



THE WAR AGAINST IMPUNITY: THE FALLING BATTLE IN AFRICA

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Abstract

In this century, perhaps more than at any other time in the history of the modern world, armed conflict, between peoples has occurred within state borders, rather than between countries. Internal conflicts, no less so than their international counterparts, imply that there will be civilian casualties, that there will be terror and torture, that there will be exceptional detention. And, therefore the civilian's populations become direct victims of terror and atrocities or indirect victims of displacement and deprivation. Africa has been particularly vulnerable to conflicts of identity, which have decimated populations and violated numerous human rights norms. The cases of Liberia, Sierra Leone, Sudan (Darfur), Libya, Cote d'Ivoire, Northern Uganda, Rwanda and the Democratic Republic of Congo constitute frightful examples of this scourge.

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1.0 Introduction

The struggle against impunity and for greater accountability is rooted in the liberation and anti colonial struggles of the people of Africa and Asia. It is the people of Africa and Asia who popularized human rights and used the gospel of human rights in their great struggles against the colonialists.² No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and judicial mechanism to try and punish the perpetrators of these types of crimes, whenever they occur.³ African countries have been among those who have been supportive of the notion of establishing the International

2 African Guide to International Criminal Justice by Institute of Security Studies Edited by Max du Plessis

3 Mochochoko (2005), 'Africa and the International Criminal Court,' in E Ankumah & E Kwakwa (eds.), African Perspectives on International Criminal Justice, Ghana: Africa Legal Aids, p 249

Criminal Court ("ICC") since the 1990s. Indeed, as of 1st June 2012, 121 countries are now State Parties to the Rome Statute. Out of these, 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin America and Caribbean States and 25 are from Western Europe and other States.⁴ The facts and statistics show that the African continent has the highest number of state parties to the Rome Statute and has played a fundamental role in firming up the Rome Statute system over the years.⁵ It is probably because of the consonance between the anti-colonial liberation struggles and human rights and the fight against impunity and for greater accountability that African people have had no difficulty relating to and supporting the concept of international criminal justice.⁶

Nonetheless, this enthusiasm on the part of African states seems to be within the realm of what one may call the ideology of rhetoric. As Judge Navanethem Pillay, the former judge of the ICC and the current UN High Commissioner for Human Rights, puts in the following words when warning African states against rhetorical commitment to the ICC:

From the standpoint of the rule of law, the ICC is one of the greatest achievements of the twentieth century. It is a court that deserved to be taken seriously by African states. On paper this appears to be the case. Currently, 30 African states have ratified the Rome Statute...but the real challenge is converting this expression of high-level political commitment into awareness and practical implementation on the ground. It is only through increased awareness, enhanced capacity and broad-based political support from practitioners and policymakers that Africa will be able to gain a reputation for being a continent

4 See <http://www.icc-cpi.int/Menus/ASP/states+parties/>> (last accessed on July 2017)

5 Ibid

6 African Guide to International Criminal Justice by Institute of Security Studies Edited by Max du Plessis

*seriously committed to ending impunity and non-adherence to the rule of law.*⁷

Nonetheless, the continent has continued to witness colossal and grave human rights violations, especially war crimes, crimes against humanity and genocide. The 1994 Rwanda genocide was a tragic reminder of the Second World War holocaust in Europe in the 1940s, and against which humanity had resolved 'never again.' The current reported war crimes, crimes against humanity and genocide in the Darfur region of the Sudan have once again challenged humanity's resolve: never again.⁸ Therefore, these gross violations of human rights witnessed in recent times in places such as Rwanda, Sierra Leone, Kenya, Sudan, Zimbabwe, the Democratic Republic of Congo, and Egypt, Tunisia, Angola, Libya and others are in reality a betrayal of the goals of the liberation struggles of the African people.

1.1 Background

The first matters to be referred to the ICC after the Rome Statute came into force were referred by the Democratic Republic of the Congo, the Central African Republic and Uganda all of which are African countries.⁹ Again, following its electoral crisis, Ivory Coast another African country became one of the first nations to file a declaration of acceptance of the jurisdiction of the ICC in terms of the Rome Statute. Yet given the state of human rights enjoyment from Asmara to Abidjan, from Cape Town to Cairo; Africa has experienced scores of human rights catastrophes of extreme proportions: the scourge of racism and apartheid in South Africa, the 1994 Rwandan genocide, the Darfur crisis, and civil wars in Somalia, Sierra Leone, Côte d'Ivoire and Liberia, one would be tempted to question the commitment of

7 Navanethem Pillay (2008), 'International Criminal Court,' in Max Du Plessis, African Guide to International Criminal Justice, pp 8-9, Pretoria: ISS.

8 Max Du Plessis (2008), 'The International Criminal Court and its Work in Africa: Confronting the Myths,' ISS Paper 173, November 2008

9 Ibid

states to the fight against impunity.¹⁰

To add salt to the wound, the legitimacy, impartiality and effectiveness of African law enforcement institutions have been questioned for a long time, while the extent of corruption, abuse of power and human rights violations point to the need for stronger national institutions of accountability.¹¹ The atrocities witnessed in Rwanda, Kenya election violence and Sierra Leone were so severe and so shocking that most African people were left convinced that mechanisms (national and international criminal justice system) were no longer in place to ensure that these kinds of gross violations of human rights would not be repeated.¹² Therefore, a number of persons in Africa will have to be persuaded that Africa needs international criminal justice in view of the recent events.

