INVESTIGATING PATHWAYS TO ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN AFRICA: COMPARATIVE REVIEW OF SELECTED JUSTICE MECHANISMS

Submitted in partial fulfilment of the requirements of the LLM in Human Rights and Democratisation in Africa

By

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31 October 2022

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DEDICATION

To my God, my family, and especially my mother whose unwavering blessing and support help me to successfully navigate the meanders of the experiences of life.

ACKNOWLEDGMENT

My heartfelt gratitude is destined to Dr. Mispa Roux. She has demonstrated an impressive mixture of expertise, diligence, and care in the supervision of this dissertation. She has taught me that excellence is in the rigorous application of clarity, precision, and thorough research.

I am very appreciative of the excellent supervision of Dr. Wondemagegn Tadesse. His incisive, well-thought and enlightening comments and observations have substantially contributed to the making of this work.

I am forever indebted to the Center for Human Rights of the Faculty of Law of the University of Pretoria (UP). The Center has offered me the unique opportunity to upgrade the level of my knowledge and develop the important skills of an international law researcher and expert.

Contents

ACRONYMS AND ABBREVIATIONS

ACRWC	**African Charter on the Rights and the Welfare of the Child**
ACHPR	**African Commission on Human and Peoples' Rights**
ACJ	**African Court of Justice**
ACJHPR	**African Court of Justice and Human Rights**
ACtHPR	**African Court on Human and Peoples' Rights**
ASP	**Assembly of State Parties**
AU	**African Union**
CEDAW	**Convention on the Elimination of all Forms of Discrimination against Women**
CRC	**Convention on the Rights of the Child**
EAC	**Extraordinary African Chambers within the Courts of Senegal**
ICC	**International Criminal Court**
ICTR	**International Criminal Tribunal for Rwanda**
ICTY	**International Criminal Tribunal for Rwanda**
ILC	**International Law Commission**
Malabo Protocol	**Protocol on Amendments on the Protocol on the Statute Of the African Court of Justice and Human Rights**
Maputo Protocol	**Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women**
OAU	**Organisation of the African Unity**
OTP	**Office of the Prosecutor**
RS	**Rome Statute**
SADC	**Southern African Development Community**
SCSL	**Special Court of Sierra Leone**
SCCED	**Special Criminal Court on the Events in Darfur**
UNSC	**United Nations Security Council**

TRC **Truth and Reconciliation Committee**

1. Chapter 1: INTRODUCTION

1.1. Background to the study

The contemporary history of Africa carries a legacy[1] of conflicts, violence, political upheavals, struggles for liberation, and crises[2] usually characterised by heinous crimes and mass atrocities.[3] As an illustration, in Sub-Saharan Africa alone more than 35 armed conflicts are currently being waged.[4] The growth of international and regional human rights law, the Nuremberg trials and their legacy, the outrage provoked by the victims, and the damages caused by the conflicts and violence have emphasised the need for accountability and the end of impunity on the continent.[5] There was and still is an 'urgent need in Africa to squarely confront impunity and the mass violation of human rights, as well as prevent militarily, politically and economically stronger countries from invading weaker ones.'.[6] In that line, several international criminal justice mechanisms have been activated to deter and provide accountability for gross human rights violations. Ad hoc tribunals such as the International Criminal Tribunal for Rwanda (ICTR)[7], hybrid tribunals like the Special Court for Sierra Leone (SCSL)[8] and Truth Commissions, as established in South Africa[9] have emerged as early responses of international criminal law to international crimes on the continent.

The project of the establishment of the International Criminal Court (ICC) and its realisation in July 2002 was lauded by African countries, as a promising forum to punish and deter egregious crimes on the continent and worldwide.[10] This positive stance toward the Court has been explained as the result of the trauma felt by Africans regarding the atrocities committed during slavery and colonialism, the will to prevent and address historical tragedies similar to the Genocide of Rwanda in 1994,[11] and the blowing wind of democracy and good governance in Africa in the 90s[12] incentivising States to take a strong position for human rights and accountability. The support for the establishment of the

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[1] R Manjoo and al *Criminal justice and accountability in Africa: Regional and national developments* (2022) V.

[2] African Union, Transitional Justice Policy, February 2019, https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf (accessed on 30 May 2023).

[3] O Oko 'The Challenges of International Prosecution in Africa' (2007) 31 *Fordham International Law Journal* 343.

[4] Geneva Academy of International Humanitarian Law and Human Rights 'Today's armed conflicts' 2023 https://geneva-academy.ch/galleries/today-s-armed-conflicts (accessed on 30 May 2023).

[5] Oko (n 3 as above).

[6] JM Mbaku 'Brooking Papers, Can the International Criminal Court and the African Union Repair Relations?'2013 https://www.brookings.edu/articles/can-the-international-criminal-court-and-the-african-union-repair-relations/ (accessed on 30 May 2023).

[7] United Nations International Residual Mechanisms for Criminal Tribunals 'The ICTR in Brief' https://www.ohchr.org/en/instruments-mechanisms (accessed on 30 May 2023).

[8] Statute for the Special Court for Sierra Leone https://www.jus.uio.no/english/services/library/treaties/04/4-06/sc-sierra-leone (accessed on 30 May 2023).

[9] Britannica Encyclopaedia 'The Truth and Reconciliation Commission in South Africa' 13 September 2023 https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa (accessed on 30 May 2023).

[10] CC Jalloh 'Regionalizing International Criminal Law?' (2009) 9 *FIU International Criminal Law Review* 445.

[11] Jalloh, as above.

[12] n 3, as above.

Court has been manifold. First, the Southern Africa Development Community (SADC) in September 1997 and June 1999, and later Senegal in February 1998 organized regional and continental conferences[13] to adopt common positions or views on the substantive, institutional, and operational framework of the projected Court which resulted notably in the adoption of the SADC principles and the Dakar Declaration.[14] The Dakar Declaration which integrated many points of the SADC principles was later approved in 1998 by the Council of Ministers of the then-Organization of the African Union (OUA)[15] which called the Member States to support the ratification of the Rome Statute. It is therefore not surprising that 34 of the 123 States which ratified the Rome Statute are Africans and represent the largest regional group of contracting States to the Rome Statute creating the ICC.[16] Besides, African States have referred several situations to the ICC. In 2023, on 17 situations before the ICC, 10 are related to Africa and six have been referred by African States, namely by Uganda in December 2003, Central African Republic in December 2004, and May 2014 respectively, DRC in April 2004, and Mali in July 2012.[17]

Nevertheless, these last decades, the ICC has been under strong scrutiny[18] regarding its intervention in Africa. The bitterest range of criticism has been raised by the African Union and some African States which have mainly accused the Court of selectively focusing on Africa, being a post-colonial tool of domination of Western countries in Africa, disregarding the sovereignty of African States, and jeopardizing the efforts for peace and conflict resolution on the continent.[19] This criticism gained traction with the issuance by the ICC of warrants in 2009 and 2010 against Omar Al-Bashir and later Gaddafi in 2011,[20] respectively heads of States of Sudan and Libya, following referrals from the UN Security Council while both countries didn't ratify the Rome Statute.[21] It also increased with the ICC proceedings on the 2007 to 2008 electoral violence in Kenya[22] and the opening of investigations in Burundi regarding crimes committed between 2015 and 2017.[23] Pursuant to the refusal of the United Nations Security Council (UNSC) to defer its proceedings

[13] S Maqungo 'Establishment of the International Criminal Court: SADC's Participation in the negotiations' (2000) 1 *African Security Review* 9.
[14] African Commission on Human And Peoples Rights 'Resolution Res.26(XXIV)98 on the Ratification of the Treaty on the International Criminal Court (1998), 31 October 1998 http://hrlibrary.umn.edu/africa/resolutions/rec32.html (accessed on 10 June 2023).
[15] As above.
[16] Paul Nyantula, 'What is next for Africa and the International Criminal Court', 07 December 2017, https://africacenter.org/spotlight/whats-next-africa-international-criminal-court-icc/ (Accessed on 31 May 2023).
[17] ICC 'Situations under investigations' 2023. https://www.icc-cpi.int/situations-under-investigations (accessed on 10 June 2023).
[18] Frankie Wong 'Criticism and shortcomings of the ICC' 26 September 2009 https://accessaccountability.org/index.php/2019/09/26/criticisms-and-shortcomings-of-the-icc/ (accessed on 10 June 2023).
[19] MT Tessema & M Vesper-Gräske 'FICHL Policy Brief Series No. 56 Africa, the African Union and the International Criminal Court: Irreparable Fissures?' 2016 https://www.toaep.org/pbs-pdf/56-tadesse-graeske (accessed on 10 June 2023).
[20] Tessema & Vesper-Gräske as above.
[21] Sudan Tribune, 'The UNSC refers situation in Libya to ICC, sanctions Gaddafi and aides' February 2011 https://sudantribune.com/article37758/ (accessed on 10 June 2023).
[22] Global Policy Forum 'International Criminal Court Investigations, Kenya' 2012 http://archive.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya.html (accessed on 10 June 2023).
[23] ICC 'Situation in the Republic of Burundi' 2023 https://www.icc-cpi.int/victims/situation-republic-burundi (accessed on 10 June 2023).

notably on Sudan[24] and Kenya,[25] despite requests from the African Union,[26] the latter continental organization has issued a non-binding resolution[27] calling its members to a mass withdrawal from the Rome Statute. Though sharply contested by some States including Senegal, Nigeria, and Botswana,[28] such a stance has been supported by countries like Rwanda, Kenya, Zimbabwe, South Africa, Gambia, and Burundi with only the last one effectively exiting the Rome Statute.[29] Moreover, many African countries have refused to comply with the arrest warrants issued by the ICC regarding notably Mr. Al-Bashir.[30]

Although seemingly legitimate, some points of the arguments of the AU should be assessed with carefulness. First, in countries where the AU has called for the prioritization of the peace process, for instance, Sudan, peace is still not a reality.[31] Also, for many of the cases at the centre of turmoil between the Court and the continent organization, justice is still not served to victims. In Kenya,[32] Sudan,[33] and Burundi[34] victims are still awaiting justice. Furthermore, as aforementioned, the ICC has opened investigations on different continents and included in its focus investigations on continents apart from Africa. Again in 17 situations, 7 are not related to Africa.[35] It is also interesting to mention that most cases about Africa have been referred by African States themselves. Moreover, the position of the AU is not shared either by some African States or even the citizens. As a matter of fact, Afrobarometer found that 55 % of Africans believe that African countries should not exit

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[24] UN 'Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining' 15 November 2013 https://press.un.org/en/2013/sc11176.doc.htm (accessed on 10 June 2023).
[25] Sudan Tribune 'AU appalled over UNSC failure to defer ICC cases of Sudan, Kenyan Leaders' 03 February 2014 https://sudantribune.com/article48722/ (accessed on 10 June 2023).
[26] African Union (AU), Decision on Africa's relationship with the ICC, October 2013 https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf (accessed on 10 June 2023).

[27] BBC 'African Union backs mass withdrawal from ICC' February 2017https://www.bbc.com/news/world-africa-38826073 (accessed on 10 June 2023).

[29] C de Vox 'the Politics of Departure: Africa and the International Criminal Court' November 2016 https://theglobalobservatory.org/2016/11/international-criminal-court-south-africa-burundi-gambia/ (accessed on 10 June 2023).
[30] EY Omorogbe 'The crisis of International Criminal Law in Africa: a regional regime in response?' (2019) 66, *Netherlands International Law Review* 287.

[31] The Guardian 'Monday briefing: Thousands killed, millions displaced – the conflict in Sudan, three months in' 2023 https://www.theguardian.com/world/2023/jul/17/sudan-conflict-three-months-on (accessed on 10 June 2023).
[32] Amnesty International, Kenya: Victims still seeking justice for the post-election violence, 15 July 2014, https://www.amnesty.org/en/latest/news/2014/07/kenya-victims-still-seeking-justice-post-election-violence/ (accessed on 30 June 2023).

[33] UN 'Sudan Must Deliver Long-Awaited Justice by Ending Impunity for Atrocity Crimes in Darfur, International Criminal Court Prosecutor Tells Security Council' https://press.un.org/en/2021/sc14546.doc.htm (accessed on 01 July 2023).

[34] UN 'Burundi must engage in credible and inclusive democratisation process, says UN expert' https://www.ohchr.org/en/press-releases/2022/09/burundi-must-engage-credible-and-inclusive-democratisation-process-says-un (accessed on 01 July 2023).
[35] n 12, as above.

the ICC.[36] Besides, it seems that the AU only has contentions with the ICC when the Court targets an incumbent Head of State or state officials. As an illustration, after he has been deposed, Sudan has agreed to deliver Mr. Al-Bashir to the ICC and no opposition has been raised from the AU.[37] Lastly, the ICC has shown more inclination to abide by the sovereignty of African States and respect the principle of complementarity as is the case for the 2009 Guinea Conakry stadium massacre trial.[38]

The other category of criticism is more about the efficiency of the ICC's intervention in Africa. Indeed, the credibility and the efficiency of the Court have been affected by the dropping of charges against accused persons in the situations in Kenya and the Republic of Central Africa, mostly due to the lack of evidence presented by the prosecution.[39] This comes along with a low conviction rate and the fact that the budget of the ICC doesn't allow the Court to address all the situations that will fall within the scope of its jurisdiction.[40] With more than 35 armed conflicts in Sub-Saharan Africa, it is unthinkable that the ICC will be able to address all the international crimes that arose and will arise from these situations. It may also be added that the ICC seems to focus on prosecution and trials while the contexts from which situations covered by the Court arose, especially in Africa, present great complexities and require more than a trial, condemnation of the accused, and compensation for victims. For instance, conflicts and violence in Africa are among others hinged on ethnic-based clashes (Ethiopia), state and nation-building failure (Mali). They are sometimes mixed in other words international and non-international armed conflicts may be occurring in the same country present international and non-international dimensions like in CAR. are prolonged because of economic and geopolitical interests (Democratic Republic of Congo/DRC). These conflicts also entail sexual and gender-based violence and have a serious impact on vulnerable groups.[41] Furthermore, the ICC is sometimes perceived as a distant Court that cannot necessarily understand the complex realities of the situations and provide relief to victims, beyond prosecution and reparations

[36] Afrobarometer, Support for the International Criminal Court in Africa: Evidence from Kenya, August 2015 https://www.afrobarometer.org/wpcontent/uploads/migrated/files/publications/Policy%20papers/ab_r6_policypaperno23_kenya_anti_corruption.pdf (accessed on 01 July 2023).

[37] L Chuttel 'Will Sudan Send Bashir to The Hague?' August 2018 https://foreignpolicy.com/2021/08/18/sudan-bashir-icc-hague-justice-darfur-hemeti/ (accessed on 02 July 2023).

[38] Memorandum of understanding between the Republic of Guinea Conakry and the Office of the Prosecutor of the International Criminal Court, 28 September 2023 https://www.icc-cpi.int/sites/default/files/2022-09/2022-09-29-mou-icc-guinea-ns-eng.pdf (accessed on on 02 July 2023).

[39] n 13, as above.

[40] As above.

[41] n 25, as above.

as it was expressed, for example, after the sentencing of Dominique Ongwen, regarding the situation in Uganda.[42]

These points, far from being a death sentence on the ICC, should constitute an incentive and a strong signal to rethink the justice delivery model and approach so far deployed, considering the context of Africa and the lived realities of the victims and populations.

