need to amend it. As deputy Prosecutors are entitled to carry out any of the Prosecutor's functions, there would appear to be no obstacles in performing all prosecutorial duties. The powers and functions of each Pre-Trial regional circuit chamber, each Trial regional circuit chamber and each Appeal regional circuit chamber will remain

[87] For similar ideas advanced by other commentators, see Magliveras (2017), p. 310.

[88] It is true that international judicial organs are unitary but arguably there are no compelling reasons for this: for example, the Court of Justice of the European Union or the European Court of Human Rights could for reasons of, *inter alia*, expediency operate under a sub-regional structure.

[89] This submission is not concerned with the possibility of having the judicial organs of the African Regional Economic Communities (RECs) undertake criminal proceedings under deferral by the ICC, on which see Sainati (2016). Arguably, it would be wrong to convolute their mandate by having them assume jurisdiction for which they are not well suited. The idea of 'one size fits all' is not appropriate here.

[90] Equally, if the UN Security Council were to refer situations under Art. 13b of the Rome Statute, they would be carried on to the relevant regional circuit chamber.

[91] Cf. Art. 34 of the Rome Statute. A separate Registry does not appear to be necessary but the relevant functions could be done centrally.

[92] Under Art. 36(2)(b), ibid., this would have to be approved by a two-thirds majority in the ASP, while the relevant decision would have immediate effect.

the same. Finally, as far as the ICC itself is concerned, i.e. the bench comprising all judges, it might be called upon to resolve instances of concurrent jurisdiction among regional circuit chambers which might arise, it could issue consultative non-binding opinions on procedural matters, it could decide on the disqualification of judges, etc.

The amendments to the Rome Statute that are necessary to set up the regional circuit chambers would be based on Article 122 thereof, which deals specifically with changes of an exclusively institutional nature. A single contracting party may propose them. They would then have to be accepted by consensus, failing which the ASP or a Review Conference must adopt them by a two-thirds majority of all contracting parties. Under Article 122(2), amendments shall come into force 6 months after their adoption (i.e. there exists no separate ratification process at the domestic level of contracting parties) and will become binding on all of them, meaning that those which disagreed must follow the wishes of the majority.

There is no doubt that achieving the required two-thirds majority would not be easy. However, African contracting parties might be willing to compromise if such an alternative were proposed. Moreover, this suggestion takes stock of Kenya's statement to the ASP Working Group of Amendments in 2015 that it will propose the amendment of the Rome Statute's Preamble to ensure that the principle of complementarity sufficiently recognizes regional criminal judicial mechanisms. According to Kenya, the ICC should remain a court of last resort, but the criminal proceedings should take place closer to the location where the alleged crimes were committed.[93] Until today, Kenya has not put forward an amendment proposal to that effect.[94]

As regards the principle of complementarity which applies to the ICC's operation,[95] the regional circuit chambers would also be bound by it. Complementarity is also applicable to the ICL Section of the ACJHR.[96] Therefore, African states should be obliged to prosecute and try international crimes themselves, whether they are those envisaged in the Rome Statute and/or those laid down in the ACJHR Statute, depending on which instrument(s) they have ratified. The ICL Section will have competence over an expansive list of international crimes, including the unconstitutional overthrow of governments, money laundering, corruption, mercenarism, etc.[97] Therefore, the *rationae materiae* jurisdiction of the African regional circuit chamber and that of the ICL Section would overlap only as regards the crime of aggression, war crimes, crimes against humanity and genocide. Should contracting parties be unable or unwilling to carry out prosecutions and trials, they could self-refer the situations at hand to the African regional circuit chamber or to the ICL Section.[98]

[93] ASP, Fourteenth Session, 'Report of the Working Group on Amendments', ICC-ASP/14/34, 16 November 2015, para. 18.

[94] ASP, Fifteenth Session, 'Report of the Working Group on Amendments', ICC-ASP/15/24, 8 November 2016, para. 20; ASP, Sixteenth Session, 'Report of the Working Group on Amendments', ICC-ASP/16/22, 15 November 2017, para. 26; and ASP, Seventeenth Session, 'Report of the Working Group on Amendments', ICC-ASP/17/35, 29 November 2018, para. 16.

[95] See the Preamble to the Rome Statute and Art. 17 thereof.

[96] See Art. 46H of the ACJHR Statute.