1.2 The Fallen Battle

Recently, a number of controversies have be-devilled international criminal justice in Africa and appear to have dented the fight against impunity and the battle to ensure that perpetrators of atrocities and gross violation of human rights are held accountable.¹³ These include;

1.2.1 The Question of Peace versus Justice

Leila Nadya Sadat argues that the ICC represents a “quantum-leap” in the enforcement of International Criminal Law and a monumental response to the most serious crimes of concern to the international community as a whole.¹⁴ And, they do emphasize

that the ICC stands as a determination that de facto impunity should no longer be enjoyed by those perpetrating genocide, war crimes and crimes against humanity by ensuring that cases are tried even when states are unwilling or unable to do so themselves.¹⁵ For them criminal prosecution of those accused of committing war crimes is a fundamental aspect of a victim’s right to justice. However, in armed conflicts where serious violations of the laws of war have been committed on a massive scale, the notion of remedial or retributive justice¹⁶ for victims of war crimes often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence.

This perception gives priority to peace. While not dismissing the need to tackle impunity, temporary immunity should be guaranteed for key actors in order to secure their engagement in peace negotiations. The argument implies that there are no ideal solutions in the field of transitional justice; there are always tensions between the desires and need to prosecute the perpetrators of crimes so that full accountability is achieved, and the reality that, in order to end conflict, there will need to be multiple compromises in which justice can only be imperfectly implemented. Therefore, using retributive measures is seen as problematic as, potentially, it obstructs efforts to reach peace accord.¹⁷

It argues that securing peace should be the first priority and that with time justice will always reach those who have committed crimes. In authorizing the arrest of Sudan’s President al-Bashir, ICC judges agreed that he had a case to answer for his alleged role in war crimes and crimes against humanity committed in Darfur.¹⁸ But the execution of

the warrant without an adequately managed transition could create a power vacuum in Khartoum, unleashing destabilizing tremors beyond Sudan’s borders. Consequently, all nine countries that share a border with Sudan are on a war footing. Without a government for two decades, nearby Somalia is already a major destabilizing factor in the region. Uganda’s murderous Lord’s Resistance Army, long supported by Khartoum and whose leaders are also wanted by the ICC, is re-grouping in vast ungoverned border territory between Sudan, Uganda and DRC.¹⁹ The 2005 ‘comprehensive’ peace agreement (CPA) that ended Sudan’s half century-long north-south war risks breakdown, while the Darfur crisis in western Sudan remains active.²⁰

Therefore, one cannot dismiss the AU’s concern that the execution of an arrest warrant without a carefully managed transition could lead to further instability in Sudan and its nine neighbouring countries. However, this argument is a variation of the numerous excuses for inaction that inevitably accompany justice measures against a head of state. A vivid example of peace versus justice dilemma resurfaced in the course of the exercise of the ICC’s mandate in Uganda. In Uganda, which was the first ICC situation country, a section of victim communities and academicians criticized the Court for partly contributing to the unsuccessful Juba Peace talks between the Government of Uganda and the Lord Resistance Army (LRA) when it issued arrest warrants for the latter rebel outfit.²¹ Negotiators and community leaders working for peace in northern Uganda had claimed that the ICC warrants for the rebel Lord’s Resistance Army (LRA) leadership jeopardized peace prospects, and that starting

investigations before the war ended risked both justice and peace.²²

1.2.2 The Vagueness of Provisions in the Rome Statute

Indeed, the aspirations of its drafters will be fulfilled just as surely if national systems carry out legitimate investigations and prosecutions on their own. Thus, while a creation of historic import, the Rome Statute envisions a Court that “may never be employed.” This perspective is reflected in two very significant ICC salutes to state sovereignty: complementarity²³ and prosecutorial deferrals in “the interests of justice”.²⁴ These “salutes” are the product of one of the most difficult negotiation points of the Rome Conference: When should the ICC defer to national proceedings?²⁵ There was a battle of conflicting purposes at Rome. On the one hand, there was the international obligation of states to prosecute international crimes added to the practical impossibility of placing that burden solely upon international tribunals (ad hoc or permanent). Opposing this view were those who advocated state sovereignty and the need to retain flexibility with regard to truth and reconciliation efforts, especially amnesty, in the context of difficult regime change. The result: a system in which prosecutorial discretion will be exercised in the context of purposefully vague provisions that recognize that peace and justice are sometimes incompatible goals.²⁶

The provision of which have been constantly employed by the majority of African countries and the AU in various scenarios such as in the recent investigation and prosecution

10 Louis Henkin, “The United Nations and Human Rights,” 12., *Org. Vol.1, XXI, No.3, (Summer, 1965): 504*

11 K. Avruch and B. Vejarano, “Truth and reconciliation commissions: A review essay and annotated bibliography”, (2002) *The Online Journal of Peace and Conflict Resolution, Vol. 4.2, pp. 34-76.*

12 Navanethem Pillay (2008), ‘International Criminal Court,’ in Max Du Plessis, *African Guide to International Criminal Justice*, pp 8–9, Pretoria: ISS.

13 Sriram, C.L. *The ICC Africa experiment: The Central African Republic, Darfur, Northern Uganda and the Democratic Republic of the Congo.* University of Kwa-Zulu Natal Press. 317. (2009)

14 M. P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, (1999) 32 *CORNELL INT’L L.J.* 507, 507

15 *Ibid*

16 K. Avruch and B. Vejarano, “Truth and reconciliation commissions: A review essay and annotated bibliography”, (2002) *The Online Journal of Peace and Conflict Resolution, Vol. 4.2, pp. 34-76.*

17 Sriram, C.L. and S. Pillay (eds). 2009. *Peace versus Justice? The dilemma of transitional justice in Africa.* Scottsville, South

Africa: University of KwaZulu-Natal Press.

18 Branch, Adam. 2004. *International justice, local injustice.* Dissent

(Summer): 22-28.