In this regard, Africa has explored complementary and alternative justice options to the ICC. To begin with, some hybrid tribunals have been created. This trend is exemplified by the establishment in 2013 of the Extraordinary Chambers in the Senegalese Courts (EAC) following an agreement between Senegal and the African Union covering crimes committed which occurred in Chad from 7 June 1982 to 1 December 1990.[43] It is a groundbreaking institution as it is the first internationalized court created with the leadership of the African Union.[44] It is also the result of long judicial battles that took place between the alleged victims, Belgium, and Senegal before notably the Community Court of the Economic Community of West African States (ECOWAS) and the International Court of Justice (ICJ).[45] Then, in 2016 the United Nations and the CAR established the Special Criminal Court in the Central African Republic to investigate and prosecute serious human rights violations including war crimes and crimes against humanity since 01 January 2003.[46]

Some countries are also engaging in the prosecution of international crimes by domestic courts as is illustrated by the case for Guinea Conakry for the trial of the 2009 stadium massacres.[47] The DRC has established military courts to try serious crimes stemming from conflicts that shake the country since the early 1990s.[48] In 2015 the AU itself adopted the AU Model Law on Universal Jurisdiction and in 2019[49]; a Transitional Justice Policy,[50]

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[42] Halima Athumani 'Ugandan victims of Rebel Leader React to his 25 years jail sentence' 06 May 2021 https://www.voanews.com/a/africa_ugandan-victims-former-rebel-leader-react-his-25-year-jail-sentence/6205524.html (accessed on 02 July 2023).

[43] Human Rights Watch 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal (accessed on 01 July 2023).
[44] As above.

[45] Accord 'How the establishment of the Extraordinary African Chambers brought the cruel dictator of the Republic of Chad to justice.' December 2013https://www.accord.org.za/conflict-trends/the-hissene-habre-case/ (accessed on 01 July 2023).

[46] Organic law No. 15-003 on the creation, organisation and functioning of the Special Criminal Court, 2015 Central African Republic https://ihl-databases.icrc.org/en/national-practice/organic-law-no-15-003-creation-organisation-and-functioning-special-criminal (accessed on 02 August 2023)
[47] Elise Kepler, 'Guinea Stadium Massacre Trial march on', 16 February 2023, https://www.hrw.org/news/2023/02/16/guinea-stadium-massacre-trial-marches (accessed on 02 August 2023)

[48] UN 'UN-supported training aims to boost DR Congo military justice system' 19 February 2019https://news.un.org/en/story/2009/02/291682 (accessed on 02 August 2023).
[49] African Union, African Union Model National Law on Universal Jurisdiction Over National Crimes, 2012 https://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf (accessed on 02 August 2023).
[50] n 2, as above.

specifically to encourage and strengthen national capacities to provide accountability for serious crimes and pursue peace and reconciliation.

This trend is further illustrated by the adoption by African States of the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter the Malabo Protocol). The Malabo Protocol creates criminal chambers at the African Court for Human and People's Rights and institutes what has been named the "African Criminal Court"[51].

1.2. PROBLEM STATEMENT

In the pursuit of a model of justice adapted to the context of Africa and against the backdrop of the backlash of the African Union against the ICC, alternative and complementary justice mechanisms are envisaged and developed by African countries. The emergence and comeback of these justice mechanisms show the need or at least provide the occasion to rethink international criminal justice in Africa, in light of the complex and particular realities of the continent as well as the requirements of international norms.

This study seeks to verify if the justice mechanisms including the ICC constitute reliable and effective models of justice for the continent. This will be done against the backdrop of the manifold critiques against the ICC and the particularities of the context of Africa. It will revolve around four types of mechanisms, namely the ICC, the regional courts, the ad hoc tribunals, and the hybrid tribunals. More specifically, the regional chambers within the African Court of Justice and Human Rights will be studied as example of regional courts. The ICTR will be studied as an example of ad hoc tribunals. The EAC as a model of hybrid tribunals. The ICC will be studied as the only treaty-based permanent international criminal court.

1.3. RESEARCH QUESTIONS

The main research question is: which mechanism can effectively embody a model of international criminal justice able to respond to the issues of justice in Africa and satisfy international standards?

Sub-questions are as follows:

- What factors, including the backlash between the AU and ICC, explain the emergence or comeback of alternative and complementary justice mechanisms as a response to international crimes?

[51] Werhle, G & Vorbaum, M; African Criminal Court: A commentary of the Malabo Protocol (2017).

- Which justice mechanisms can better capture Africa-specific issues? Among other issues, are the increase of non-international armed conflicts on the continent (NIAC); the peculiarities of the conflicts in Africa, ie, the fact that they entail the recruitment of child soldiers and notably result in massive gender-based violence. Other issues may relate to the fact that most of the atrocities and gross human rights violations are caused by state failure and ethnic-based clashes geopolitical interests, and mineral resources of the country in question.
- Are the mechanisms under study sheltered from political influence which may hamper their independence?

1.4. LITERATURE REVIEW

The questions addressed by this study have been covered by significant literature. Chacha Murugu explains that the backlash finds a starting point in the indictment of African state officials mostly sitting heads of states by the ICC and some European States.[52] Mutua supports that viewpoint and underscores the hypocrisy of African heads of state who only find that the ICC is selective when targeting heads of state and state officials but support the court when it comes to other individuals they would like to get rid of.[53] After distinguishing the opinion of the AU head of state from the one of the African Public, he argues that the backlash against the ICC purports to shield from justice the wealthy and the powerful by demagoguing powerful and legitimate arguments about the inequity of international law.[54] Allwell Uwazuruike explains the phenomenon by the fact it is part of Africa's consistent journey towards regional sovereignty and argues it is not limited to international criminal law but also human rights and economy.[55] Gerhard Werle also believes that the criminal chambers created by the Malabo Protocol and national justice mechanisms are not a retrogressive step but an echo of the regionalisation of human rights issues on the continent.[56] Mbaku argues that regardless of the legitimacy of the backlash against the ICC, it is imperative for African countries to develop domestic capacities to effectively address international crimes.[57] For him, it is important for the administration of justice that accused persons be prosecuted in the communities where the crimes were committed.[58]

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[52] C Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011)9 *Journal of International Criminal Justice*, 1076.

[53] M Matua 'Africans and the ICC: Hypocrisy, Impunity, and Perversion' K Clarke, Knottnerus, & E de Volder, (eds) *Africans and the ICC: perceptions of justice*, (2016) 52.

[54] As above.

[55] Allwell Uwazuruike 'The AU's journey to an African Criminal Court: a regional perspective' (2021) 7 *Taylor and Francis Online Global Affairs* 343.

[56] n 56 as above.

[57] n 6 as above.

[58] As above.

Regarding the effectiveness of the justice mechanisms under review in this study, Schabas extensively argued that it is nearly impossible for the Court to be politicized and non-independent.[59] Schneider, taking a similar approach, nevertheless argued that though the ICC is not a post-colonial tool of the hegemony of Western states, the accusation of bias in the referral of cases by the UNSC might be justified.[60] Clark argues that the Court might be seen as a distant court that, beyond prosecution, doesn't address root causes of situations that fall in its jurisdiction.[61] Caroll praises ad hoc and hybrid tribunals as some of the most effective judicial structures to address country-specific international crimes and gross human rights violations.[62] They strengthen the domestic judiciary and peacebuilding process as well as address issues beyond justice which have been causes of the violence and conflicts at the basis of their creation.[63] The criminal chambers within the African Court of Justice and Human Rights are also considered a strong alternative to the ICC. According to Omorogbe, the Malabo Protocol proposes a list and definition of international crimes that present particularities that correspond to the context of Africa[64] The Malabo Protocol Court comes to cure deficiencies of the ICC including its jurisdictional limitations, assumptions of selective justice, few cases pursued, and addressing of regional and root causes.[65] Murungu rather considers that the creation of the Court will undermine the work of the ICC and is a breach of the Rome Statute.[66]

1.5. METHODOLOGY

Desk research will be the method used to collect the information and data necessary to complete the dissertation**.** Primary and secondary sources will be used to conduct this study. In terms of primary sources, founding documents, and decisions of the justice mechanisms as well as relevant regional and international instruments and reports will be used. Secondary sources will consist of books, journal articles, reports, theses, newspapers, and internet sources.

1.6. STRUCTURE AND OVERVIEW OF THE CHAPTERS

The first chapter gave a summary presentation of the main reasons that have justified the creation of various mechanisms to address international crimes in Africa. After underscoring the support of the AU, African states, and citizens for the project of the

[59] WA Schabbas *An Introduction to the International Criminal Court* (2017).
[60] L Schneider 'The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa?' (2020) 01 *Journal of International Criminal Law*' 90.
[61] P Clark *'Distant Justice: Impact of the International Criminal Court on African Politics'* (2018).
[62] EC Carroll "Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State" (2013) *Student Works* 90.
[63] As above
[64] Omorogbe (n 30) 287.
[65] D Mystris *An African Criminal Court: An African Union Rethinking of International Criminal Justice* (2021) 42.
[66] Murungu (n57) 1076.

establishment of the ICC, it highlighted the different criticisms the Hague-based Court has faced since its inception.

The second chapter analyses in-depth and from a legal perspective the criticism addressed against the ICC as well as the rationale behind the development of alternative and complementary justice mechanisms. The analysis focused on the criticism raised by the AU which has been the most vehement, the specificities of Africa which may require recourse to the mechanisms and the legal basis of the latter.

Chapter three assesses the four mechanisms under study on their capacities to deliver independent justice and address African specificities. The assessment was made at two levels. Four criteria have been selected on the basis of available scholarship to assess the capacity of the justice mechanisms to address African specificities. The first one is the capacity of the mechanisms to address the prevalence of NIAC on the continent. Another criterion is their ability to address the recruitment of child soldiers and sexual and gender-based violence. A third criterion is their ability to address the causes of violence, conflicts, and gross human rights violations. The last one is if they are sheltered from political influence.

Chapter four serves as a conclusion. It summarizes the findings of the comparative assessment of the justice mechanisms and formulates strategies to ensure that international criminal justice is more effective and meets its objectives in Africa.

1.7. JUSTIFICATION OF IMPORTANCE OF THE STUDY

This study is conducted in a context where alternative and complementary mechanisms to the ICC are envisaged and established by the African Union and some African states. It will give an opportunity to assess the legitimacy and legality of their creation. The study is also an occasion to verify the credibility, effectivity, and independence of the suggested and implemented justice mechanisms, on the background of African-specific realities and international standards.

1.8. CONCEPTUAL FRAMEWORK

The following core legal concepts will be used in the mini dissertation:

'International Criminal Law': William Schabas defines international criminal law as the 'body of laws, norms, and rules governing international crimes and their repression, and the rules addressing conflict and cooperation between national criminal law systems.'[67]

[67] Encyclopaedia Britannica 'International Criminal Law', August 9, 2023, https://www.britannica.com/topic/international-criminal-law accessed on 10 August 2023.

'International Criminal Justice': Jean Galbraith defines international criminal justice as 'a field of international law that calls for the prosecution of the planners and organizers of the gravest war crimes and human rights abuses.'.[68] Galbraith assigned three objectives to international criminal justice which are to 'bring perpetrators' (1); 'to create a historical record of mass atrocities' (2) and to help 'societies in transition to achieve peace and reconciliation.'[69]

'Justice mechanism': this term must be understood in the broad context of the international criminal justice mechanism. As Galbraith set them out, a justice mechanism means any mechanism established or envisaged to fulfil the three aforementioned objectives of international criminal justice. It entails that they may be legal or not, judicial, or not, and even bear hybrid components.

'The principle of complementarity': this principle in the context of international criminal law establishes that '[s]tates have the primary competence and authority to investigate and prosecute international crimes and international tribunals have a secondary jurisdiction'.[70] The first international criminal tribunals established by the international community didn't apply the principle of complementarity and held primary jurisdiction over atrocity crimes. This was so for the International Military Tribunal at Nuremberg (1945) and the International Military Tribunal for the Far East (1946), as well as for the ICTY and the ICTR in the 1990s.[71] The Rome Statute applies the principle of complementarity, as provided for in the Preamble, articles 1, 17 to 20, as well as 53.

'Universal jurisdiction': Randall defines the term as a 'legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[72] The rationale behind this principle is that 'certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'.[73] Universal jurisdiction was used by the International Military Tribunals as well as by the EAC. In 2015, the African Union adopted a Model Law on Universal Jurisdiction[74].

[68] J. Galbraith 'The Pace of International Criminal Justice' (2009) 31 Mich. J. Int'l L. 79
[69] As above.
[70] Cornell Law School Legal Institute Information 'Complementarity' 2023 https://www.law.cornell.edu/wex/complementarity Accessed on 10 August 2023.
[71] P Seils *Handbook On Complementarity An Introduction to the Role of the National Courts and the ICC in Prosecuting International Crimes* (2016) 9.
[72] K Randall 'Universal Jurisdiction under International Law' (1988) *66 Texas Law Review 785.*
[73] Princeton University Program in Law and Public Affairs 'The Princeton Principles on Universal Jurisdiction' 2001 http://hrlibrary.umn.edu/instree/princeton.html (accessed on 10 August 2023).
[74] n 45, as above.

1.9.LIMITATIONS OF THE STUDY:

This study could have benefited from interviews provided by civil society organizations, the AU, and state officials, especially because it covers the realities of African citizens as well as the rationale and the drive of the AU and African states towards the creation of justice mechanisms. Unfortunately, due to time constraints and complex procedures to obtain ethical clearances for conducting these interviews, the study will rely on desk research only.

This study also intends to undertake a comparative analysis of legal mechanisms that have different jurisdictions and mandates, some operate with an international reach, others at the regional level, and others are national mechanisms. The element of analysis may therefore apply differently depending on the jurisdiction and reach of these mechanisms.

2.1. CHAPTER 2: UNPACKING AFRICA'S DRIVE FOR NATIONAL AND REGIONAL JUSTICE MECHANISMS

The resurgence and increase of regional and national justice mechanisms alternative and complementary to the ICC have been partly explained in the introductory chapter by the backlash of the African Union against the ICC and the imperative to compensate for the limitations of the ICC in addressing African-specific realities regarding international criminal justice if there is any. This chapter will dissect these two motivations in more depth and find out to which extent they are justified.

2.1.1. Issues at the core of the deterioration of the ICC-AU relationship

There are at least five issues that have been identified as the causes of the decline in the ICC-AU relationship. The first one is the fact that the intervention of the ICC doesn't match the initial vision of the African States who participated in the drafting and negotiation process of the Rome Statute.[75] The second one is that the ICC doesn't respect the principle of complementarity embedded in its founding treaty, notably in the preamble and Articles 1, 17, and 53.[76] Another issue is that the ICC is a tool of Western domination or neocolonialism in Africa.[77] The fourth one is that the issuance of warrants by the ICC regarding among others the situations in Sudan, Kenya, and Libya violates the international customary law protecting the sitting heads of state against prosecution before domestic and international courts.[78] The last one is that the intervention of the ICC undermines the efforts of peace and conflict resolution in African countries.[79]

These five issues will be developed and explored in the following lines in order to verify their veracity or not.

