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Cutting through the Gordian knot of the ICC in Africa: Can a regional court be the solution?

The International Criminal Court (ICC) came into existence after an overwhelming majority of states attending the Rome Conference voted in favour of its adoption in 1998. To date the [Rome Statute](#) has been ratified by 122 states. Its preamble recognises that the grave crimes of genocide, war crimes and crimes against humanity threaten the peace and security of the entire world. The ICC aims to put an end to impunity, affirming that these serious crimes cannot go unpunished and that their effective prosecution must be ensured by enhancing international cooperation.

This sentiment is echoed in the responsibility to protect (R2P) doctrine that evolved from the concept of state sovereignty being a responsibility, seeing the protection of a state's population as the responsibility of each sovereign state. In the [2005 World Summit Outcome Document](#), the Heads of State and Government at the UN World Summit Meeting agreed to the responsibility to protect their populations from genocide, war crimes and crimes against humanity, and to "encourage and help States to exercise this ability". This is a universal declaration of protection, and nowhere is the manifestation of the need and challenges more visible than the ongoing and escalating opposition of the ICC in Africa, culminating in an AU [strategy for mass withdrawal](#) from the ICC in January 2017.

Historically the [relationship between African states and the ICC](#) can be tracked along governance lines – those states with poor governance and rule of law being most opposed to international jurisdiction in fear of personal criminal liability. States with a history of good governance and rule of law, on the other hand, tended to be more supportive of the ICC. Therefore, being one of only seven African nations still [considered free in 2016](#), South Africa's proposed withdrawal from the ICC was met with shock. South Africa's argument in justification of its refusal to arrest President al-Bashir in 2015 centred on the conflict between South Africa's ICC obligations versus its obligations towards the AU. In fact, African countries have become increasingly vocal in their displeasure on a number of issues which can broadly be placed in three categories: (1) The justice versus peace debate; (2) sovereignty and (3) Africa versus Western Imperialism. These arguments have been extensively debated within the [literature](#) and have serious repercussions for the future legitimacy of the ICC. Being the largest regional grouping, it has been convincingly [argued](#) that "the impact of the ICC on global justice will be determined in Africa".

At first glance Africa's opposition to the ICC reflects negatively on perceptions regarding the AU's willingness to protect its people, the argument being that without international criminal liability impunity will prevail. This assertion is however not necessarily true. With the al-Bashir-situation as a case in point, African states' objection to the arrest of al-Bashir was not about the arrest and prosecution *per se* but rather the detrimental effect of the [timing of the warrant](#) on regional peace building efforts.

As an alternative to the ICC, Africa proposes the African Court of Justice and Human Rights (ACJHR) – a merger between the current African Court on Human and People's Rights and the African Court of Justice, established by the AU Constitutive Act but never operationalised. This merged court will have [three main mandates](#), addressing general affairs between states, human and peoples' rights, and international crimes. Although the current African court does not possess international criminal jurisdiction [the Malabo Protocol](#) extends the ACJHR's jurisdiction to include 14 international and transnational crimes, including genocide, war crimes and crimes against humanity.

In the spirit of previous innovative African human rights documents, the Malabo Protocol goes further than any other contemporary treaty. It provides the ACJHR with wider jurisdiction than the ICC possess in terms of addressing the serious challenges faced in Africa regarding transnational crimes. It provides the means of interpreting and applying not only the AU Constitutive Act, but "[all other Treaties](#)" adopted within the framework of the AU, whereas other international courts are limited to a single treaty.

The biggest challenge of the Malabo Protocol is arguably Article 46A *bis* which gives immunity to serving heads of state or anybody acting in such capacity. This may be in line with international custom but is in direct opposition of Article 27 of the Rome Statute which does not exempt such heads of state from prosecution. The aim of the Rome Statute is to end impunity and the Malabo Protocol raises the spectre of perpetual impunity since history has shown the real probability of heads of state never stepping down.

Aspiring to personal accountability as a means to end impunity and being able to deliver hold different outcomes. To date the ICC has attempted to prosecute two sitting heads of state – Kenya's President Kenyatta and Sudan's President al-Bashir, without success. African leaders have relative limited political power in global politics. The concern is that the ICC will be just as unsuccessful with more powerful world leaders who in fact deserve to be held to account. Considered in this context, does a clause protecting serving heads of state then warrant the scathing criticism levelled against it, especially when the absence of that clause will scuttle any political will to implement the Protocol?

Now is the time for African states to give serious consideration to the ratification and implementation of the Malabo Protocol. The ICC is facing a legitimacy crisis. The ICC's statistics bear witness to the fact that nine out of ten cases before the ICC are African. The ICC is seemingly unable to get past the veto powers of the UN Security Council, where three of the five most powerful countries are not even parties to the Rome Statute. This is a clear predictor that the possibility of any prosecutions of non-African states is little to none.

The ICC received a further blow to its stature recently. One of its few successful prosecutions were [overturned by the ICC Appeal Chamber](#) on 8 June 2018. In 2016 the Trial Chamber III found Congolese military commander, Jean-Pierre Bemba guilty of crimes against humanity and war crimes. He was sentenced to 18 years, the longest period of imprisonment imposed by the ICC to date. Of serious concern is the Defence's assertion that he was denied a fair trial when exculpatory evidence was dismissed, leading to his conviction, an allegation that may have some basis since the conviction was overturned.

In contrast, the Extraordinary African Chambers in Senegal successfully prosecuted deposed Chadian President Hisséne Habré. Although the victims waited 25 years for justice, this case was confirmed on appeal, showing that Africa can indeed successfully prosecute the most serious of international crimes and strengthening the argument for a regional court.

The challenges faced by the ICC in Africa resemble the proverbial Gordian knot. Allowing a regional alternative may just prove to be the undoing of the Gordian knot.

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