19 Allen, Tim. *Trial Justice: The International Criminal Court and the Lord’s Resistance Army.* London: Zed Books. 2006

20 *Ibid*

21 Mary Kimani, “Pursuit of Justice or Western Plot: International Indictments stir angry debate in Africa” (October 2009) at Page 12 mentions that the warrants for Joseph Kony and other leaders of the LRA were seen as impeding a peaceful end to the conflict in Northern Uganda. Available at www.un.org/en/africarenewal/Volume23no233-icc.html

22 “Uganda: ICC indictments to affect northern peace efforts, says mediator,” IRINnews, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654>, (accessed Dec. 11, 2015); also see Richard Dowden, “ICC in the Dock,” commentary, *Prospect Magazine*, May 2007

23 Rome Statute art. 17

24 Rome Statute art. 53(1)(c)

25 D. J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator’s Perspective on the International Criminal Court*, (2001) 167 *MIL. L. R. EV.* 1, 10–12

26 M. P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, (1999) 32 *CORNELL INT’L L.J.* 507, 507

of perpetrator of Kenya violence and the Darfur crisis. As evidenced by Jean Ping, the AU Chairperson is quoted to have stated as follows:-

*“The AU’s position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace.”*²⁷

1.2.3 The Feud between the ICC and AU

The current turbulent relationship between the International Criminal Court and Africa was sparked off in July 2008 when the Prosecutor applied for a warrant of arrest for Omar Al-Bashir, the sitting President of the Republic of the Sudan. Al-Bashir was charged on the basis of individual criminal responsibility for committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan. Following this application by the Prosecutor, the Peace and Security Council of the AU adopted a decision in relation to the ICC Prosecutor’s application for a warrant of arrest.²⁸

In this decision, the Council reiterated the African Union’s commitment to the fight against impunity on the African continent and also condemned the gross violations of human rights in the Darfur region.²⁹ The Council, however, emphasized that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace, thereby pointing to the “wrong timing” of the Prosecutor’s application for Bashir arrest warrant. In

²⁷ See “World Reaction-Bashir Arrest” (4th March 2009) BBC, available at: <http://news.bbc.co.uk/2/hi/africa/7923797.stm>

²⁸ This application was made on the basis of Article 58 of the Rome Statute

²⁹ Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at <http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf>

addition, the Council reaffirmed its statement of 11th July 2008, which highlighted the African Union’s concerns regarding the misuse of indictments against African leaders in conformity with decision Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction.³⁰ On 3 July 2009, at the 13th African Union (AU) summit of Heads of State in Sirte, Libya, African leaders resolved to “denounce the International Criminal Court (ICC) and refuse to take action on the Court’s order that should Sudan’s President Omar al-Bashir land in their territories, he should be arrested, and extradited for prosecution by the ICC, for crimes against humanity, allegedly committed in the Darfur region of southern Sudan.

1.2.4 Non-Cooperation to the ICC (Al Bashir Escape in South Africa)

Early, 15th June, 2015, Al-Bashir escape in South Africa has been cited alternatively as demonstrating the ineffectiveness of the ICC and as showing its ability to force responses from governments and officials under arrest warrants from the court. With Al-Bashir in South Africa to attend an African Union (AU) summit, the South African Litigation Center filed a motion in Pretoria’s high court to compel the execution of two International Criminal Court (ICC) arrest warrants for the Sudanese president. The court ordered Al-Bashir to remain in the country pending a ruling on the matter, but he fled before a decision on the arrest motion was issued. The South African government said that Al-Bashir had immunity because he was attending an AU summit as a head of state. The argument is against the resolution of the UN Security Council, in its 31st March 2005 Resolution 1593 referring the situation in Darfur to the ICC, implicitly waived any immunity for Al-

³⁰ Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at <http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf>

Bashir. This follows the Rome Statute’s core principle that explicitly precludes immunity regardless of government office.

And, furthermore, it is against the NGHC’s judgment that relates to the content of the Host Agreement between South Africa and the African Union (hereinafter the ‘Host Agreement’).³¹ The Host Agreement provides, in part, that the South African Government:

*“shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.”*³²

The General Convention on the Privileges and Immunities of the OAU (hereinafter the ‘General Convention’), for its part provides that ‘Representatives of Member States’ shall be accorded, inter alia, ‘immunity from personal arrest or detention’ and ‘such other privileges, immunities and facilities ...as diplomatic envoys enjoy...’³³ The NGHC first determines that the General Convention is irrelevant for the purposes of disposing of the matter since South Africa never ratified it.³⁴ Second, the NGHC determines that Host Agreement, on its terms, ‘does not confer immunity on the Member States or their representatives or delegates.’³⁵

While South Africa’s experience with the conflict of obligations caused a stir, several African states had already faced the dilemma. Some of these states, in particular Djibouti

³¹ Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organisation of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015, the 27th Ordinary Session of the Executive Council from 10 to 12 June and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015

³² Article VIII of the Host Agreement

³³ Section C, Article V (1) of the General Convention

³⁴ See generally Southern African Litigation Centre vs. the Minister of Justice, supra note 2, at § 28.4

³⁵ Ibid, at § 28.10.1

and Kenya, have had to make ‘appearances’ before the Bureau of the Assembly of States Parties to the ICC to explain their non-cooperation with the duty to arrest and surrender of Al-Bashir. Others, most notably the Democratic Republic of Congo, Malawi and Chad, have had to appear before the Pre-Trial Chambers of the ICC.³⁶ All told, before June 2015, there had been seven cases of non-cooperation with the duty to arrest and surrender Al-Bashir, Kenya, Djibouti, Chad (twice), Malawi, Nigeria and the Democratic Republic of Congo.³⁷