[97] Ibid., Art. 28A. For the constitutive elements of these crimes, see ibid., Arts. 28B et seq.

[98] See, respectively, Arts. 13a and 14 of the Rome Statute and Art. 46F(1) of the ACJHR Statute.

And of course the Prosecutor of either Court could take the initiative and act accordingly.[99] In both cases, i.e. self-referrals or Prosecutors initiating investigations, this could potentially lead to a conflict, especially if the same individuals or same group of people were targeted.

To address this conflict, the rule of first refusal might be applied, namely which self-referral was made first, or the Prosecutor of which Court was first authorized to commence the investigation.[100] This choice could be implemented by inserting a clause to that effect in the Rules of Procedure of the African regional circuit chamber or of the ACJHR. That two different judicial organs should not at the same time examine the same situation is a well-known rule in transnational courts and quasi-judicial entities mandated to rule on alleged breaches of human rights and fundamental freedoms. Thus, the Inter-American Court of Human Rights must not deal with a complaint if its subject is 'pending before another international procedure for settlement',[101] and the Committee against Torture shall not consider any communications if the same matter has been or is being examined pursuant to any other 'procedure of international investigation or settlement'.[102] Similar clauses bind the Human Rights Committee[103] and the European Court on Human Rights.[104]

It could be counterargued that the setting up of ICC regional circuit chambers presupposes that all states of the world have become contracting parties to the Rome Statute. Since the ICC has not yet achieved universality, this proposal is unattainable. True as this submission is, there is no doubt that presently the ICC constitutes a self-contained transnational regime with its own decision-making body (the ASP) where almost 65% of the UN membership participate, including 33 out of the 55 AU member states. This allows the ICC to claim a considerable degree of legitimacy as the principal international criminal justice institution, able and willing to act when the criminal justice system in a contracting party is unable or unwilling to address the commission of very serious international crimes.

In summary, the present proposition aims at ensuring that the ICC is more user-friendly (if this term could be used) and adapts to the developing needs of contracting parties, specifically African states which form the bulk of the ICC's workload and would most probably continue to do so. The regional circuit chamber for Africa would be tasked with investigating, prosecuting and holding trials for qualifying criminal behaviour allegedly committed in the territory of African contracting

[99] See, respectively, Arts. 13c and 15 of the Rome Statute and Arts. 46F(3) and 46G of the ACJHR Statute.

[100] On an authorization to investigate, see Art. 15(3)–(4) of the Rome Statute and Art. 46G of the ACJHR Statute. .

[101] See Art. 46(1)(C) of the American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978, 1144 UNTS 143.

[102] See Art. 22(5)(a) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 112.

[103] See Art. 5(2)(a) of the (First) Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

[104] See Art. 35(2)(b) of the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, entered into force 3 September 1953, 213 UNTS 221, as currently in force.

parties (and any other which may accede in the future) and those which have been referred by the UN Security Council. Moreover, being regional in nature and in scope, it would take into consideration African customs, legal traditions, societal values, and rituals,[105] provided that they do not violate the peremptory rules of international law, e.g. the negation of slavery, the prohibition of human trafficking and similar practices, full equality among all people (including men and women), etc.[106] The application of continental practices and conventions should remove the bias that the ICC operates to promote Western domination. But this cultural relativism, welcomed as it might be, should also have its limits. To allay any fears that the invocation of regional traditions and norms might be treated as grounds for mitigation, reference will be made to Article 21(1)(c) of the Rome Statute, which is entitled 'Applicable law': it permits the ICC to apply, *inter alia*, general principles of law deriving from the domestic legal systems of contracting parties, 'provided that those principles are not inconsistent with [the Rome] Statute and with international law and internationally recognized norms and standards'.

6 Conclusions

The withdrawal of African states from the ICC cannot be a good thing for anyone, including for the seceding states themselves, which, lest it be forgotten, rushed to join the ICC in the late 1990s and early 2000s. Moreover, it will have negative consequences for the thousands of victims and for the members of their families who will no longer have access to it. The drive towards withdrawal continues both in Africa[107] and elsewhere (the Philippines,[108] Malaysia[109]). Therefore, the international community cannot and should not treat it lightly. But irrespective of whether the AU's Withdrawal Strategy is good, bad or irrelevant, the ICC has its own

[105] Cf. Allen (2007).