2.1.1.1. The AU's initial vision of the ICC: unfulfilled promise?

The introductory chapter has highlighted the great support and participation of African States in the project of establishment of the ICC. Conferences organized by the SADC and by Senegal have resulted in declarations that have articulated the vision of some of the African States of the ICC.[80] Moreover, the African States have actively been engaged in discussions, negotiation, and drafting of the Rome Statute. African states' participation has been notable in several forums namely the UN General Assembly's Sixth Committee, the 1995 Ad Hoc Committee to Establish an ICC, the 1996–1998 Preparatory Committee to Establish an ICC, the 1998 Rome Conference, and the post-Rome Conference Preparatory

[75] L E Gissel 'A different kind of Court: Africa's Support for the International Criminal Court, 1993-2003' (2018) 3 European Journal of International Law 29.
[76] Max Duplessis 'ISS Research Monograph: The International Criminal Court that African wants' 01 August 2010 https://issafrica.org/research/monographs/the-international-criminal-court-that-africa-wants accessed on 10 August 2023.
[77] As above.
[78] As above.
[79] As above.
[80] Maqungo (n13) as above / n 14, as above.

Commission.[81] On the basis of the statements issued by the African States during these meetings and the declarations they have adopted at the regional and continent levels, it is possible to articulate some of the main points of the vision of the African States about the ICC. Line Gissel has identified, by examining these statements, the major concerns[82] forming that vision. They may be summarised in three. They revolve around the universal ratification of the Rome Statute and diverse geographical participation of the States (1), the independence of the Court (2) and complementarity of the Court with national jurisdictions (3).

2.1.1.1.1. Universal ratification of the Rome Statute and diverse geographical participation

According to Gissel, 76 % of African States participating in the aforementioned forums leading to the establishment of the ICC considered the universality of the Court to be essential, and primarily defined as the worldwide ratification of the Rome Statute as well as the substantial participation of developing countries to the debates.[83] The ICC had to enjoy the support of the largest number of States at the negotiation stage and after the establishment of the Court. Besides, the diverse geographic representation of all continents as States parties to the ICC was crucial. As of today, 123 states are parties to the Rome Statute, compared to 193 states that are members of the United Nations. These 123 countries represent 33 African countries; 28 from Latin America and Caribbean States; 19 are Asia Pacific countries; 18 from Eastern Europe and 25 from Western Europe and other regions.[84] It seems that concern has been partially satisfied considering that despite this significant ratification of the Rome Statute and the diverse geographic representation, 70 states have still not ratified the Rome Statute.

The universal or at least wider ratification of the Rome Statute may be justified in many aspects. First, it has been argued that one of the reasons why most of the cases under investigation by the ICC are in Africa is because African countries represent the largest regional group of State parties to the Rome Statute.[85] The wide ratification of the Rome Statute may help the OTP to expand its focus from Africa.

Besides, it is a matter of fairness. Larger nations and their allies, like the USA, Russia, and China which are recurrently engaged in armed conflicts and allegedly accused of war crimes are usually out of the jurisdiction of the ICC because they have not ratified the Rome Statute. For instance, 'Between the end of World War II and 2001, there were 248 armed

[81] Gissel (n76) as above.
[82] Gissel (n76) as above.
[83] As above.
[84] Gissel (n76) as above P. 735.
[85] Schneider (n60) as above.

conflicts in 153 regions across the world, among which 201 were initiated by the US.'[86] Russia is involved in armed conflict and situation of occupation in Syria, Georgia and in Moldova.[87] This is without mentioning that Russia has recognised that it is funding and maintaining[88] the Wagner Group, a private military company, that is allegedly involved in war crimes all over the world.[89]

The universal or wide ratification of the Rome Statute would show that the ICC is not just a court for politically weak countries but also for powerful States.

2.1.1.2. Independence of the Court

According to Gissel, 70% of the African participants in the drafting and negotiating process raised the question of the independence of the ICC.[90] Their concerns focused on the powers of referral and deferral of the UNSC as enshrined in Article 12(b) and, Article 16 of the Rome Statute. The issue was sharply debated considering that according to the UN Charter, a resolution of the UNSC may be barred by one of the five countries that have been granted veto power. For many States, granting the power of referral and deferral to a political organ may hamper the independence of the Court and go against the principle of separation of powers. At the same time, some States could not conceive that the UNSC regarding its role of maintaining and reestablishing peace and security would not be given at least a referral power. Certain countries have therefore suggested that the UN General Assembly should also be given the referral and deferral powers in case the UNSC is blocked by a veto. This proposal will be shared again by African states during the Assembly of State Parties meetings to no avail[91].

As it will be developed later in this study, it seems that this is one of the most objective concerns of the African States considering how the UNSC has referred to the ICC situations in Sudan and Libya while similar situations have been vetoed notably in Syria.

2.1.1.3. Complementarity of the ICC

Gissel has noted that 20 African States raised concern of the complementarity of the Court, during the debates leading to the adoption of the Rome Statute, asserting state sovereignty and primacy of national courts.[92] The ICC according to them should intervene not when the State having jurisdiction over the targeted crimes is showcasing flawed criminal and

[86] Bradley Blakenship 'War crimes committed by the US show its evil foreign policy' 26 May 2023 https://www.globaltimes.cn/page/202305/1291437.shtml accessed on 10 August 2023.
[87] Geneva Academy of International Humanitarian and Human Rights law Rulac 'Russia's involvement in Conflict' 22 October 2022 https://www.rulac.org/browse/countries/russian-federation accessed on 10 August 2023.
[88] Lieber Institute 'Putin Admits to Funding the Wagner Group: Implications for Russian State Responsibility' 30 June 2023 https://lieber.westpoint.edu/putin-admits-funding-wagner-group-implications-russias-state-responsibility/
[89] As above.
[90] Gisssel (n76) as above.
[91] CC Jalloh 'The ICC Reform Process and the Failure to Address the African State Concerns on the Sequencing of Peace with Criminal Justice Under Article 53 of the Rome Statute' (2022) 54 *N.Y.U. J. Int'l L. & Pol.* 809.
[92] Gissel (n76) as above.

political systems but rather positively failed States where it is (nearly) impossible to expect any form of accountability. Articles 1, 17 and 53 of the Rome Statute have integrated the principles of complementarity in the legal and operational framework of the Court, taking a different approach from the modern military tribunals and ad hoc tribunals. It also seems that the expectations of the African states have been considered in this sense that a case is deemed admissible unless notably the State having jurisdiction is unwilling or unable to carry out investigation and prosecution.

However, the narrative of voluntary self-referral has been questioned notably by Phil Clark.[93] According to him, field investigations and interviews with NGOs and state officials of Uganda and DRC show that the Office of the Prosecutor (OTP) invited and persuaded these countries to refer cases even if some indictments against suspects were already issued and judicial structures exist to carry out investigations and prosecutions.[94] Nevertheless, it seems that with the recent multiple signatures of memorandum of understanding by Prosecutor Khan notably with the government of Guinea Conakry, there is a will from the OTP to apply fully the letter and the spirit of Articles 17 and 53 of the Rome Statute as advocated by African States.[95]

In conclusion, some of the concerns of the African States have not been integrated in the Rome Statute and the functioning of the Court. Among others, is the granting of referral and deferral powers to the UNSC and the non-application of the principle of complementarity embedded in the Rome Statute. It is then surprising that, even though some of their major concerns were not considered according to the points selected, most of these African countries ratified the Rome Statute and still represent the largest regional bloc States parties to the founding treaty of the ICC.

2.1.2. The ICC, a post-colonial tool of the hegemony of Western States in Africa

This part is focused on the perception of selectivity and control by Western powers of the ICC as developed by the AU and some African leaders. [96] This criticism will be examined on two aspects which are a geographic and a geopolitical perspective.

From a geographic perspective, the AU and some heads of state have taken the position that the action of the ICC is focused on the continent of Africa.[97] As proof, they usually advance that for its first 15 years of existence, all the situations under investigation before

[93] P Clark *'Distant Justice: Impact of the International Criminal Court on African Politics'* (2018).
[94] As above.
[95] n 38, as above.
[96] K David 'Rwanda: Kagame Tells Why He is Against ICC Charging Bashir' 03 August 2008 https://allafrica.com/stories/200808120157.html (accessed on 01 October 2023); David Bosco 'Robert Mugabe attacks the ICC' 30 November 2010 https://foreignpolicy.com/2010/11/30/robert-mugabe-attacks-the-icc/ (accessed on 01 October 2023); Reuters 'Ethiopian leader accuses the ICC of racial bias' 27 May 2013 https://www.reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527 (accessed on 01 October 2023); n 77, as above.
[97] n 77 as above.

the ICC were located in Africa.[98] Besides, if today, 7 situations under investigation before the ICC are not located in Africa, until 2023, all the 44 people indicted by the ICC are Africans. In 2023, the ICC has issued two arrest warrants in the situation of Ukraine namely against Vladimir Putin, the president of the Federal Republic of Russia.[99] A constant question is why the ICC would wait 15 years to decentralize its actions from Africa to other continents and 23 years to indict a non-African actor, despite many recommendations from UN Organs, citizens of relevant territories, and NGOs notably for contemporary situations notably in Sri-Lanka,[100] and Syria[101] . The main reply of the support of the ICC is to assert that most African situations under investigation before the ICC are self-referrals, that African states represent the largest regional group to have ratified the Rome Statute and that there is a high prevalence of conflicts and human rights violations on the continent.[102] None of this argument seems fully convincing. It has been proved that the narrative of the voluntary African self-referrals was not verified. Besides, regarding the number of conflicts, even if Sub-Saharan Africa hosts most of the conflicts, currently 45 armed conflicts are waged in the Middle East and North Africa, 21 in Asia, seven in Europe and six in Latin America.[103] It is difficult to understand how the situations in Africa are hierarchically more important than those on other continents.

A geopolitical-oriented criticism is on the allegedly biased role of the UNSC regarding its powers of referral and deferral of situations to the ICC, under Articles 12(b) and 16 of the Rome Statute and Chapter VII of the UN Charter of 1945. The accusation of political biases comes first from the fact that three members of the UNSC i.e., China, Russia, and the USA are not parties to the Rome Statute but have been given such great powers over the ICC.

The bulk of the accusation nevertheless comes from the fact that the UNSC has referred situations regarding African non-state parties to the Rome Statute which are Libya and Sudan. The accusation of biases hinges on the fact that the UNSC refused to refer to similarly pressing situations notably in Gaza, Sri Lanka, and Syria[104] usually on the veto of one permanent member of the UNSC based on its political entanglements with a party of the conflicts from which the relevant situation emerged from.[105] The accusations also

[98] As above.
[99] International Criminal Court 'Situation in Ukraine: ICC Judges issues warrants against Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed on 01 October 2023).
[100] T Cadman 'Sri-lanka: Need for credible international investigations' 26 March 2014 https://www.aljazeera.com/opinions/2014/3/26/sri-lanka-need-for-credible-international-investigations (accessed on 01 October 2023).

[101] UN 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' 22 May 2014 https://press.un.org/en/2014/sc11407.doc.htm (accessed on 01 October 2023).
[102] CC J 'Africa and the International Criminal Court: Collision Course or Cooperation' (2012) 34 North Carolina Central Law Review 203.
[103] n 4, as above.
[104] Human Rights Watch 'UN Security Council: Address Inconsistency in ICC Referral' (2012) https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals (accessed on 04 October 2023).
[105] n 95, as above.

sprang from the fact the UNSC refused to defer situations in Libya, Sudan, and Kenya as requested by the states and the African Union in order to ensure the restoration of peace and based on the principle of complementarity.[106] At the same time, from the inception of the ICC, the UNSC has used its power of deferral to issue resolutions that grant and renew immunities to nationals of non-state parties to the Rome Statute that are part of the UN peacekeeping missions.[107] The same immunities were renewed for the soldiers of the non-states parties to the Rome Statute contributing States to the Multinational Force in Liberia,[108] regarding the conflict in Liberia, and has been also integrated in the referral's resolutions on Libya[109] and Sudan.[110]

While accusations of biases were focused on the UNSC, they have also been directed to other organs of the ICC, notably the Pre-Trial Chamber and the OTP. The typical case which supports such claims is how the situation under investigation in Afghanistan is being managed. In 2017, the OTP requested the ICC Pre-trial Chamber to approve the opening of an investigation of crimes, committed by the 'Taliban, Afghan National Security Forces, and United States military and Central Intelligence Agency (CIA) personnel as well as the members of the international armed forces',[111] in the armed conflict in the Islamic Republic of Afghanistan since 2003. The request was rejected by the Pre-trial Chamber, motivating its decision by the fact that such an investigation wouldn't serve the interests of justice, in terms of Article 53(3)(b) of the Rome Statute.[112] In the much criticised decision, which was later reversed by the Appeals Chamber,[113] the Pre-trial Chamber argued that the lack of cooperation of the State with the OTP notably hampers the prospects of success of such an investigation. After the opening of the investigation, it was deferred by the Prosecutor, according to Article 18 of the Rome Statute, at the request of the Islamic Republic of Afghanistan.[114] Later on, when the Prosecutor decided to resume the investigation and seek the permission of the Pre-trial Chamber, he announced that it would only focus on crimes committed by the Taliban and the Islamic State of Khorasan, leaving outside, the US military forces, the CIA and the members of the international armed forces, arguing

[106] As above.
[107] UN Security Council Resolutions 1422 and 1487
[108] UN Security Council Resolution 1497.
[109] UN Security Council Resolution 1970.
[110] UN Security Council Resolution 1593.

[111] International Criminal Court 'The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorization to commence an investigation into the Situation in the Islamic Republic of Afghanistan' (2017) https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation (accessed on 01 October 2023).

[112] Human Rights Watch 'In Afghanistan, the ICC Abandons the Field' (2019) https://www.hrw.org/news/2019/04/23/afghanistan-icc-abandons-field (accessed on 01 October 2023).
[113] Human Rights Watch 'ICC Greenlights Investigation in Afghanistan' 5 March 2020 https://www.hrw.org/news/2020/03/05/icc-greenlights-afghanistan-investigation (accessed on 01 October 2023).
[114] Human Rights Watch 'ICC: Afghanistan inquiry may resume' 31 October 2022 https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume (accessed on 01 October 2023).

matters of budget, gravity of the crimes and prospects of success.[115] His request was eventually granted.[116] It is also noteworthy to state that when the OTP requested the initiation of an investigation into the situation in Afghanistan and related territories, the US government issued a sanction against the prosecutor, prohibiting them from traveling to the US, even if another government has lifted the ban.[117]

It appears that this is the most relevant criticism against the ICC from the AU. Obviously, it doesn't signify that heads of State who have committed atrocities and have been indicted should be forgotten and forgiven. However, as Mutua says 'the appearance of selective, race-based justice will be difficult to avoid if the ICC does not vigorously pursue egregious offenders elsewhere.'.[118] it seems important to highlight the world vigorously which means that the focus of the ICC must be truly decentralized from Africa. The Court must show the same perseverance it demonstrates for situations in Africa for other similar situations on other continents. As long as the ICC doesn't show evidence of such vigour, the following observation of David Crane will remain true and supported.