1.2.5 The Push to Merge African Court of Justice and African Court on Human and People’s Rights

The African Union is trying to undermine the ICC by establishing its own court or mechanism to try international crimes. In response to AU decision in 2009 on whether to create an African substitute for the ICC, the AU Commission began a process in February 2010 to amend the protocol on the Statute of the African Court of Justice and Human Rights to expand the court’s jurisdiction to include international and transnational crimes. The resultant draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as terrorism, piracy, and corruption. Apart from, African supra national bodies such as the African Union- most recently the East African Legislative Assembly has continued to push for the Court to withdraw its mandate in Africa and leave the investigation and prosecution of grave crimes to national and

³⁶ See Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, the Prosecutor vs. Al Bashir, Pre-Trial Chamber I, 12 December 2011 (ICC-02/05-01/09)

³⁷ Decision Pursuant to Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, the Prosecutor vs. Al Bashir, Pre-Trial I, 13 December 2011 (ICC-02/05-01/09); and Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, The Prosecutor vs. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, 9 April 2014 (ICC-02/05-01/09)

regional justice mechanisms on the basis of the principle of complementarity which gives states the primary jurisdiction to try grave crimes and play an active role in the fight against impunity³⁸; The President of the African Court on Human and People's Rights announced that the Court would request the 19th AU Summit to merge the African Court of Justice and the African Court on Human and People's Rights and give it the jurisdiction to try criminal cases. According to the President, this move will allow for Africans accused of war crimes and crimes against humanity to be tried by the African Court instead of being sent to the ICC.³⁹ Article 28A of the "Draft Protocol on the Statute of the African Court of Justice and Human Rights," (hereinafter referred to as the "Draft Protocol") seeks to give the Court the power to try persons for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression, among others.⁴⁰

Consequently, on 27 June 2014 African heads of state in Malabo, Equatorial Guinea, adopted an Amended Protocol on the Statute of the African Court of Justice and Human Rights (known as the ACJHPR Amendment).⁴¹ The ACJHPR Amendment grant the resultant court jurisdiction over international criminal law, adding to the human-rights jurisdiction it currently exercises and the general international-law jurisdiction it is expected to exercise when the 2008 ACJHR Protocol comes into effect⁴². Moreover, the amended protocol contains a provision that grants immunity from prosecution to serving African Union (AU) heads of state and other senior officials.⁴³ Therefore, African leaders have

confirmed their resolve to shield themselves from any accusation or prosecution for international crimes while in office.⁴⁴

Likewise, at the regional level, in April 2012, the EALA passed a resolution in which it requested that the East African Council of Ministers to immediately embark on the process of requesting the transfer of proceedings for the accused four suspects in respect of the 2007 Kenya Post Election violence from the ICC.⁴⁵ In the same request citing and congratulating the people of Kenya upon a successful and speedy transition from the post-election violence, they posited that the country was now able to locally resolve the matter given that the Coalition Government was largely successful and the fact that there was constitutional order.

1.2.6 African States Threaten to withdraw from ICC

One of the most serious challenges the ICC has ever faced is the States threat to withdraw from the court jurisdiction. If this current attack on it succeeds, the court's future may be in doubt. Most of the African States are concerned that in its eleven-year history, the International Criminal Court (ICC) has prosecuted only Africans. States condemned the court for discrimination and for taking advantage of Africa's weak global position.⁴⁶ The ICC has not faced a pullout threat since 2013, when a group of African member states angered over the court's announcement of charges against sitting Kenyan President

Uhuru Kenyatta called for the continent's en masse withdrawal from the body. Charges were subsequently dropped against Kenyatta, due in part to the Kenya's refusal to cooperate.⁴⁷ Suddenly facing prosecution, Kenyatta and Ruto buried their political differences and formed the Jubilee Alliance, sometimes mockingly called the Coalition of the Accused. Ominously, the alliance campaigned in part by denouncing the court, turning the charges against its leaders into a nationalist protest against interference in Kenya's affairs.⁴⁸ Kenyatta conveniently interpreted his narrow victory as a mandate to ignore the legitimate demands for justice of the victims and survivors of the 2007–2008 violence.⁴⁹ Kenya contends that the court's so-far exclusive focus on African crimes is unfair, a modern-day form of colonialism. As Kenyatta put it in a speech at the AU summit in October, the ICC "stopped being the home of justice the day it became the toy of declining imperial powers."⁵⁰

Recently, three African countries initiated a process to withdraw from the Rome Statute of the International Criminal Court.⁵⁰ **On October 18, 2016** Burundi's president signed legislation to withdraw from the International Criminal Court, the first country to do so. Burundi officially holds the ICC as a 'Western tool to target African government'.⁵¹ The ICC's inability to try heads of state/leaders of any of the P5 countries or even launch preliminary investigations against them for acts of impunity has bolstered the notion of substantial unfairness and geopolitical prejudice in the debate surrounding individual accountability. This allegation of institutional

political bias is not a new one but has gained ground in recent times with nine out of ten situations being currently investigated by the office of the prosecutor being in Africa (Mali, Cote D' Ivoire, Central African Republic, Libya, Kenya, Sudan, Uganda, Democratic Republic of Congo) while Georgia is the only country outside Africa facing such an investigation.⁵²

South Africa also announced its intention to follow suit by submitting a written notice of withdrawal to the United Nations Secretary-General. South Africa's decision to withdraw from the ICC was a first in the history of the court. South Africa justified its decision to quit the Rome Statute was due to the apparent conflict with its obligations to the African Union to grant diplomatic immunity to serving heads of states, leaders and officials. Not long after, on October 25, 2016, The Gambia, using particularly colorful language in which it referred to the ICC as "an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans," announced that it, too, was going to withdraw and, on November 10, 2016, submitted its written notice to the Secretary-General. The recent decisions by South Africa, Burundi, and Gambia to leave the International Criminal Court (ICC) set a bad precedent and has swung the exit door wide open for others to follow.⁵³

0.2.7 States' Unwillingness to Prosecute

The court can only exercise its jurisdiction when the state concerned cannot, does not, or is unwilling to prosecute the perpetrators itself. As ICC Special Prosecutor Fatou Bensouda (2012) states:⁵⁴

"Simply put, the Court

³⁸ Ibid

³⁹ See "Africa to create criminal court" (15th July 2012) Daily Monitor Newspaper

⁴⁰ See "Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights" Available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>>

⁴¹ Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes, issue paper 235, June 2012; see also Max du Plessis, A new regional International Criminal Court for Africa? South African Journal of Criminal Justice, 2, 2012, 286.