[106] Note that this submission does not argue that the ICC should defer to alternative regional methods of criminal justice, on which see Keller (2008), pp. 15 et seq.; the criminal justice system created by the ICC is to be maintained.

[107] E.g. on 12 December 2017, the South African government introduced to the National Assembly the International Crimes Bill (B37-2017), at https://pmg.org.za/bill/751/, which envisaged, *inter alia*, the repeal of the Implementation of the Rome Statute of the International Criminal Court Act 2002, see also n. 51 above. On 7 May 2019, the Bill lapsed.

[108] In the case of the Philippines, the withdrawal announcement on 14 March 2018, C.N.138.2018. TREATIES-XVIII.10 (Depositary Notification), appears to have been prompted by the ICC Prosecutor opening a preliminary examination against President Rodrigo Duterte the previous month, at https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat. The legality of the withdrawal was challenged by opposition senators before the Supreme Court: *Senator Francis Pangilinan et al. vs. Alan Peter Cayetano et al. & PCICC et al. vs. Salvador Madialdea et al*. However, it did not rule on the challenge before the withdrawal took effect (17 March 2019, C.N.138.2018.TREATIES-XVIII.10 (Depositary Notification)). The preliminary examination is ongoing.

[109] Malaysia submitted its instrument of accession on 4 March 2019. A month later the government decided to withdraw the instrument of accession. Even though this did not constitute a formal withdrawal from the Rome Statute (it would have become a contracting party only on 1 June 2019), the practical effects are the same, i.e. Malaysia does not participate in the ICC.

mechanisms, namely the ASP and the Review Conferences, which are the proper venues to discuss and take action on contracting parties' criticism, grievances and concerns.

As evidenced by the reservations attached to the AU Assembly resolution approving the Withdrawal Strategy,[110] many of the African parties to the Rome Statute remain ICC supporters, often staunch ones. However, when they find themselves in a political organ such as the AU Assembly, in order to challenge any AU common position antagonizing the ICC, they are required to invoke sound arguments. The fact that no member state has yet ratified the Malabo Protocol creating the ICL Section is of course an important argument but may be easily discarded because none of the AU treaties concluded after July 2010 has entered into force.[111] Thus, it is imperative to propose a solution which will bring the work of the ICC much more closely to the continent and bestow a feeling among African states that it could fulfil the role of the transnational criminal justice system which is much needed to combat the ethos of impunity. Arguably, while maintaining the ICC's overall mandate and functioning, the challenge lies in being viewed as an entity which is not foreign to Africa and to Africans.

Indeed, a substantial part of the ICC's work will continue to focus on existing African situations, and new ones might be added. Therefore, it will have to deal constructively with the continent[112] and come up with solutions promoting its own effectiveness but also addressing African concerns. This must become a priority. No one wishes to see a weak and indifferent global criminal justice mechanism, which arguably has only recently come out of a protracted infancy. Sharing the belief of other commentators that the only way forward is through a consistent Africa-ICC engagement and not through unilateral African actions,[113] the present article has suggested the creation of ICC regional circuit chambers corresponding to a single continent. That the ICC should refocus by adopting a regional perspective has been one of the AU's contentions and there is no reason why it should not be granted.

Finally, as to whether the suggestion for regional circuit chambers is implausible, because the required two-thirds majority for amending the Rome Statute (currently 81 parties) would not be obtained, one has to accept the possibility that the suggestion could be discarded. Even if the group of African parties (currently 33 states) were to support it *en masse*, without the wholesale backing of the Western European and Eastern European groups it could not be brought to fruition. However, this should not be considered as a failure, if the present suggestion, and any others that might surface in the future, generates a level of discussion among contracting parties within the designated bodies (the ASP, the Review Conferences) leading to a realization of the issues surrounding the AU-ICC antiparathesis.

[110] See above nn. 30–31 and the corresponding text.

[111] See the ratification tables of AU treaties at https://au.int/en/treaties.

[112] See e.g. Chinedu Olugbuo (2014), p. 363, suggesting an ICC-AU relationship agreement following the pattern of the Agreement between the ICC and the European Union on Cooperation and Assistance, signed 10 April 2006, in force 1 May 2006, [2006] OJ L 115/50.

[113] See Mbengue and McClellan (2017).

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