> African leaders can easily manipulate popular thinking by loudly declaring that the justice being imposed (and threatening the status quo or a leader's power) is 'white man's justice, playing upon the fears of colonialism as a way of excusing the rampant corruption and impunity that is Africa, particularly West Africa.[119]

In conclusion, as Ina Schneider says, although the ICC is not a post-colonial tool for the domination of Western states on Africa, the use of powers of referral and deferral by the UNSC was guided more by geopolitical interests than the imperative of justice.[120]

2.1.3. State officials' immunities, Complementarity and the dilemma between justice and peace in Africa

Another set of criticism issued by the African Union against the ICC is that its interventions in Africa have undermined the sovereignty of states at least at three levels.[121] The ICC has undermined the principle of complementarity by not respecting the principle of complementarity. The indictment of heads of State in Africa was also considered as a violation of the immunities of serving heads of state. Last, the intervention of the ICC is a

[115] A Deutch and S Van den Berg 'War Crimes Prosecutor would not focus on U.S. Forces in new Afghanistan Probe' 27 September 2021. https://www.reuters.com/world/asia-pacific/icc-prosecutor-seeks-authorisation-resume-afghanistan-war-crimes-investigation-2021-09-27/ (accessed on 01 October 2023).
[116] AP "ICC judges approve request to reopen Afghanistan probe' 31 October 2022 https://apnews.com/article/afghanistan-crime-war-crimes-taliban-international-criminal-court-570bfa1f57f912f5ac49df2c1f301144 (accessed on 01 October 2023).
[117] S Caine 'US Sanctions ICC staff Probing War Crimes in Afghanistan' 11 June 2020 https://www.voanews.com/a/episode_us-sanctions-icc-staff-probing-alleged-war-crimes-afghanistan-4320756/6110603.html (accessed on 01 October 2023).
[118] Mutua (n53) as above.
[119] DM Crane 'White Man's Justice: Applying International Justice after Regional Third World Conflicts' (2005-2006) 27 *Cardozo L. Rev.* 1683
[120] Schneider (n 60) as above.
[121] n 77, as above.

challenge to the national and continental efforts to pursue and achieve peace. During the meetings of the Assemblies of State Parties, African states have regularly raised these complaints and suggested reforms that were not welcome and implemented.[122] All these three issues will be analysed in the following lines.

2.1.3.1. The allegation of non-respect of the principle of complementarity by the ICC

The Rome Statute entrenches the principle of complementarity in its preamble, and articles 1, 17, and 53. It provides among others that a case is inadmissible and falls under the primary jurisdiction of the relevant State except if the former is 'unwilling or unable genuinely to carry out the investigation or prosecution.'[123]. One of the criticisms against the ICC regarding the principle of complementarity is the *sensu lato* interpretation of the criteria of admissibility of a case. It may be illustrated by two decisions. In *Prosecutor v Dyilo*, the Pre-Trial Chamber decided that for a case to be 'inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court'. [124] The Chamber pursued to observe that:

> that the warrants of arrest issued by the competent DRC authorities against Mr Thomas Lubanga Dyilo contain no reference to his alleged criminal responsibility for the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003.[125]

As Benson Olugbo explains, an application of positive complementarity from the ICC would have consisted in encouraging the military courts to include that specific criminalised conduct in the list of charges, which was not done.[126]

In *Prosecutor v Katanga and Chui*,[127] regarding the situation in the DRC the Appeals Chamber of the ICC has supported this jurisprudential creation of a third criterion. In that case, the Appeals Chamber held that:

> It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.[128]

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[122] CC Jalloh 'The ICC Reform Process and the Failure to Address the African State Concerns on the Sequencing of Peace with Criminal Justice Under Article 53 of the Rome Statute' (2022) 54 *N.Y.U. J. Int'l L. & Pol.* 809.
[123] Article 17(a) of the Rome Statute.
[124] Prosecutor v Dyilo ICC-01/04-01/06 Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, Para 37.
[125] As above, Para 38.
[126] B Olugbo 'Positive Complementarity and the fight against Impunity in Africa' in C Murungu and J Biegon ' *Prosecuting International Crimes in Africa* (2011) 249.
[127] Prosecutor v Katanga and Chui ICC-01/04-01/07 OA 8 Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, Para 78.
[128] As above, para 80.

According to the Chambers, the case was admissible 'as Congolese courts had not filed any charges against Katanga relating to the Bogoro massacre of February 2003.'[129]

The situation in North Uganda may also serve as a good example of a missed opportunity to apply positive complementarity. The ICC could have encouraged and supported Uganda to establish and reinforce judicial structures and capacities to prosecute the LRA leaders as well as members of the army which committed serious crimes during the conflict. However, the ICC convinced Uganda to refer the case to the Court.[130] This referral was notably met with resistance from the Atcholi people and community which form a substantial part of the victims of the Lord Resistance Army (LRA), whose leaders were surrendered to the ICC.[131] According to this community, the ICC's intervention didn't match the retributive and reconciliatory justice that was embedded in the practices of the community.[132] As well, this community felt that government military forces should also be held accountable because of the crimes they committed their failure to protect the civilians against the atrocities committed by the LRA.[133]

On the other hand, some African countries have used the principle of complementarity to delay or stop the action of the ICC. This is notably the case of Sudan which created the Special Criminal Courts on the Events in Darfur (SCCED) in 2005 to cover and try serious crimes committed in the region since early 2003. Not only did cases brought before the Court not reflect the reality of the international crimes that took place in Darfur, but at the same time it seems that the Court was used by the Sudanese government to circumvent its responsibilities regarding international law.[134]

2.1.3.2. The question of the relevance or irrelevance of the immunities of serving heads of state before the ICC, notably in the situations in Sudan.

The AU has taken the position that the warrants of the ICC against the sitting heads of states in Africa undermines the sovereignty of the States and violates customary international law.[135] The criticism was even harsher regarding the issuance of a warrant against Al Bashir as a national of a non-state party of the Rome Statute within a situation referred to the ICC by the UNSC.

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[129] As above.
[130] Clark (n78) as above.
[131] Shubhangi Agarwalla 'ICC, Complementarity and Africa' 10 November 2019 https://internationallawandtheglobalsouth.com/icc-complementarity-and-africa/ (accessed 02 October 2023).

[133] As above.
[134] Human Rights Watch 'Lack of conviction, the Special Criminal Court on the Events in Darfur: A human Rights Watch Briefing Paper' June 2006 https://www.hrw.org/legacy/backgrounder/ij/sudan0606/sudan0606.pdf (accessed on 02 October 2023).
[135] n 77, as above.

Regarding state officials, international law recognizes two kinds of immunities, personal (*ratione personae*) and functional (*ratione materiae*) immunities.[136] Personal immunities are attached to *any* private and official acts carried out by certain categories of senior government officials for the entire duration that they hold office, and it is an absolute immunity.[137] Functional immunities are also granted to such officials, but is only attached to official and governmental acts performed *whilst* they are in office. Personal immunities are absolute and applicable to any type of act performed.[138] Personal immunities cease when the senior government officials vacate their office but immunities ratione materiae remain and attach to the officials acts they have performed while in function.[139] The contentions of the AU are related to incumbent heads of state, therefore immunities *ratione personae*.

It is undisputed that personal immunities constitute a bar against prosecutions before domestic courts[140] as it has been confirmed the ICJ in the *Arrest Warrant case* judgement. [141] The situation is different when it comes to international criminal courts. Immunities ratione personae have been deemed irrelevant before these courts. First, by constitutive statutes of the International Military Tribunal of Nuremberg in Article 7, the ICTR in Article 6(2), the ICTY in Article 7(2), and the SCSL in Article 6(2) which established that immunities of former state officials are not a bar for prosecution and a ground for mitigation of sentences under their jurisdiction. Besides, there have been precedents of heads of states indicted by international criminal courts. It is notably the case of Slobodan Milosevic, president of the Federal Republic of Yugoslavia (FRY) indicted by the ICTY.[142] However, it should be underscored that neither the FRY nor Milosevic never invoked personal immunities as bar to the jurisdiction of the ICTY.[143] Another precedent is the indictment and the issuance of an arrest warrant against Charles Taylor while he was still president of Liberia by the SCSL.[144] Again, when Taylor appeared before and challenged the jurisdiction of the SCSL, he had resigned as a president and therefore didn't enjoy immunities ratione personae but rather immunities ratione materiae. Besides, Nigeria where Taylor was finding haven after his resignation, only accepted to surrender the former

[136] C Murungu 'Immunities of State officials and Prosecution of International Crimes in Africa' in C Murungu and J Biegon ' *Prosecuting International Crimes in Africa* (2011) 33.
[137] AS Galand 'UN Security Referrals to the International Criminal Court: Legal Nature, Effects and Limits' (2019) 153.
[138] As above.
[139] As above.
[140] D. Akande, 'International Law Immunities and the International Criminal Court, (2004) 98 *American Journal of International Law* 407, 409
[141] Arrest Warrant Case Democratic Republic of Congo v Belgium (17 October 2000) (2002) ICJ Reports 2002.
[142] Prosecutor v. Milosevic et *al,* Case IT-99-37-I, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999.
[143] P Gaeta & P Labudah 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases' in CC Jalloh & I Bantekas (eds) The International Criminal Court and Africa (2018) 151.
[144] Human Rights Watch 'Charles Taylor: Q&A on the case of The Prosecutor v Charles Gankay Taylor at the Special Court of Sierra Leone' 16 April 2012 https://www.hrw.org/news/2012/04/16/charles-taylor-qa-case-prosecutor-v-charles-ghankay-taylor-special-court-sierra (accessed on 10 August 2023).

president after the formal request of Liberia through President Ellen Johnson-Sirleaf.[145] However, it is noteworthy to say that The SCSL rejected the challenge on the basis that although it was not created by a treaty and not by a resolution of the UNSC as it was done for the ICTY and the ICTR, it is an international tribunal.[146] Its establishment was the result of the powers of the UNSC under Articles 39 and 41 of the UN Charter to initiate the establishment of such a tribunal. Relying, therefore, on the ICJ's Arrest Warrant Case decision, the SCSL concluded that as an international tribunal, the immunities of Mr. Taylor didn't stand before it.[147]

Another fact which should be considered is the judgement of the ICJ in in the *Arrest Warrant Case* in which the Court held that although incumbents and former state officials except in some specific cases enjoy immunities before foreign domestic tribunals, they lose such privileges before 'certain international tribunals when they have jurisdiction'.[148] In its obiter dictum, the ICJ as a matter of examples cited the ICTR and ICTY, created by the UNSC and the ICC, treaty-based jurisdiction, as courts and tribunals before which immunities do not stand. The ICJ mentioned article 27 of the Rome Statute as an example of provision which makes irrelevant state officials' immunities before international criminal courts.[149]

The matter would have been simple if the arrest warrant against Al Bashir was the one against a national of a state party to the Rome Statute. In which case, article 27 would have settled the issue.[150] A difficulty arose with respect to the fact that Al Bashir was a head of State of a non-state party to the Rome Statute and that the situation in Darfur was referred by the UNSC to the ICC. On this basis, another article of the Rome Statute becomes relevant regarding the cooperation of states parties to the Rome Statute with the ICC in the arrest and surrender of Al Bashir. Indeed, Article 98(1) of the Statute provides that the ICC will not compel a state to proceed with a request to surrender an alleged criminal if the State must act inconsistently with its obligations under international law regarding state and diplomatic immunity unless such immunity has been waived by the third state. Article 98(1) according to many commentators mean that the ICC may not oblige a sending or requested state to arrest a national of a non-state party to the Rome Statute if such national is protected by immunities under international law, unless, the State of that national has

[145] As above.
[146] ICRC 'Sierra Leone, Special Court Ruling on Immunities of Taylor' (2004) https://casebook.icrc.org/case-study/sierra-leone-special-court-ruling-immunity-taylor c (03 october 2004).
[147] As above.
[148] n 133, as above, para 61.
[149] As above.
[150] Dapo Akande, The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities, (2009) 7 *J. INT'l CRIM. Just.* 333.

waived the immunity.[151] Besides, the wording of the article seems to state that it is up to the ICC to obtain that waiver and not to compel the States parties to arrest the national in question.[152]

It is on the basis of the interpretation that article that the AU and several states have refused to arrest and surrender Al Bashir while he was travelling to several African states despite the ICC's arrest warrant.[153] African states have relied on the decision of non-cooperation of the AU with the ICC and the immunities of heads of states under customary international law to refuse to arrest Al Bashir while visiting their territories.[154] For instance, South Africa has taken the decision to withdraw from the Rome Statute[155] and refused to arrest Al Bashir while he was attending an AU event hosted by South Africa. The matter was brought before domestic courts of South Africa.[156] There, the Government argued[157] that to be able to host the event, South Africa had to enter an agreement with the AU relating to the material and technical organization of the meetings, hereafter, 'the host agreement'. Article VIII of the host agreement requires South Africa to grant immunities and privileges to 'the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations attending the Meetings', in conformity with the General Convention on the Privileges and Immunities of the Organisation of African Unity hereafter 'the OAU Convention'. The government further argued that these provisions are in conformity with the Vienna Convention on Diplomatic Relations, 1961 hereafter 'the Vienna Convention', and its domestication by South Africa notably the Diplomatic Immunities and Privileges Act 37 of 2001 hereafter the 'Immunities Act'. Besides, the Immunity Act grants discretionary power to the minister of foreign affairs to grant immunities, in accordance with international agreements. Furthermore, Al Bashir enjoyed immunities ratione personae under customary international law as attested by the Immunity Act. The High Court of Pretoria[158] later supported by the Supreme Court of Appeal of South Africa[159] dismissed these claims. According to High Court, South Africa has not ratified the OAU Convention which is therefore not binding on the country.[160] Besides, the Host Agreement only grants immunities and privileges to AU staff members and not head of States. Furthermore, and more importantly, South Africa has ratified and

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[151] Gaeta & Labudah (n143) as above.
[152] As above.
[153] Dire Tladi, The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98, (2013) 11 J. INT'l CRIM. Just. 202 & 203.
[154] As above.
[155] Al Jazeera 'ICC: south Africa broke rules by failing to arrest Bashir' 6 July 2017 https://www.aljazeera.com/news/2017/7/6/icc-s-africa-broke-rules-by-failing-to-arrest-bashir (accessed on 10 August 2023).
[156] *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* 2016 (1) SACR 161 (GP).
[157] As above.
[158] As above.
[159] *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* 2016 ZASCA 17.
[160] N 156, as above, para 28.

incorporated the Rome Statute through the Implementation Act.[161] The Implementation Act obligates South Africa to prosecute customary international law crimes and cooperate with the ICC notably to implement requests for arrest and surrender of any accused according to Article 89 of the Rome Statute.[162] The Implementation Act confirms that the legislature of South Africa never intended to confer blanket immunities to AU staff and bodies representatives as it has been moreover attested by the non-ratification of the OAU Convention.[163] In addition to that, the Implementation Act enjoys pre-eminence of the Immunity Act in the South African constitutional order.[164] Therefore, the government has violated the constitution and its international obligations by not arresting and surrendering to the ICC, Al Bashir while he was participating to the AU-event hosted by South Africa in June 2015.[165]

The South Africa supreme Court of Appeal upheld[166] the judgement of the high Court holding that the Implementation Act has removed the immunity of heads of State regarding customary international law crimes and that the Implementation Act never intended to grant immunities for such crimes.[167]

Regarding the stance of the ICC, the Court has provided different and inconsistent positions on the interpretation of Articles 27 and 98(1) of its statute. Indeed, the Pre-trial Chambers on their different findings of non-compliance of African countries regarding the arrest warrant against Mr. Bashir didn't adopt the same logic or reasoning. About the non-compliance findings on Malawi and Chad for instance, the Chamber held that the position of head of states doesn't have any effect on its jurisdiction as an international criminal court and that international law doesn't afford immunities to heads of the states before international courts.[168] The Chamber to substantiate its arguments cited the Commission on the Responsibility of Authors of the First World War, the Nuremberg and Tokyo Tribunals, the ICTY, the ICTR and the ICJ in the Arrest Warrant case.[169] So far the reasoning of the Court is persuasive and supported by the precedents it has mentioned. The controversy started when the Chamber added that: 'the unavailability of immunities with respect to prosecutions by international courts *applies to any act of cooperation by states which forms an integral part of those prosecutions*'.[170]

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[161] As above, para 10.
[162] As above.
[163] As above, para 28.
[164] As above.
[165] As above.
[166] N 159, as above.
[167] As above.
[168] Prosecutor v. Al-Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr (Dec. 15, 2011), paras 33 to 36.
[169] n 134; 135 & 136, as above.
[170] n 145, as above, para 44.