⁴² Robert Jackson, The Legal Basis for Trials of War Criminals, Temple Law Quarterly, vol. xix, 1945

⁴³ Jarinde T. Tuinstra, defending the defenders: The role of defence counsel in international criminal trials, Journal of international

Criminal Justice, 8, 2010, 463–486.

⁴⁴ Deya, D. Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes.

http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf

⁴⁵ See the East African Legislative Assembly, "Resolution of the Assembly seeking the EAC Council of Ministers to implore the International Criminal Court to transfer the case of the accused four Kenyans facing trial in respect of the aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to reinforce the treaty provisions" Available at http://www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-seeking_to_try_kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.htm

⁴⁶ Amnesty International, (2014), Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya. Available at: <https://www.amnesty.org/en/press-releases/2014/07/kenya-victims-still-seeking-justice-post-election-violence/>.

⁴⁷ Institute for Security Studies, (2015), International justice at a crossroads in Africa, Live webcast, 16 July 2015, Pretoria, South Africa

⁴⁸ Al Jazeera (2013). Kenya parliament votes to withdraw from ICC. 5 September 2013. Available at: <http://www.aljazeera.com/news/africa/2013/09/20139515027359326.html>.

⁴⁹ Mail & Guardian, (2014), African Union unites against ICC trials. 2 February 2014. Available at: <http://mg.co.za/article/2014-02-02-african-union-unites-against-icc-trials>.

⁵⁰ Josph, Abraham. "Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?" The Wire. The Wire, 1 Nov. 2016. Web. 2 Nov. 2016.

⁵¹ Josph, Abraham. "Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?" The Wire. The Wire, 1 Nov. 2016. Web. 2 Nov. 2016.

⁵² Ibid

⁵³ Josph, Abraham. "Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?" The Wire. The Wire, 1 Nov. 2016. Web. 2 Nov. 2016.

⁵⁴ Bensouda, F., (2012), Setting the record straight: The ICC's new prosecutor responds to African concerns, Office of the Prosecutor, International Criminal Court, 10 October 2012. Available at: http://www.iccpi.int/en_menus/asp/complementarity/CompletedProjects/Lists/Capacity%20Building/Attachments/22/10Oct2012ICCKeyNoteAddress.pdf.

cannot investigate if a state itself is investigating and prosecuting the same crime. In all situations referred to the Court by states themselves (Uganda, DRC, Central African Republic ...), the Office [of the Prosecutor] started investigating only after determining that there were no ongoing investigations. Even in situations referred to the Office by the UNSC (Sudan and Libya) or situations in which the Office opens investigations by [its] own motion (Kenya), the Office is obliged to first determine whether there are ongoing national proceedings before starting its own investigations.”⁵⁵

Following the 2008 post-election violence in Kenya, a Commission of Inquiry (popularly known as the Waki Commission) was established to investigate and offer recommendations to the Kenyan government.⁵⁶ The Waki Commission identified potential suspects and recommended the establishment of an independent Kenyan tribunal with international participation. In December 2008, the government accepted the Waki Commission’s findings and agreed that it would refer the situation to the ICC if the Commission’s recommendations were not implemented.⁵⁷ Because Kenya’s regular courts had a poor record of dealing with electoral violence, Kenya was asked by Annan and others to set up a special tribunal that would include international judges. However, twice a bill to create the tribunal was voted down by the Kenyan parliament.

55 Ibid

56 Wolf, T. International justice vs. public opinion?, The ICC and ethnic polarization in the 2013 Kenya election, (2013), Journal for African Elections, 12(1), 143-177

57 Wolf, T. International justice vs. public opinion?, The ICC and ethnic polarization in the 2013 Kenya election, (2013), Journal for African Elections, 12(1), 143-177

Not only Kenyatta’s allies but Ruto himself led the opposition to the bill. They must have calculated that a Kenyan special tribunal posed a greater threat than what at the time seemed the distant prospect of prosecution by the ICC.⁵⁸ Subsequently, the Kenyan Cabinet announced that it would not establish a special tribunal, but would instead convene a Truth, Justice and Reconciliation Commission (TJRC) which would not prosecute suspects but rather to oversee reforms in the judiciary, police, and other investigatory bodies that may, in turn, deal with the issue.⁵⁹

In 2008, a Kenyan commission of inquiry handed to Kofi Annan a confidential list of people behind the violence. It asked him to give the list to the ICC if the government did not establish a tribunal. When it did not, Annan reluctantly handed the list to the ICC in 2009. Kenya’s president at the time, Mwai Kibaki, encouraged him to do so and promised his government’s support⁶⁰. In 2011 the ICC, in turn, summoned six Kenyans in connection with violent acts: Kenyatta and two alleged accomplices from one side and Ruto and two alleged conspirators from the other. Therefore, the ICC intervened only after Parliament rejected the commission’s recommendation to establish a special tribunal.⁶¹

58 Ibid at note 61

59 See Mike Pflanz, “US Professor Quits Kenyan Truth Commission, Citing Lack of Confidence,” The Christian Science Monitor, October 22, 2010.