Here the Chamber first totally ignores Article 98(1) and its implications and second 'it conflates its adjudicatory jurisdiction with the immunities related to the arrest and surrender of heads states'[171] and even in this case of a head of state not party to the Rome Statute. The Chamber seemed to say that as soon as the ICC could assert jurisdiction over Al Bashir, its immunities have also vanished. To accept such a stance simply means that Article 98 is meaningless and against the basic rule of treaty interpretation.[172]

Other reasonings came from the Pre-Trial Chambers' decisions on the failure of DRC[173] and South Africa[174] to arrest Al Bashir. On the decision regarding DRC, the Chamber held that:

> Al-Bashir, the head of State of Sudan, a non-party State, did not enjoy immunity under international law, because that immunity had been implicitly waived by the Security Council, which had also imposed on the Sudan a general obligation to cooperate with the Court when it referred the situation in Darfur to the ICC.[175]

In its decision on South Africa, the Chamber held that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute.'[176] The Chamber held that 'when the SC refers a situation to the ICC it makes the Court's legal regime applicable to the referred State, even if the latter is not a party to the Rome Statute.'.[177]

These reasonings have been supported by Dapo Akande as persuasive and settling the issues of conflicting norms or obligations under international law raised by article 98(1) of the Rome Statute.[178] According to him, the UNSC resolution referring the situation in Darfur to the ICC under Article 103 of the UN Charter has precedence on other obligations under international law obligations arising from the UN Charter which in this case arise from the SC referral under Chapter VII of the UN Charter.[179] Sudan as a member of the UN and submitted to the powers granted by the UN Charter had the obligation to cooperate with the ICC as stated in the SC referral resolution and cannot in that sense raised any immunity arising from a treaty or agreement contrary to the SC referral resolution.[180] Other voices notably Paola Geta and Patrick Labuda found that position not convincing.[181] According to them, such a stance contradicts the text of the Article 98(1) here debated

[171] Gaeta & Labudah (n 143) as above.
[172] As above.
[173] Prosecutor v Al Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09, (09 April 2014).
[174] Prosecutor v 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, (06 July 2017).
[175] n 102, as above, para 29.
[176] n 103, as above, para 88.
[177] Galand (n 130) as above.
[178] Akande (n 140) as above P. 346.
[179] As above.
[180] As above.
[181] Gaeta & Labudah (n143 as above).

which requires the third state party here Sudan to waive the immunities not the UNSC. Besides, nothing in the UNSC Resolution, Resolution 1953 is related to immunities but rather cooperation with the ICC.[182] Furthermore, such a stance would give powers to the UNSC that the Rome Statute has said nothing about. The Rome Statute has empowered the UNSC to assert jurisdiction even in situations where the State on the territory of which the conduct took place or the national is suspect of relevant crimes didn't ratify the statute. The Rome Statute never conferred to the UNSC the power to remove or waive immunities of nationals of third states. They have concluded that the position of the AU on immunities of heads of states regarding the arrest and the surrender of heads of states of non-states party to the ICC is correct.[183]

2.1.3.3. The action of the ICC in Africa, a barrier to the efforts of the AU to achieve and sustain peace:

The last criticism raised by the AU against the ICC is that its interventions in situations that include ongoing conflicts have seriously undermined peace efforts initiated by the continental organization and governments.[184]

Among other examples given is how in the situation of Northern Uganda, the maintenance of the ICC's warrants against the LRA's top five leaders fuelled their refusal to sign the peace agreement.[185] According to that opinion, these warrants didn't as well take in account the great support of the Acholi community as the main victims, for the reconciliation process. [186]The example of the Darfur situation is also usually mentioned. The ICC's issuance of warrants against Mr. Al Bashir and state officials has made it difficult to achieve a peace agreement.[187] Most of the military and state officials refused to engage substantially in any peace talks and were ready to stay in power as long as it takes to avoid prosecution and punishments.[188]

On the other hand, another stream of opinion has consisted in saying that prosecution of suspects of these crimes has never undermined peace processes.[189] For instance, the indictment of Milosevic as president of the FRY and Radovan Karadzic from Bosnia and Herzegovina by the ICTY never impeded but rather positively impacted the Dayton peace negotiations and agreements to end the Bosnian War.[190] Along the same line, the

[182] As above.
[183] As above.
[184] n 76 (as above).
[185] P Clark 'The International Criminal Court's Impact on Peacebuilding in Africa' in T Mcnamee and M Muyangwa (eds)*The State of Peacebuilding in Africa* (2021).
[186] As above.
[187] n 124, as above.
[188] Clark (n 163) as above.
[189] Human Rights Watch 'Selling Justice Short: Why Accountability Matters for Peace' 07 July 2009 https://www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace (04 October 2023).
[190] As above.

indictment of Charles Taylor by the SCSL weakened his influence in Liberia and helped the country to succeed in its peace process.[191] Besides, on contrary to the first opinion, it has been claimed that it is the issuance of arrest warrants against the LRA's leaders in Uganda which compelled them in part to join the peace talks.[192] Furthermore, it helped to cut the support of Sudan and created awareness on the then-ongoing conflict, and pushed the LRA to end it.[193]

This duality of the positions stem from the understanding of the interpretation of justice, particularly within the scope of international criminal law. While some have limited justice to prosecution, other positions argue that justice may include more than prosecutions and cover a wider range of mechanisms.[194]

The ICC has maintained a *stricto sensu* definition of justice, notably under the terms of its two first chief prosecutors. Ocampo stated that:

> Allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion; I call it blackmail. We cannot yield.[195]

Bensouda, his successor held similar position by arguing that 'As the I.C.C. is an independent and judicial institution, it cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council.'[196] arguing that peace negotiations and agreements should not bar prosecution and trials of perpetrators of serious crimes falling notably under the jurisdiction of the ICC.

While commentators have held that this position is not totally wrong, it fails to consider that alternative justice mechanisms that may be more adapted to the specifics of the context from which the crimes arose should be considered and that may set aside the investigation and prosecution from the ICC.[197] Examples like the truth and reconciliation

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[191] As above.

[192] N Grono & A. O'Brien 'Justice in Conflict: The ICC and Peace Processes' https://www.crisisgroup.org/africa/horn-africa/uganda/justice-conflict-icc-and-peace-processes (accessed on 04 October 2023).

[193] As above.
[194] Institute of Security Studies 'Position Paper: An expert Study on the African Union Concerns on Article 16 of the Rome Statute of the ICC' 2010 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969124 (accessed on 09 October 2023).

[195] ICC 'Building a Future on Peace and Justice, Address by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC' 24 June 2007 https://www.icc-cpi.int/news/building-future-peace-and-justice-address-mr-luis-moreno-ocampo-prosecutor-icc (accessed on 04 October 2023).

[196] Mark Kersten 'ICC Prosecutor enters the 'Peace versus Justice' Sweepstakes' 02 April 2023 https://justiceinconflict.org/2013/04/02/icc-prosecutor-enters-the-peace-versus-justice-sweepstakes/ (accessed on 09 October 2023).
[197] n 194, as above, p 21.

process as it took place in South Africa and traditional justice mechanisms like the gacaca courts have been cited as examples.[198]

The relevant provision of the Rome Statute dealing with the 'peace or justice dilemma' is Articles 53 (1)(c) and 53(2)(c). Article 53(1c) states that while considering the opening of an investigation, the prosecutor should consider among other criteria if '[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'. Article 53(2)(c) states that when an investigation is open, the prosecutor may 'conclude that there is no sufficient basis for prosecution' because among other reasons:

> [a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

It must be noted that the burden of proof on the prosecutor to exercise discretion based on the interest of justice is higher when it is about the pursuance of an investigation (substantial reasons) in Article 53(2)(c) than for the initiation of an investigation (sufficient basis) in Article 53(1)(c).[199] Elements to consider while considering the interest of justice has been expanded regarding the pursuance of an investigation. They seem to be non-exhaustively cited compared to the initiation of an investigation where only two elements have been mentioned, which are the interests of the victims and the gravity of the crimes.

It may be argued that the Rome Statute sides with the interpretation that justice doesn't stop at investigation or prosecution and that investigation may be set aside if there is a sufficient basis that justice is better served through alternative mechanisms to the ICC as aforementioned.

The OTP, in its policy paper on preliminary examinations of November 2013, seems to have adopted a narrow interpretation of the interest of justice. Although it has been recognized that alternative forms of justice should be considered the OTP stated that:

> The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, 13 must be interpreted in accordance with the objects and purposes of the Statute. As indicated above, however, the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions. [200]

[198] As above.
[199] Jalloh (n 85) p. 840.
[200] International Criminal Court 'Policy Paper on the Interests of Justice' (September 2007) https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (accessed on 04 October 2023), P. 8 & 9.

It seems that even if the OPT recognizes that peace and justice are not mutually exclusive, criminal justice as implemented by the ICC would be rarely set aside for peace processes and imperative considerations.

2.2. The increasing recourse of Africa to alternative domestic and regional mechanisms to the ICC: legitimacy and legal grounds

In addition to the backlash of the AU against the ICC, other motives may explain the recourse of continental organizations and African States to alternative domestic and regional mechanisms. They are mostly linked to the imperative to create or reinforce mechanisms that will fit the African specificities and still not totally derogate from the principles of international law. This part will discuss these motives and at the same time the legality of the creation of these mechanisms, notably at the regional level.

2.2.1. 'African solutions to African problems': satisfying the dual imperative to address Africa-specific realities and comply with international norms.

The maxim 'African solutions to African problems' underscores the imperative for the AU in general and the African states specifically to take primary responsibility for the issues of the continent and ensure that solutions that are crafted are the most adequate and are not applied because of dependency to western countries or international organizations. The OAU was built on the principle of non-interference upholding at the core of its principles, the sovereignty, and the territorial integrity of its member States. The organisation's ambitions were focused on the political and territorial liberation of African states leaving very little place for the need to lead and coordinate efforts to address the issues plaguing the continent and specific African countries.[201] The replacement of the OAU by the AU marked a change of perspectives and paradigm of intervention of the continental organisation. The constitutive Act of the AU reflects that the organization is built on the ambition to address efficiently the issues of the continent.

The maxim may also suggest that the continent may face challenges whose roots and characteristics are particular to the realities of the continent and may therefore require African-specific solutions. It must be said at the outset that, even though the history of Africa carries the particular patterns[202] of protracted colonialism and slavery, main issues related to conflicts, poverty, authoritarian regimes, state failures, and underdevelopment may be found in other regions of the world, where solutions may also be found that may address them.[203] Nevertheless, the particularities of the context of Africa and the manifestations of these issues must also suggest that solutions may not just be simply

[201] Article 3 of Organization of Africa Unity Charter https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf (accessed on 06 October 2023).

[203] E Benyera 'Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States' (2018) 1 *Politeia* 37.

imported and applied but must be thought through thoroughly in order to assess if they fit the specific needs of the continent.[204]

Regarding international criminal justice, it has been argued that some specificities of Africa may need to resort to alternative or African-made forms of justice which may differ from the model of international criminal courts and tribunals that are based on individual criminal prosecution. These specificities are manifold. They stem among others from the peculiarities of conflicts and the situations from which they arise. As stated in the introductory chapter, Africa's history is regularly marred with widespread human rights violations and mass atrocities. The continent still presents the greatest number of conflicts in the world. Most of these conflicts and gross human rights violations nevertheless arise because of various and complex reasons, among which are ethnic distrust and hate, state failure, and the control of natural resources.[205] These issues are also attributed to colonial powers whose delimitation of African states' borders placed communities that have little in common together, thereby creating and exacerbating crises and conflicts.[206] Also, despite African countries' political independence, they still massively economically, culturally, and politically depend on international organizations and former metropoles whose control has resulted in state failure and the formation of nations as well as integrated regional communities in Africa. Besides, conflicts in Africa have particular features. Omorogbe cites several of them.[207] She underscores that conflicts in Africa are usually mixed, presenting international and non-international dimensions, such as the conflicts in Mozambique and the DRC. The conflicts in Ethiopia and Sudan illustrates that conflicts may last for decades and be waged or fuelled by different actors. Then, non-state actors often wage war, therefore states aren't parties to the conflicts, such as the conflicts in Somalia, the DRC, and the RCA. The conflicts in Nigeria, Mali, and Burkina Faso involve terrorist and jihadist attacks, that include the recruitment of child soldiers and the commission of mass sexual and gender-based violence. Oko also cites that Africans have more preference for restorative and community-based justice. He also points out the need for justice to address the maladies and causes of violence on the continent instead of limiting justice to prosecuting few senior civil or/and military leaders.[208]

They also stem from the particular realities of Africa. according to a study by Afrobarometer, across 36 countries, only one in eight citizens admit having had direct contact with the courts in the past five years. At the same time, 54% of those citizens declared that obtaining needed assistance from their interactions with the courts was

[204] As above.
[205] n 3, as above.
[206] As above.
[207] Omorogbe (n 30 as above).
[208] Oko (n3 as above).

difficult.[209] It may be implied for that study that access to justice and familiarity with justice mechanisms in Africa are relatively low. It may explain that Africans may not understand all the niceties and complexities of the prosecution and trials before international criminal courts and tribunals. It is not then be surprising that regarding the situation of Northern Uganda, which is the first state referral to the ICC, the Atcholi community challenged the model of justice presented by the ICC and wanted to rely on community-based and cultural mechanisms of justice for atrocities committed against them.[210]

Furthermore, international criminal justice is not the only area where efforts of regionalisation by the AU and African countries have been observed. In terms of human rights, for instance, even though African Countries have adopted most of the principal UN human rights treaties, the OAU and later the AU have adopted similar continental human rights treaties. For instance, the Convention on the Rights of the Child (CRC) equivalent is the African Charter on Rights and the Welfare of the Child (Children Charter).[211] Another example is the Convention on the Elimination of All Forms of Discrimination Towards Women (CEDAW), adapted in the African context as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the 'Maputo Protocol'.[212] The rationale behind the adoption of these human rights instruments is that they better capture and address African realities that escape the scope of the universal treaties.

Having regard to the foregoing, it seems legitimate for the AU and African states to develop complementary and alternative justice mechanisms. As mentioned before, the ICC is built on the principle of complementarity and doesn't reject the development of such mechanisms.

2.2.2. Legal grounds for the development of national and regional justice mechanisms:

In addition to the legitimacy of the development of the national and regional justice mechanisms in Africa alternative and/or complementary to the ICC, it is important to assess their legality. The mechanisms under this study comprise on the one hand international courts, ad hoc tribunals, hybrid or internationalized tribunals, the Malabo

[209] C Logan 'Ambitious SDGs confront challenging SDGs: Access to Justice is still elusive for many africans' March 2017 https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Policy%20papers/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf (accessed on 06 October 2023).
[210] n 91, as above.
[211] ACERWC 'Overview of the African Charter on the Rights and the Welfare of the Child' 2023 https://www.acerwc.africa/en/page/about-the-charter (accessed on 09 October 2023).
[212] AU 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' 2023 https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa (accessed on 07 October 2023).

Protocol Courts, and on the other hand domestic courts (for instance criminal courts and transitional justice mechanisms). This part will assess the legal powers of the AU to create international courts and of the states to initiate domestic prosecutions and transitional justice mechanisms.

Regarding the powers of the AU to create international courts, they may first come from Article 52 (1) of the UN Charter, which states:

> nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

According to the UN Charter, there is no prohibition for the creation of international or regional courts if the activities of such a court are established to pursue international peace and security and are consistent with the Purposes and Principles of the United Nations. The AU is the African continental organization established according to the African Union Constitutive Act in Article 2, which subjects the organization to the UN Charter and its principles (Article 3(e)) and the objective of promotion of peace, security, and stability on the continent. Article 5(2) also authorizes the AU Assembly of Heads of State and Government to create any organ they decide to establish.

About the legal basis of domestic prosecution of international crimes, international law consecrates a duty to prosecute[213] international law crimes, which in the present case, must be understood as crimes committed by individuals.[214]

For our study, we will limit ourselves to international law crimes listed in the Rome Statute with the understanding that they may represent the 'most classical international law crimes'.[215] They are notably the crimes of aggression, crimes of genocide, war crimes, and crimes against humanity.

There is a conventional basis for the duty to prosecute international law crimes by States. The Rome Statute for instance consecrates the principle of complementarity which recognises to the States parties the primary responsibility to prosecute international law crimes. The preamble of the ICC supports this stance by stating that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

Besides, Common Articles 49; 50; 129, and 146 to the 1949 Geneva Conventions oblige the High Contracting Parties to put an end, enact criminal legislation, and bring before their

[213] Ken Obura 'Duty to prosecute international crimes under international law' in C Murungu and J Biegon 'Prosecuting *International Crimes in Africa* (2011) 13.
[214] J Wouters 'The Obligation to Prosecute International Crimes' 2005 https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf (accessed on 07 October 2023).
[215] As above.

courts or hand over to other high contracting parties for trial perpetrators of grave breaches of the conventions. Such obligations are only effective for international armed conflicts. Common Article III of the Geneva Conventions as well as Additional Protocol II don't truly contain such obligation if not Article 5 of the latter Protocol calling for amnesties after the conflict.

Another convention is the Convention on the Prevention and the Punishment of the Crimes of Genocide of 1498. Its Articles 1 and 6 place on the States parties the obligation to prevent, punish, and ensure the trial of the crimes of genocide by a competent court or 'by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'.

This may also be true for the Convention Against Torture (CAT) of 1984 whose article 7 obliges the State Parties to prosecute or extradite alleged perpetrators. Article 5 also provides for universal jurisdiction in case the State of the territory on which the conduct took place failed to prosecute the crime of torture.

Regarding, it that duty has achieved the status of customary international law, the UN International Law Commission hereafter 'UNILC' has concluded that there are not yet solid grounds generally accepted as international customs.[216] It is then still not concluded that customary international law upholds such obligation.

Furthermore, it may be argued that jus cogens or peremptory norms of international law create erga omnes obligations which means that all States have an interest in invoking the responsibility of a State for breaching a jus cogens norm.[217] In the *Barcelona Traction Case*, the ICJ held that erga omnes obligations are the concerns of all States which have a legal interest in their legal protection.[218] The ICJ further held that jus cogens norms would have erga omnes obligations.[219] The UNILC has also found that jus cogens norms give rise to erga omnes obligations as obligations owed to the whole international community and in which all states have a legal obligation.[220] The ILC deduced such a link from decisions of the ICJ and scholarly writings.[221] The erga omnes obligations emanating from jus cogens norms may have implications for their enforcement. According to Article 48 of the ILC Articles on

[216] UN General Assembly 'Report A/CN.4/678 of the International Law Commission on the work of its sixty-sixth session Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat' 21 January 2015 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/020/20/PDF/N1502020.pdf?OpenElement (accessed on 10 October 2023).
[217] E De Wet 'Jus Cogens and Erga Omnes Obligations' in D Shelton (ed) *The Oxford handbook on International Human Rights Law* (2003) 541.

[218] Barcelona Traction, Light and Power Company, Limited Case Belgium v. Spain (5 February 1970) 1970, ICJ Report 3, para 32.
[219] As above.
[220] UN International Law Commission 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)' 2022 https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf (accessed on 10 October 2023).
[221] As above.

State Responsibility, states other than those injured may invoke the responsibility of state in breach of an obligation which is owed to the international community as whole.[222] These States may then require the cessation of the breach of the norms and that steps must be taken to ensure reparation in the interest of the beneficiaries.[223] In the case *Belgium v Senegal*, the ICJ held that all States parties to the Convention against Torture (CAT) may invoke a common interest in the compliance of the initiation of a prosecution by State on whose territory the alleged offender is found.[224]

In conclusion, this chapter has tried to analyse from a legal and practical perspectives if the contentions of the AU against the ICC were legitimate and relevant. It also aimed to verify if some specificities and other motives may justify the limitations of the intervention of the ICC and at the same time the creation of regional and national justice mechanisms to address international crimes in Africa.

It has to be said at the outset that no contention against the ICC from the AU and African states will nullify the fact that in the relevant situations under investigation and trial before the ICC, gross human rights violations and atrocities have been widely documented and linked to the accused.[225] So far, the inquiry partially results in upholding that the ICC has been highly supported by the African leaders and the ICC from the project of its establishment.[226] The relationship between the ICC and the AU turned sour when the ICC targeted sitting or incumbent heads of States.[227] To avoid prosecution, the latter have exploited certain flaws in the legal framework and intervention of the Court. Among other things, is that the powers of referral and deferral of a situation have been given to the UNSC, a political organ, which have used these powers based on geopolitical interests than the purpose of achieving justice.[228] Besides, it is flabbergasting that the ICC which is an international court whose treaty has been ratified by States on all continents, in its first two decades of existence, has indicted 44 persons who are all Africans, while similarly pressing situation exist and investigations have been opened on other continents.[229] Another flaw is that the ICC has not fully respected the principle of complementarity at the core of the Rome Statute. In the situation of DRC and Northern Uganda, it has been demonstrated that the narrative of self-referral was not verified.[230] For DRC, the country was already engaged in the prosecution of relevant criminals.[231] Regarding Northern Uganda, the

[222] De Wet (217) as above.
[223] As above.
[224] Case Questions relating *to the* Obligation *to* Prosecute *or* Extradite Belgium v. Senegal ICJ (20 July 2012) 2012, *ICJ* Reports 2012.
[225] n 31; 32; 33 & 34 as above.
[226] Jalloh (n10) as above.
[227] As above.
[228] n 104, as above.
[229] n 133, as above.
[230] Clark (n61) as above.
[231] Olugbo (n126) as above.

intervention of the ICC didn't target governmental armed forces which fail to protect the population and also committed gross human rights violations.[232] Besides, the justice offered by the ICC seem to be limited to criminal prosecution and didn't truly consider alternative forms which will satisfy the requirements of a community-based and restorative justice.[233]

These flaws have been instrumentalised by the sitting heads of state to escape justice and even if they should constitute a death sentence on the ICC must be corrected. Furthermore, the continent is in urgent need of complementary and alternative justice mechanisms to the ICC to pursue justice.[234] The whole strategy of international justice of 55 countries cannot rest upon a Court whose budget and staff only permit it to engage in few situations every year.[235] Besides, some specificities of the continents and the benefits of regionalising international criminal justice further justify the creation of the justice mechanisms.

The next chapter will try to assess the capacity of the mechanisms under study to deliver justice which match the specificities and complexities of the continent.

[232] N 131, as above.
[233] n 194, as above.
[234] n 6, as above.
[235] As above.

3 CHAPTER 3: A JUSTICE MECHANISM ABLE TO ADDRESS THE COMPLEXITIES AND SPECIFICITIES IN AFRICA.

There is a wealth of scholarship which have underscored that the African context indeed presents some distinct features compared to other continents as well as the limitations in the legal and operational architecture of the ICC to address them. As a matter of summary, Omorogbe focused on the peculiarities of the conflicts in Africa. Relevant points are that there is a prevalence of NIAC on the continent.[236] These last years, they have been on the rise.[237] Among others, she points out that conflicts usually entail the recruitment of child soldiers and result in massive sexual and gender-based violence. She also noted that many conflicts on the continent are prolonged and fuelled by the illicit exploitation of natural resources.[238] Oko on his side puts an emphasis on the necessity for criminal justice mechanisms beyond trying a few senior alleged perpetrators, and the need to address the causes of violence and atrocities on the continent, notably systemic state failure and ethnic hatred.[239] He has also pointed out that the mechanisms must incorporate or/and be complementary with some community-based and victims-focused forms of justice.[240] Mutua and Schneider have underscored how the use of the deferral and referral powers of the UNSC and the failure of the ICC to prosecute state officials have given the impression of politicization of the Court and impacted its credibility and efficiency.[241] It shows then the imperative of the justice mechanisms to be sheltered from political influence.

These issues will be discussed in this chapter not only to assess their pertinence but to find out which justice mechanisms better consider all these specificities and complexities peculiar to the African context. Before diving into these discussions, the study will make a summary presentation of the justice mechanisms under study.

3.1. Overview of the selected justice mechanisms under study

This part gives a summary presentation of the five mechanisms under study.

3.1.1. The ICC

The ICC is the first permanent treaty-based international criminal court that has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern'.[242] Its legal substantive jurisdiction covers four crimes which are the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.[243] The ICC was founded by the Rome Statute on 17 July 1998. As of today, 123 countries have ratified the

[236] Omorogbe (n30) as above.
[237] As above.
[238] As above.
[239] Oko (n3) as above.
[240] As above.
[241] Mutua (n53) as above; Schneider (n60) as above.
[242] Article 1 of the Rome Statute https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf accessed on 15 October 2023.
[243] Articles 5 to 8 of the Rome Statute.

Rome Statute. The Court became operational on 01 July 2002, after the ratification of 60 countries.[244] The Court is based in the Hague in the Netherlands.[245]

The ICC is made up of four primary organs which are the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry. [246] The Presidency is composed of three judges and is in charge of the administration of the court with the exception of the OTP.[247] The Judicial divisions are made up of 18 judges who are divided into the pre-trial division, the trial division, and the appeals divisions. 'The judges of each Division are then divided into Chambers (the Pre-trial; the Trial and the Appeal Chambers) which are responsible for conducting the proceedings of the Court on specific cases and situations at different stages of the judicial procedure.'.[248] The OTP is an independent body that oversees investigating and prosecuting crimes within the jurisdiction of the ICC. The Registrar's mandate is to support the organs of the Court on the administrative and operational plan as well as 'the Registrar's activity in relation to defence, victims, communication and security matters.'.[249]

Aside from these organs, there is the Assembly of the State Parties (ASP) which ensures the management, legislative, and oversight mandate of the Court and is constituted of States that have ratified the Rome Statute.[250] The Trust Funds for Victims (TFV) is separate from the Court and has been created by the ASP. It is mainly in charge of assisting the victims and relatives of crimes within the jurisdiction of the ICC.[251]

As of today, 31 cases have been opened before the Court with 40 arrest warrants issued by the Court, 21 persons detained at the Hague detention centre, 10 convictions, 4 acquittals, and 5 charges dropped due to their demise and 16 persons at large.[252]

3.1.2. The ICTR

The ICTR is one of the two ad hoc tribunals and was established by the UNSC through Resolution 955.[253] The ICTR was created at the request of the post-1994 genocide government of Rwanda and is empowered by its statute to

[244] The International Criminal Court 'Understanding the ICC' https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf accessed on 15 October 2023, P 10.
[245] As above.
[246] Article 34 of the RS.
[247] As above, P 17.
[248] As above.
[249] As above.
[250] As above, P10
[251] As above, P 54.
[252] Council of Foreign Relations 'The Role of the International Criminal Court' https://www.cfr.org/backgrounder/role-international-criminal-court accessed on 15 October 2023.
[253] United Nations/International Residual Mechanisms for Criminal Tribunals (IRMCT) 'The ICTR in brief' https://unictr.irmct.org/en/tribunal accessed on 15 October 2023.

> prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994'.[254]

The jurisdiction of the ICTR covers the crimes of genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[255]

The ICTR is composed of three organs that are the Chambers, the Office of the Prosecutor, and the Registry.[256] The Chambers consisting of 16 permanent judges and 9 ad litem judges adjudicate trials and motions. They are constituted of three lower chambers and an appeal chamber.[257] The Registry ensures the overall administration and management of the ICTR. The Office of the Prosecutor has been mandated to investigate and prosecute crimes under the jurisdiction of the ICTR.[258]

Its seat is in Arusha, Tanzania with offices in Kigali, Rwanda. The Appeals Chambers are headquartered in the Hague, Netherlands.[259] In 2010, the UNSC created the International Residual Mechanisms for Criminal Tribunals (IRMCT) to conclude the works initiated by the ICTR still with its office in Arusha, Kigali, and the Hague.[260]

During its existence, the ICTR indicted 93 individuals, issued 61 convictions and 14 acquittals with three individuals who were deceased before the end of the trials, and five cases were transferred to national courts in Rwanda and France.[261]

3.1.3. The Criminal Chamber of the African Court of Justice and Human Rights

In June 2014, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.[262] This Protocol creates an international criminal law section in the African Court of Justice and Human Rights and empowers it to deal with individual criminal responsibility.[263] The Court is the culmination of the adoption of different treaties which give birth to different jurisdictions. The 2000 Constitutive Act of the AU has established an African Court of Justice as the main judicial organ of the continental organization which to this day has not been operationalized.[264] In 1998, in Ouagadougou, Burkina Faso, the AU adopted the Protocol creating an African

[254] Article 1 of the Statute of the ICTR https://legal.un.org/avl/pdf/ha/ictr_EF.pdf accessed on
[255] Articles 2 to 4 of the Statute of the ICTR.
[256] As above.
[257] As above.
[258] As above.
[259] As above.
[260] As above.
[261] As above.
[262] n 55, as above.
[263] As above.
[264] Article 18 of the Constitutive Act of the African Union. https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf accessed on 15 October 2023.

Court on Human and Peoples' Rights which was established in 2004.[265] In 2005, the AU merged the African Court of Justice and the African Court of Human and Peoples' Rights to create the African Court of Justice and Human Rights which as of today exists only in the texts.[266] The aforementioned Malabo Protocol of 2014 is the latest protocol adopted by the AU. The Criminal chambers are not yet operational since the ratification of the Protocol has not reached the required 15 signatures.[267] As a matter of fact, no African country has ratified the Malabo Protocol. Only 11 countries signed it which are Benin, Chad, Comoros, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, Sao Tome and Principe, and Uganda.[268]

The Protocol empowers the Court to try persons for:

> the crimes of genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenaries, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.[269]

The Court then has jurisdiction over 14 crimes in addition to the atrocity crimes listed in the Rome Statute.

3.1.4. The EAC

The EAC was created pursuant to an agreement between the AU and Senegal.[270] According to its statute, it was empowered to try:

> the person or persons most responsible for crimes and serious violations of international law, customary international law, and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990.[271]

Its substantive legal jurisdiction covers the crimes of genocide, crimes against humanity, war crimes, and torture.[272] It is governed by its statute and the Senegalese law.[273] It is composed of three main organs: the Chambers, the Office of the Prosecutor, and the

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[265]AU 'Protocol on the Statute of the African Court of Justice and Human Rights' 2008 https://www.refworld.org/pdfid/4937f0ac2.pdf accessed on 15 October 2023.
[266]AU 'Protocol on the Statute of the African Court of Justice and Human Rights' 2008 https://www.refworld.org/pdfid/4937f0ac2.pdf accessed on 15 October 2023.
[267] Article 8 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf Accessed on 15 October 2023.
[268] Georgetown law 'The Emerging African Human Rights System' 2023 https://guides.ll.georgetown.edu/c.php?g=273364&p=6025371 accessed on 15 October 2023.
[269] Articles 28A to 28N of the Malabo Protocol.
[270] United Nations 'Agreement between the Government of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System' https://unterm.un.org/unterm2/en/view/UNHQ/66a7f28c-7de7-4f4c-927c-3495d753b9c9 (accessed on 15 October 2023.
[271] Article 4 to 8 of the Statute of the EAC https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers accessed on 15 October 2023.
[272] As above.
[273] Article 16 of the Statute of the EAC.