60 Wolf, T. International justice vs. public opinion?, The ICC and ethnic polarization in the 2013 Kenya election, (2013), Journal for African Elections, 12(1), 143-177

61 Kanyinga, K., & D. Okello (eds.), Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections. Nairobi: Society for International Development and Institute for Development Studies (IDS)/University of Nairobi, pp. 1-28.

1.2.8 The Issue of Selective Prosecution

The issues of selective prosecution as argued by most of African’s elite including President Museveni of Uganda in which the President is reported to have said, “The issue of ICC is something we want to discuss among ourselves as Africans, but the way it is being implemented it seems like it is only Africans committing crimes. There are people who have committed crimes but nothing has been done on them.”⁶² The President of Zimbabwe is reported to have told the UN General Assembly that the ICC has no credibility in Africa. He said:

“The Court “seems to exist only for alleged offenders of the developing world, the majority of them Africans. The leaders of the powerful Western States guilty of international crime, like Bush and Blair, are routinely given the blind eye. Such selective justice has eroded the credibility of the ICC on the African continent.”⁶³

Also, Mubarak M. Musa, the Deputy Head of Mission-Consulate General Uganda, opined that “International Criminal Court has lost its impartiality”⁶⁴ in which he argued that the ICC’s selectively against the Sudanese Government during the quest for peace and efforts of national reconciliation in Africa. Finally, President Paul Kagame of Rwanda, a country which is not a party to the Court, has portrayed the ICC as a form of “imperialism” that seeks to “undermine people from poor and African countries, and other powerless countries in terms of economic development and politics.”⁶⁵ Others allege that the

62 See, for example, “Uganda: ICC Targeting African Presidents-Museveni” (17th December 2011) The Monitor, story available at: <<http://allafrica.com/stories/printable/201112180083.html>>

63 Also see “Mugabe Slams “Blind” International Criminal Court” (23rd September 2011) The Zimbabwe Mail, available at: <http://www.thezimbabwemail.com/zimbabwe/9132-mugabe-slams-blind-international-criminal-court.html> (accessed on 24/09/2017)

64 See the Daily Monitor Newspaper (22nd June 2010)

65 AFP, “Rwanda’s Kagame says ICC Targeting Poor, African Countries,” July 31, 2008; Rwanda Radio via BBC Monitoring, “Rwandan President Dismisses ICC as Court Meant to ‘Undermine’ Africa,” August 1, 2008

Prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy.⁶⁶ The ICC’s investigations in Africa have stirred concerns over African sovereignty, in part due to the long history of foreign intervention on the continent. Therefore most of the African elite are of the view that ICC is an impediment to achieve peace and also as machinery created by western countries targeting African elites hence offers no cooperation to the ICC orders.

1.2.9 Scratch my Back, I will scratch yours

Recent events on the African continent make one sad to be African. Beginning with the African Unions’ (AU) stand against the International Criminal Court (ICC) concerning the arrest warrant issued for Omar Al-Basir. A resolution⁶⁷ was passed at the last meeting of African heads’ of states not to respect the arrest warrant and for that matter, to allow the Sudanese leader the right to traverse the length and breadth of the continent without fear of being arrested and sent to the Hague to face trial. Their reason is that, the Security Council of the United Nations (UN) treated the AU with contempt by not suspending the warrant for the one year they requested.⁶⁸ A few days, after the summit it became obvious that not all the leaders were in agreement. Botswana distanced itself from the resolution and vowed to arrest Al-Basir should he set foot on their land; Uganda did same a few days later which prevented the Sudanese leader from attending a regional summit. The impression created by this action is, so long as you’re in power, you play blind, deaf and dumb; that is see no evil, hear no evil and speak no evil

66 Oraib Al Rantawi, “A Step Forward or Backward?”, *Bitter Lemons*, 32, 6, August 14, 2008 ; also in Charles Kazooba, “African Legislators See Bias in ICC’s Workings,” June 7, 2010

67 Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at <http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf>

68 This application was made on the basis of Article 58 of the Rome Statute

against your fellow head of state. It may also be a case of you scratch my back, I scratch yours. This argument is backed by the fact that, out of the 53 countries making up the AU, not more than 10 are truly democratic. Most leaders are dictators with terrible human right records so they will protect their kind in order to safeguard their own futures. Robert Mugabe has turned a country from being a net exporter of food to become one depending on food aid, yet his colleagues see him as the voice of the voiceless. Yet, most of African leaders are more interested in receiving applause from their colleagues for standing up to western leaders than preventing their citizens from dying from hunger and starvation, as a result of war. They are keen to show bravado in the full glare of the media by daring the developed nations for speaking out against undemocratic practices but, never report, sent or prosecute them for grave violations of human rights.

The only case which was brought to the ICC by one African State against another state was the case of **Democratic Republic of the Congo versus Uganda**⁶⁹; whereupon on June 23rd 1999, The Democratic Republic of the Congo (DRC) filed an application in the ICJ instituting proceedings against the Republic of Uganda; concerning acts of armed aggression by Uganda in the territory of the DRC. The DRC said this was in violation of the UN Charter and of the Charter of the Organization of African Unity; this military action was part of Uganda's involvement in the civil war and multi-state conflict that took over the DRC between 1998 and 2003. Ugandan troops entered the DRC territory on 28 July 1998. President Kabila requested for the foreign troops to leave but they refused; *inter alia* violation of the sovereignty and territory of the DRC, along with violations of human rights and international humanitarian law.⁷⁰

The court found that Uganda did violate the international principles of non-use of force and non-intervention with its armed activities between August 1998 and June 2003. The magnitude and duration of their military intervention was a huge violation of Article 2(4) of the UN Charter. Uganda was also to be found in violation of human rights law and international humanitarian law. The Court granted the DRC's request for reparations, noting under prior precedent it is "well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act."⁷¹

1.1.10 The EACJ has no Mandate on Human Rights Violations Cases

The East African Court of Justice (EACJ)⁷² was inaugurated in 2001 following its establishment as the judicial organ of the East African Community (EAC).⁷³ The Court is divided into a First Instance Division and an Appellate Division. The jurisdiction of the EACJ, as set out in articles 23 and 27 of the Treaty, is to ensure the adherence to law in the interpretation, application of and compliance with the rules and norms of the EAC Treaty.⁷⁴ In principle, the EACJ has no mandate to hear Human Rights Cases until such time when Article 27(2)⁷⁵ will be operational zed to include Human Rights in the jurisdiction of the Court. The Court's mandate derives from the EAC Treaty. The basic role of the Court, in this integration process, is "to ensure adherence to law in the interpretation and application of and compliance with [the provisions of] this Treaty".⁷⁶ Accordingly, the Court would have no direct jurisdiction over Human Rights disputes. This was clearly

⁷¹ Democratic Republic of the Congo vs. Uganda, The International Court of Justice, No. 116 (2005)

⁷² Art. 9(1) (e) of the 1999 EAC Treaty

⁷³ John Eudes Ruhangisa, Role of the East African Court of Justice in the Realization of Customs Union and Common Market 2-3 (paper presented at the Inter-Parliamentary Relations Seminar, Burundi National Assembly, Bujumbura, Burundi, Jan. 27-31, 2010)

⁷⁴ Art. 23 of the 1999 EAC Treaty

⁷⁵ Of the 1999 EAC Treaty

⁷⁶ Ibid at Article 23(1)

elaborated in **Attorney General of Kenya versus Independent Medical Legal Unit**⁷⁷; between 2006 and 2008, over 3,000 Kenyan residents of the Mt. Elgon District were forcibly disappeared, tortured and executed by Kenyan governmental authorities. The applicants alleged that the Kenyan government's failure to take measures to prevent, investigate or punish those responsible violated several International Human Rights Conventions, the Kenyan Constitution as well as the EAC Treaty. The Appeals Chamber stated that the First Instance Division had failed to adequately address the question of jurisdiction. The Appeals Chamber affirmed the decision in *Katabazi*, on which the First Instance Division had relied, in that the lack of direct jurisdiction over human rights disputes under Article 27(2) will not prevent the Court from exercising jurisdiction over disputes under some other basis (including the rule of law, under Article 6(d)) just because they involve a human rights issue. However, the Appeals Chamber found that the First Instance Division had failed to examine or explain how this cause of action fell within one of its jurisdictional bases, particularly Kenya's infringement of State responsibility towards its citizens under Articles 5, 6, and 7.

Nonetheless, the Treaty does contain certain other provisions whose nature and, therefore, interpretation and application, fall well within the realm of democracy, good governance, accountability, social justice, rule of law, economic and civic rights, and even human rights.⁷⁸ **Attorney General of Rwanda versus Plaxeda Rugumba**⁷⁹; The applicant, the sister of Lieutenant Colonel Seveline Rugigana Ngabo, complained that the Rwandan government committed human rights violations when her brother was arrested and detained without trial. He was in custody without justification from 20 August 2010 to 28 January 2011, and no

⁷⁷ 15 March 2012, EACJ Appellate Division, Appeal No. 1 of 2011

⁷⁸ Articles 6 (d), and 7 (2) of the Treaty

⁷⁹ June 2012, EACJ Appellate Division, Appeal No. 1 of 2012

information on Lieutenant Ngabo, or any details concerning his detention, was given to his family. He had not been formally charged in court and his wife could not file for his release because her efforts in doing so have led to harassment, forcing her to go into hiding. The applicant argued that the arrest and detention of her brother without trial and Rwandan authorities' failure to investigate constitute breaches of the Community's good governance and human rights principles under Articles 6(d) and 7(2). The Appeals Chamber found that although the EACJ does not yet have jurisdiction to adjudicate disputes concerning human rights per se, Article 6(d) of the EAC Treaty and Article 6 of the African Charter allow the Court to assert jurisdiction over this claim. The fact that Lieutenant Ngabo was held without justification for five months was not in dispute, as the Rwandan government had stipulated that his detention was in accordance with Rwandan national law. However, his incommunicado detention was not transparent and thus amounted to violations of Articles 6(d) and 7(2) of the Treaty (rule of law, good governance, transparency and human rights).

Notwithstanding the afore-stated, the EACJ exemplifies a new trend in African regional human rights enforcement. Rather than serving as a tribunal to resolve trade disputes, as envisaged by its original designers, the court has evolved into one that seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law. Like its counterparts the Economic Community of West Africa Court of Justice (ECCJ) and the now suspended Southern African Development Community (SADC) Tribunal, the EACJ has become an important human rights court.