Registry. There are four chambers in the EAC, the investigative chamber composed of four investigative judges and four alternate judges; the indicting chamber constituted of three judges and one alternate judge; the trial chamber made up of one president, two judges, and one alternate judge and finally, the Appeals Chambers composed of two judges and two alternate judges.[274] The OTP is mandated to carry out prosecutions before the EAC.[275] The registry is composed of clerks to assist with the administrative and management works of the EAC.[276]

Hissène Habré, former president of Chad and the only accused before the Chambers, was convicted of a life sentence for war crimes, crimes against humanity, and torture including rape and life sentence.[277] The Appeals Chamber of the EAC confirmed that verdict and awarded 123 million Euros of compensation to the victims.[278]

3.2. Addressing the specificities of the African continent

With reference to the introduction, four issues will be considered below. They are the capacity of justice mechanisms to address the challenge of the increase of NIACs. Their capacity to protect children efficiently as well as to address sexual and gender-based violence will also be discussed. Another issue is their ability to address the causes of violence, conflicts, and atrocities on the continent, beyond the trial of a few perpetrators. A fourth issue is their ability to be sheltered from politicisation.

3.2.1. The imperative to address the challenge of NIACs and offer wider protection against violations.

As a matter of background, 35 non-armed conflicts are currently being waged in Sub-Saharan Africa.[279] NIACs are less regulated by international law compared to IACs because the former are traditionally 'considered as falling in the domestic domain of States'.[280] Therefore, only Common Article 3 of the 1949 Geneva Conventions primarily and cursorily regulates the NIACs. These conventions have been ratified by all African countries. The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts hereafter Additional Protocol II, an extension of the common Article 3, and focusing on the protection of civilians in NIACs, has been ratified by 51 of the 55 African States.[281] It may suggest a changing trend in the will of African States to see the NIACs being regulated and offer greater protection to civilians

[274] Article 11 of the Statute of the EAC.
[275] Article 12 of the Statute of the EAC.
[276] Article 13 of the Statute of the EAC.
[277] https://www.aljazeera.com/news/2017/4/27/court-upholds-life-sentence-of-chads-hissene-habre accessed on 16 October 2023.
[278] As above.
[279] n 4 as above.
[280] Omorogbe (n 30 as above) P 299.
[281] UN 'Status of Ratification of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II)' 2023 https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8 (accessed on 16 October 2023).

in these types of conflicts.[282] To measure the capacity of the justice mechanisms to address the challenge of the increase of NIACs, our study will verify if the definition of war crimes by their founding instrument includes those committed in the context of NIACs. It will also be measured the type of regulation on NIACs their founding instruments have included.

3.1.1.1. The ICC

The Rome Statute has given jurisdiction to the ICC over war crimes occurring in the contexts of IACs and NIACs. Specifically, to NIACs, Articles 8(2)(c) and 8(2)(e) prohibit and list as war crimes serious violations of Common Article 3 of the Geneva Conventions and the laws and customs of war application to armed conflicts of a non-international character. There is no mention of the Additional Protocol II. Besides, there are ten crimes prohibited under IACs that are not under NIACs.[283] Voices have called for the reform of the Rome Statute to harmonise the list of war crimes during IACs and NIACs, considering the recent legal developments.[284]

3.1.1.2. The ICTR

The statute of the ICTR in Article 4 gives the tribunal jurisdiction on war crimes constituted by serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II. The statute of the ICTR has therefore integrated in the subject matter jurisdiction relevant instruments to address war crimes occurring in the context of NIACs.

3.1.1.3. The Criminal Chamber of the African Court of Justice and Human Rights

The Malabo Protocol in Articles 28(D)(c) and 28(D)(e) defines war crimes as serious violations of the Common Article 3 to the Geneva Convention as well as the laws and customs of war. It doesn't mention Additional Protocol II while Additional Protocol I is mentioned in Articles 28(D)(b). However, the Malabo Protocol has added 11 acts as war crimes during the NIAC which are not found in the Rome Statute.[285] Four of them are found in Additional Protocol II, notably its articles 4 and 14. They are the despoliation of the wounded, sick, shipwrecked, or dead; the slavery and collective punishment as well the starvation of civilians as war crimes. Four of them reflect the provisions of Additional Protocol I. They are the launching of indiscriminate and non-proportional attacks, attacks on civilian objects and demilitarized zones as well as the use of civilians and other protected persons. Another one is the use of nuclear weapons and other weapons of mass destruction. It must then be noted that the Malabo Protocol has reduced the gap of war crimes

[282] Omorogbe (n30 as above) P 299.
[283] PS Nagler 'Research Brief on Harmonizing War Crimes Under the Rome Statute' March 2019 https://www.geneva-academy.ch/joomlatools-files/docman files/Harmonizing%20War%20Crimes%20Under%20The%20Rome%20Statute.pdf (accessed on 16 October 2023).
[284] As above.
[285] Omorogbe (n30 as above) P 306.

prohibited within IAC which are not during NIAC under the Rome Statute. The Malabo protocol also incorporates three acts that were originally prohibited during IAC under the Rome Statute but extended to the NIAC. They relate to 'relate to the use of weapons known to cause indiscriminate harm and unnecessary suffering'.[286]

3.1.1.4. The EAC

The EAC's statute in its article 7(2) defines war crimes notably as violations of the Common Article 3 to the Geneva Conventions and Additional Protocol II. It has adopted the same formulation used by the ICTR's founding statute.

In short, the four mechanisms have been empowered by their founding statutes to have jurisdiction over war crimes occurring in the context of NIACs. The EAC and the ICTR directly refer to the Additional Protocol II which heightens the protection afforded to the civilians. There are ten crimes prohibited by the Rome Statute during IAC which are not during NIAC. Primarily adopting the same list and formulation as the Rome Statute, the Malabo Protocol has however reduced the gap. Indeed, even if it doesn't directly mention Additional Protocol II, it includes several crimes prohibited the Protocol II.

3.2.2. Address the conscription and direct participation of children as well as sexual and gender-based violence during armed conflicts:

Conscription and use of children as well as sexual and gender-based violence in armed conflicts are not necessarily a feature particular to Africa and don't occur in every armed conflict but they are found on a larger scale on the continent.[287] Actually, Africa is considered the epicentre of child soldiers phenomenon[288] Besides, in several conflicts in Africa, armed groups have resorted to sexual and gender-based violence including abduction, rape, and enslavement of women and girls.[289]

3.2.2.1. The ICC

With respect to child soldiers, the Rome Statute in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) prohibits as war crimes respectively in the context of IACs and NIACs the conscription of children under 15 years old in national armed groups and their participation in hostilities. With respect to the aforementioned crimes, the ICC has issued a wealthy and interesting jurisprudence. The first one is the case *The Prosecutor v Dyilo*, in which on 14 March 2012, the Trial Chamber found the accused guilty of war crimes of 'enlisting and conscripting of

[286] Omorogbe (n30 as above) P 299.
[287] Omorogbe (n30) as above.
[288] PW Singer 'Brooking Papers: Child Soldiers, the New Faces of War' 2005 https://www.brookings.edu/wp-content/uploads/2016/06/singer20051215.pdf (accessed on 12 October 2023).
[289] Omorogbe (n30) as above.

children under the age of 15 years and using them to participate actively in hostilities.'.[290] Besides, on 08 July 2019, the ICC's trial chamber and then the Appeal Chamber found Bosco Ntaganda in the *Prosecutor v Ntaganda* guilty of the war crime of 'conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities.[291] In The ICC in The *Prosecutor v Ongwen* has also found Dominique Ongwen guilty of among other crimes conscription and the use of children as active combatants in armed conflict in Northern Uganda.[292]

Regarding sexual and gender-based violence, in the Rome Statute, they are prohibited as crimes against humanity under Articles 7(g);(h) &(k) and as war crimes in Articles 8(2)(a)(iii); 8(2)(b)(xxii) and 8(e)(vi). The ICC's OTP has also issued two policy papers on the subject notably on gender persecution [293] in 2014 and gender-based violence [294] in 2022 to clarify and enhance the prosecution efforts and interventions on the matter. Several judgments on sexual and gender-based violence as part of the crimes within the jurisdiction of the ICC have been issued by the Court. In the case, the Prosecutor v Ntaganda, the Appeals Chambers has found Bosco Ntaganda guilty of rape and sexual slavery of child soldiers.[295] Furthermore, in the Prosecutor v Ongwen, the ICC found Dominique Ongwen guilty of:

> on the charges of rape as crime against humanity and war crime, sexual slavery as crime against humanity and war crime, **forced pregnancy** as crime against humanity and war crime, **forced marriage** as crime against humanity, enslavement as crime against humanity, torture as crime against humanity and war crime, and outrages upon personal dignity as war crime.[296][Emphasis added].

It seems in regard to the provisions of the Rome Statute and the decisions of the ICC, that the question of child soldiers as well as sexual and gender-based violence has been addressed by the Court.

3.2.2.2. The ICTR:

[290] ICC 'Case Information Sheet: Situation in the Democratic Republic of Congo, The Prosecutor v Dyilo' July 2021 https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf (accessed on 12 October 2023).
[291] ICC 'Case Information Sheet: Situation in the Democratic Republic of Congo, The Prosecutor v Bosco Ntaganda' July 2021 https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf (accessed on 12 October 2023).
[292] ICC "Case Information Sheet: Situation in Uganda, The Prosecutor v Dominique Ongwen' July 2021 https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/OngwenEng.pdf (accessed on 12 October 2023).
[293] ICC OTP 'Policy Paper on Sexual and Gender-based crimes' June 2014 https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed on 13 October 2023).
[294] ICC OTP 'Policy Paper on Crime of Gender Persecution' 07 December 2022 https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf (accessed on 13 October 2022).
[295] n 251, as above.
[296] n 252, as above.

The founding statute of the ICTR doesn't contain any provision on the conscription of child soldiers and their participation in direct hostilities. A very surprising fact when considering that thousands of children were used as tools to commit genocide.[297]

With respect to sexual and gender-based violence, Articles 3(g) and 4(h) of the statute prohibits such acts respectively as crimes against humanity and war crimes. Besides, the ICTR has been acclaimed for issuing groundbreaking decisions on sexual and gender-based violence. The most significant[298] is the decision *Prosecutor v Akayesu*,[299] the trial chamber and later the Appeals Chamber found that rape and forced nudity have been committed as crimes against humanity and that rape was used to destroy the victims physically and mentally, and that it is proof of genocidal intent. It is noteworthy to say that the charges of rape and forced nudity were not included in the initial indictment but were included by the prosecution after witnesses testified about rape other women and girls as themselves have suffered.

The ICTR despite the great number of children involved in the genocide didn't address that issue. However, regarding sexual and gender-based violence, the tribunal has issued landmark decisions notably on the use of rape to commit genocide.

3.2.2.3. The criminal chambers of the African Court of Justice and Human Rights

The Malabo Protocol affords great protection to women, children, and vulnerable groups. For instance, in the context of armed conflicts, the Malabo Protocol in its Article 28D(b)(xxxvii) states it is a war crime to conscript or enlist children under 18 in national armed forced groups or to use them to participate actively in hostilities. Article 8(2)(e)(vii) of the Rome Statute sets the limit at 15 years old. The Malabo protocol's prohibition follows African standards notably the African Children Charter which in Article 2 defines a child as any human being under 18 years old. It also aligns with the Maputo's protocol whose article 11(4) prohibits the recruitment and participation of women under 18 years in conflict.

The Malabo Protocol in Article 28 (b)(f) also lists acts of rape and any form of sexual violence as a crime of genocide. A stance similar to Article 11(3) of the Maputo's protocol which requires State parties to consider such acts against asylum-seeking women, refugees, returnees, and internally displaced persons as genocide, war crimes, and crimes against

[297] Human Rights Watch 'Rwandan Genocide: Children Attacked' 2003 https://www.hrw.org/reports/2003/rwanda0403/rwanda0403-03.htm (accessed on 13 October 2023).
[298] KD Askin 'Gender Crimes in the ICTR Jurisprudence: Positive developments' (2005) 3 *Journal of International Criminal Justice* 4, 1007.
[299] *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-A, 2 September 1998, para 731.

humanity. It aligns as well with the jurisprudence of the ICTR, notably in its decision *Prosecutor v Akayesu*.

3.2.2.4. The EAC

The Statute of the EAC and the Chambers didn't address the question of child soldiers. However, Article 6(a) of the Statute of the EAC lists as crimes against humanity 'Rape, sexual slavery, enforced prostitution, enforced sterilization, or any other form of sexual violence of comparable gravity'. The judgment against Hissène Habré found him guilty of sexual slavery and rape as crimes against humanity.[300] These charges were not included in the initial indictment, but charges were later revised after testimonies of victims.[301]

In conclusion, only the Rome Statute and the Malabo Protocol addressed the issue of enlistment and participation of children in armed conflicts. Besides, the ICC has issued several judgements on the issue showing its ability to address it efficiently. Regarding sexual and gender-based violence, all the mechanisms under study have addressed these issues.

3.2.3. Addressing causes of violence, atrocities, and conflicts

As presented in the introduction, it is important for the justice mechanisms not to limit themselves in trying a few perpetrators but also to address the causes of the violence and atrocities which have justified their intervention. This may be done through a list of crimes within their jurisdictions that cause and fuel violence and the atrocities. It may also be done by incorporating or jointly operating with community-based forms of justice which address these issues.

3.2.3.1. Specific crimes that cause and fuel conflicts as well as gross human rights violations

Among the instruments of the mechanisms under study, only the Malabo protocol prohibits crimes that may be at the root or constitute significant components of conflicts and gross human rights violations in Africa. It is maybe the case of trafficking in persons prohibited by Article 28(J) and trafficking in drugs in Article 28(k) which constitute serious human rights issues in Africa. In 2019, it was determined that 3.7 million people in Africa are in slavery as a result of trafficking in persons with a profit of 13.1 billion USD in Africa.[302]

[300] Trial Judgement, Ministère Public c. Hissein Habré, 2006.
[301] As above.
[302] International Labour Organisation 'Conference: Combatting Human Trafficking and Forced labour in Africa-Current responses and way forward' November 2013. https://www.ilo.org/global/topics/forced-labour/events/WCMS_226730/lang--en/index.htm (accessed on 16 October 2023).