⁶⁹ The International Court of Justice, No. 116 (2005)

⁷⁰ Democratic Republic of the Congo vs. Uganda, The International Court of Justice, No. 116 (2005)

1.1.11 Failure of African States to Accept the competence of ACHPR

The African Court of Human and Peoples' Rights (ACHPR) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol) which entered into force in 2004.⁸⁰ The ACHPR has jurisdiction to consider all cases and disputes referred to it concerning the African Charter on Human and Peoples' Rights (the African Charter), the Court Protocol and any other relevant human rights instrument ratified by the state(s) concerned.⁸¹ There are 26 states parties to the Court Protocol. In certain circumstances, cases may be submitted to the ACHPR by states and African Intergovernmental Organizations.⁸² The Court Protocol allows individuals and NGOs with observer status before the Commission to complain that a state which is a party to the Court Protocol has violated the African Charter or another relevant human rights instrument which it has ratified.⁸³ However, it is important to note that this right of individual petition only applies where the state concerned has made a declaration accepting the competence of the ACHPR to receive such a complaint.⁸⁴ Therefore, the African States failure to submit declarations prevents individual applicants and other organizations, from bringing claims for human rights violations before the African Court, and thus violated the African Charter and the Protocol. At the time of writing, only five states (Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda) have made such a declaration.

In **Democratic Party vs. Secretary General of the East African Community & 4 Others**⁸⁵ at that time Rwanda, Kenya, Uganda, and Burundi failed to make individual country declarations accepting the competence of the African Court on Human and Peoples' Rights (African Court), as required by articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol). The applicant alleged that each state, after ratifying the African Charter on Human and Peoples' Rights (African Charter) and the Protocol, was obligated to submit this declaration "expeditiously." The applicant argued that the failure to submit declarations prevented the applicant, other organizations, and individuals from bringing claims for human rights violations before the African Court, and thus violated the African Charter and the Protocol. In addition, the applicant argued that EAC Treaty articles 6(d) and 7(2) that require partner states to act in accordance with the principles of good governance, and articles 126 and 130 requiring partner states to honor their international obligations, were also violated.⁸⁶

The court determined that it had jurisdiction to consider the claims for violation of the EAC Treaty, but found that there were no violations of the EAC Treaty articles. While article 130 of the EAC Treaty allows the court to mandate compliance where a state party has "failed to honor commitments made" to an international organization, it found that the delay in submitting declarations did not constitute such a failure. The court noted that article 34(b) of the Protocol does not require states to submit declarations "expeditiously" rather, they can be submitted "at any time" following ratification of the Protocol. It further held that it lacked the authority to rule on the alleged violations of the African

Charter or the Protocol, stating that the proper forum for such a claim was the African Court. The court stated that it only has authority to interpret the EAC Treaty and cannot "delve into" state party obligations created by other international instruments.

Conclusion

Many in the international community cheered when the treaty to create the ICC, the Rome Statute, was adopted in 1998 as a way to pursue some of the world's worst atrocities: genocide, war crimes and crimes against humanity. Generally speaking, the underlying need for the ICC has not changed. The world, Africa, clamored for a court to ensure that those who commit the gravest crimes such as genocide, crimes against humanity and war crimes, should not go unpunished. The likelihood of such perpetrators going unpunished is great, because they often operate in contexts where the criminal justice system has broken down, and where their prosecution and conviction under the national legal system is quite unlikely.

In Africa, the AU has the mandate to address justice and human rights on the continent. Under article 3(h) of its Constitutive Act outlines the aim of the AU to promote and protect human and people's rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments. Additionally, the provision of Article 4(h)⁸⁷ provides for the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. However, the Sirte Resolution when African leaders resolved to denounce the International Criminal Court (ICC) and refuse to take action on the Court's order and the recent Malabo

Protocol (as the ACJHPR Amendment).⁸⁸ The ACJHPR Amendment grant the resultant court jurisdiction over international criminal law, adding to the human-rights jurisdiction it currently exercises and the general international-law jurisdiction it is expected to exercise when the 2008 ACJHR Protocol comes into effect.

If it is established, this Court would have three chambers, one dealing with international crimes, one with inter-state disputes and one with human rights. The last chamber would be a limited continuation of the current African Human Rights Court, which sits in Arusha, Tanzania. Undoubtedly, the most controversial provision of the ACJHPR Amendment is Article 46A, which deals with immunities. This provision states: 'no charges shall be commenced or continued before the court against any serving AU Head of State of Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' That goes without say, African leaders have confirmed their resolve to shield themselves from any accusation or prosecution for international crimes while in office. Whatever the merits of an African-based court on criminal justice may be, it will be justifiably viewed with skepticism due to the conflict between this clause and the ICC Statute. Under article 27 of the Statute, in contrast, provides that "official capacity" as head of state or senior state official "shall in no case exempt a person from criminal responsibility". Therefore, the underlying political motivation behind the African court's expanded jurisdiction, which can be traced to unsuccessful attempts to curtail the ongoing proceedings involving the Kenyan and Sudanese presidents before 88 Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes, issue paper 235, June 2012; see also Max du Plessis, A new regional International Criminal Court for Africa? South African Journal of Criminal Justice, 2, 2012, 286.

80 See Art. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

81 Ibid at, Art. 3

82 Ibid at, Art. 5

83 Ibid at, Art. 5(3)

84 See Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

85 29 November 2013, EACJ First Instance Division, Ref. No. 2 of 2012

86 Democratic Party vs. Secretary General of the East African Community & 4 Others, 29 November 2013, EACJ First Instance Division, Ref. No. 2 of 2012

87 African Union. 2000. Constitutive Act of the African Union. Addis Ababa: African Union

the ICC, raises questions about regional leaders' genuine commitment to fighting impunity and ensuring justice for the victims of international crimes. A mass walk-out by African countries would not only see African countries lose the moral ground on international justice discourses but would be a betrayal to its people. These withdrawals are a massive blow to the many victims of especially state-sponsored violence in the continent.

It is indeed a tough time for the court. And even though a good number of African countries have expressed confidence in it, the official position by the African Union calling for alternative dispute resolution mechanisms and African mechanisms of dealing with African problems puts the future of the court in a precarious situation, and this is a huge loss for victims of the many African conflicts especially those that are state-sponsored.