As well, in 2018, 60 million Africans were consuming drugs, a figure that may increase by 35 % by 2030 according to the United Nations Office on Drugs and Crimes (UNODC).[303] The UNODC has noted that 'piracy, terrorism funding, money laundering, extortion, kidnapping, prostitution, counterfeit products, human trafficking' are usually the result of this illegal drug trade.[304] It may also be true with terrorism prohibited by Article 28G, knowing that 1800 terrorist attacks occurred in the first semester of 2023 in West Africa. [305] It is also maybe verifiable for mercenaries criminalised in Article 28 H with countries like Libya, Mozambique, Sudan, the RCA, and Mali which have resorted to mercenaries and private security groups resulting in egregious human rights violations.[306] It may be the case for unconstitutional changes of government prohibited by Article 28(b)) with West Africa recording its eighth coup d'état since 2020, as of this date.[307]

As previously mentioned, some conflicts in Africa are fuelled and prolonged by the exploitation of resources and how they result in environmental degradation. The Malabo's Protocol lists corruption in Article 28I as a crime and there is a great link between insecurity or conflict and corruption. The RCA, the DRC, Somalia, South Sudan, and Sudan which are five of the ten least peaceful countries in Africa are considered by the Transparency International Index as part of the 30 countries with the most corrupted public sector.[308] Also, 120 billion per year is generated by the illicit trade of natural resources and constitutes a loss for Africa's economy.[309]

3.2.3.2. Complementarity with other mechanisms

The ICC's founding treaty has provided for complementarity as has been previously discussed in this paper. However, according to the provisions of the Rome Statute notably Article 1, this complementarity is linked with national criminal jurisdictions which may then include community-based forms of justice. A good example of complementarity is in the CAR where apart from the intervention of the ICC, the Truth, Justice, Reparation and Reconciliation Commission (CVJRR) has been established and is operating as a transitional

[303] Enact Observer 'Africa's drug crisis stimulated by poor policy' 24 September 2019 https://enactafrica.org/press/press-releases/africas-drugs-crisis-stimulated-by-poor-policy (accessed on 16 October 2023).
[304] n 302, as above.
[305] Al Jazeera 'Over 1,800 terrorist attacks in West Africa: ECOWAS' 2023 https://www.aljazeera.com/news/2023/7/26/over-1800-terrorist-attacks-in-west-africa-in-2023-ecowas (accessed on 16 October 2023).
[306] ISS 'Mercenary and private military security: Africa in the thin grey line' 01 December 2021 https://issafrica.org/iss-today/mercenaries-and-private-military-security-africas-thin-grey-line (accessed on 16 October 2023).
[307] Reuters 'Recent Coup d'Etats in West and Central Africa' 30 August 2023 https://www.reuters.com/world/africa/recent-coups-west-central-africa-2023-08-30/ (accessed on 16 October 2023).

[308] 500 Words magazine '2023 Global Peace Index: South Sudan Fourth Least Peaceful Country in the World' 1 July 2023 https://500wordsmag.com/sudan-news/2023-global-peace-index-south-sudan-fourth-least-peaceful-country-in-the-world/ (accessed on 16 October 2023).
[309] African Development Bank 'Illicit Trade in Natural Resources – A forthcoming report from the African report from the African Natural Resources Center' 2016 https://www.afdb.org/fileadmin/uploads/afdb/Documents/Events/IFF/Documents_IFF/ANRC_ILLICIT_TRADE_IN_NATURAL_RESOURCES.pdf (accessed on 16 October 2023).

justice mechanism.[310] The ICC may therefore jointly operate with community-based or alternative forms of justice.

Article 8 of the founding statute of the ICTR provides for concurrent jurisdiction with national courts but grants primacy of jurisdiction to the ad hoc tribunal. Therefore, while the ICTR focused notably on high-profile suspects of crimes within its jurisdiction, hundreds of thousands of them remained which could not be prosecuted by the ICTR. Rwanda therefore in 1996 enacted a law titled 'Organic Law (OL) 08/96 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1, 1990.' which created specialized chambers lodged in national courts and gave them jurisdiction over crimes of genocide and crimes against humanity. In 2000, the Special chambers were abolished, and national courts where they were lodged received jurisdiction over crimes previously tried by the chambers. In 2004, a judicial reform, 15 courts received such jurisdiction which are the Supreme Court, five High Courts, and nine Higher Instance Courts.[311] Nevertheless, the war which occurred during the genocide period left the country including the domestic and created a lack of infrastructures and resources to meet the need for justice. Thousands of suspects were still not prosecuted. To fill that gap, the country resorted to a traditional community court system called the 'gacaca court'. They were established by the 1996 Organic Law and 2001 Gacaca Law 'to hear the trials of genocide suspects accused of all crimes except planning of genocide.'. [312]Judges were elected by the community elections and trained subsequently. More than 12000 community-based courts were established, and they tried more than 1.2 million people.[313] The complementarity of the mechanisms deployed to achieve justice in the aftermath of the 1994 genocide was lauded for the possibility it created for international courts, domestic courts, and community-based courts to operate concurrently. It also allowed to implement alternative forms of justice to retributive justice including restorative justice and transitional justice.

The Malabo Protocol in Article 46H provides for complementarity of the criminal chambers to national courts and the Court of Regional Economic Communities (REC). it may be inferred that the criminal chambers would operate jointly with community-based or/and alternative forms to retributive justice.

[310] UN "Paving the way to transitional justice in CAR' 22 February 2021 https://peacekeeping.un.org/en/paving-way-transitional-justice-car (accessed on 16 October 2023.
[311] B Hola and HN Brehm 'Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts Gacaca Courts' (2016) 10 *Genocide Studies and Prevention: An International Journal* 7.
[312] As above, p63.
[313] As above.

Regarding the EAC, no mention has been made of complementarity in its founding statutes. This may be due to the fact that even if the EAC is recognized as a hybrid court, it is more a domestic court with international elements similar to the War Crimes Chambers in the Courts of Bosnia and Herzegovina.[314] Four criteria are usually common to hybrid tribunals. They are first the application of international and domestic law (1) the combination of international and national judges and personnel (2) the employment of both international and national lawyers (3) and formal international participation. (4).[315] Although the EAC responds to these four criteria, it is installed in the Senegalese Court and finds its powers not in the agreement between Senegal and AU but rather in its statute and Senegalese Laws.[316] Furthermore, Senegal modified its legislation to be able to try perpetrators of international crimes including under universal jurisdiction. This may explain why complementarity was not addressed by the statutes of the Court. The EAC only tried Hissène Habré. Therefore, there was no need for the creation of a special complementary jurisdiction.

3.2.4. Ability to be sheltered from political influence.

This part doesn't aim to explore all the criteria for the independence of an international or domestic tribunal. This will fall outside the scope of the study. In alignment with the objectives of this study, it purports to assess if the justice mechanisms are sheltered from the influence of political organs which may hamper their credibility and independence. Drawing from the criticism of the ICC, as developed in this paper, two concerns are at the core which are the non-politicization of the jurisdictional triggers (1) and the sources of funding (2).

3.2.4.1. The ICC

The independence of the ICC has been discussed widely in this paper. Among other legitimate critiques is that the referral and deferral powers have been in a biased manner depending on the geopolitical interests and issues.[317] Besides, it has also been noted that the narratives of voluntary self-referrals by African states have been contested.[318] Moreover, it still raises unanswered question that the ICC would wait 15 years to decentralise its actions from Africa to other continents. With respect to the budget and the funding of the ICC, it is noteworthy to mention that the adoption of the ICC's budget is set in three steps. A budget proposal is provided by the Court itself which is later analysed by an independent

[314] https://hybridjustice.com/the-war-crimes-chamber-in-bosnia-and-herzegovina/ (accessed on 17 October 2023).
[315] ER Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform,' (2006) 23 *ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 347.
[316] Article 16 of the Statute of the EAC
[317] n 113, as above.
[318] Clark (n61) as above.

body, the Committee on Budget and Finance (CBF) with the contributions of civil society.[319] This budget is therefore reviewed and approved by the ASP of the ICC and allocated among state parties depending on the size of their economies. European countries are among the biggest funders of the ICC.[320] It has been observed that the funding of the ICC may impact on its efficiency but also the situations it decides to focus on in terms of investigation.[321] While the ASP in the first four years of the mandate of Bensouda has agreed to increase the budget of the ICC, several States have announced later that the decrease in their contributions arguing internal inefficiencies and the global financial crisis of the Court.[322] These budgetary restrictions enforced by of 11 States have coincided with the decision of the ICC to expand its focus from situations in Africa to situations in Afghanistan involving interests of the US and UK.[323] It may not be surprising why prosecutor Khan at the reopening of investigations on Afghanistan has decided not to focus on crimes allegedly committed by the CIA and international armed forces. On the other hand, after the mass referral of the situation of Ukraine to the Court, voluntary contributions of countries have exploded including those of the US despite the fierce opposition of the country to the ICC.[324]

In short, the UNSC's use of its powers of referral and deferral were governed by political biases has negatively impacted the image of political independence of the Court. Besides, it seems that the volume of the funding of the Court may increase and decrease depending on the situations it decides to focus on and the interests which are threatened.

3.2.3.2. The ICTR

Regarding the ICTR, the OTP oversees the investigation and prosecution of the crimes within the jurisdiction of the Court. Article 15(2) provides that 'The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.' In practice, this provision has not been respected.[325] The UNSC has voted unanimously to replace Carla de Fonte, first chief prosecutor of the tribunal, when she signified her will to prosecute members Rwandan Patriotic Forces (RPF) involved in the 1994 genocide.[326] This replacement comes as a result of a backlash of the then-leadership of Rwanda held by the

[319] E Wiebelhaus-Brahm & K Ainley 'The evolution of funding for the International Criminal Court: Budgets, donors and gender justice' (2023) 1 *Journal of Human Rights* 22, 31-46.
[320] As above.
[321] As above.
[322] As above.
[323] As above.
[324] As above.
[325] John Hooper 'I was sacked as Rwanda Genocide Prosecutor for challenging president, says Del Ponte' 13 September 2003 https://www.theguardian.com/world/2003/sep/13/johnhooper (accessed on 17 October 2003).
[326] Relief 'Rwanda: Del Ponte addresses alleged RPF massacres with massacres' 14 December 2000 https://reliefweb.int/report/rwanda/rwanda-del-ponte-addresses-alleged-rpf-massacres-kagame (accessed on 17 October 2023).

RPF which has suspended his collaboration with the tribunal to contest the fact that the prosecutor will also investigate and prosecute members of the RPFs.[327] Not surprisingly, no member of the RPF has been later on indicted and tried by the ICTR in spite of the fact that at least 25.000 Hutu were killed during the war,[328]following a declaration of the next prosecutor. This has prevented the tribunal even to investigate the assassination of President Habyarimana which has been the trigger of the genocide.[329] Some observers have spoken about one-sided justice.[330]

About the funding, Article 30 of the ICTR provided that the expenses of the tribunal will be imputed to the UN in accordance with Article 17 of its Charter and voluntary contributions. Apart from the fact that the tribunal never prosecuted a member of the RPF, there has been little evidence that the ICTR was politically influenced, notably through its funding. However, the high financial cost which imply the operation and maintenance of the tribunal, about 10% of the UN budget, has pushed the UN to press the tribunal to conclude its work which may have maybe covered more cases if it had more time.[331]

3.2.3.3. The criminal chambers of the African Court of Justice and Human Rights

The Malabo Protocol provided for three jurisdictional triggers in Article 46F which are state referrals, referrals by the AU Assembly Heads of State and Government or the Peace and Security Council, and the initiation of investigations by the prosecutor. These jurisdictional triggers are almost similar to those of the ICC with the exception that both the AU Assembly Heads of State and Government or the Peace and Security Council don't have any deferral powers. Furthermore, the AUPSC is composed of five members of which 5 are elected for 3 years and 10 for 2 years. It doesn't have any permanent members or veto powers.[332] The AU Assembly Heads of State and Government or the Peace and Security Council may not take any valid decision if two-thirds of the State members are not present at the meeting.[333] Although this doesn't prevent geopolitical considerations in the referral of cases, it diminishes the risk of having a powerful State delay or stop the march of justice.

It is also important to assess the safeguards of the criminal chamber from political influence through the backlash the African Court on Human and Peoples Rights (ACtHPR) has been undergoing from some African countries. The ACtHPR has lately faced backlash from

[327] n 325, as above.
[328] Human Rights Watch 'Rwanda: International Tribunal Closes its doors' 23 December 2015 https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors (accessed on 17 October 2023).
[329] As above.
[330] K Ilioupolos 'the ICTR accused of one-sided justice' 31 August 2009 https://archive.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/international-criminal-tribunal-for-rwanda/48103-ictr-accused-of-one-sided-justice.html (accessed on 17 October 2023).
[331] P Wald 'To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings,' (2001) 42 H ARV. INT ' 'L L.J. 535, p 536.
[332] AU 'The Peace and Security Council' 2023 https://au.int/en/psc (accessed on 17 October 2023).
[333] AU 'The Assembly' 2023 https://au.int/en/assembly accessed on 17 October 2023.

selected countries in Africa.[334] About the ACtHPR, the ratifying of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment the African does not allow individuals of the ratifying country to bring a case before the African Court. This direct access is conditioned by an optional declaration under Article 34(6) of the Court's protocol. Among the 34 countries party to the protocol, only 12 ever proceeded with the optional declaration under Article 34(6) which are Burkina Faso; Mali; Tanzania; Malawi; Rwanda; Ghana; Ivory Coast; Benin; Tunisia; Niger; The Gambia and Guinea Bissau. Following to decision of the African Court, four countries which are Rwanda; Tanzania; Benin, and Ivory Coast have withdrawn their optional declaration to manifest their opposition.[335]

Regarding its funding, the African Court of Justice and Human Rights will be funded by the AU which itself is mainly funded by the EU.[336] Noting that the ICC itself is largely funded by European countries, it seems that there won't be a main difference between the African Court of Justice and Human Rights and the ICC in terms of financial independence.

3.2.3.4. The EAC

The EAC's statute, under Article 12, empowers the OTP to investigate and prosecute suspects of crimes within the jurisdiction of the Chambers. The Chambers have been financially supported by donors including Chad, the AU, the US, Germany, and the Netherlands.[337]

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[334] MT Taye 'Backlash against individual access to the African Court on Human and Peoples' Rights' 18 February https://www.openglobalrights.org/backlash-against-individual-access-african-court-human-peoples-rights/ (accessed on 17 October 2023).

[335] As above.

[336] Institute for Security Studies 'Financial Independence is key to stronger AU partnerships' 2023 https://issafrica.org/iss-today/financial-independence-is-key-to-stronger-au-partnerships (accessed on 17 October 2023).

[337] HRW 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' 2016 https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal (accessed on 17 October 2023.

4. Chapter 4: Conclusion

This study endeavoured to investigate the relevance and legitimacy of the backlash of the AU against the ICC and the development of regional and national justice mechanisms complementary or alternative to the ICC. It also tried to assess the capacity of the justice mechanisms under study to address the specificities in Africa and to deliver effective justice. This part will present a summary of the findings of the study in two aspects. First, the criticism against the ICC. Second, the capacity of the justice mechanisms discussed in this study to offer effective and context-specific justice to the continent.

4.1. Criticism against the ICC: legitimate concerns or political demagogy?

The creation of the ICC has been met with euphoria by the AU and several African states. The ICC, as the first treaty-based permanent Court, has been considered a strong tool to prevent historical tragedies like the 1994 Rwandan Genocide as well as the numeral conflicts and mass atrocities on the continent.[338] In the last decades, the ICC has experienced severe scrutiny notably from the same AU and some states. Five major critiques have been raised against the ICC. The Court has been accused of selectively focusing on Africa as a post-colonial tool of domination of Western countries in Africa. The Court has also been accused of disregarding the sovereignty of African States by indicting and issuing arrest warrants against heads of state. The third accusation is that the Court jeopardizes the efforts for peace and conflict resolution on the continent. It has also been accused of not respecting the principle of complementarity. [339] The last accusation is that the concerns of African States during the negotiation of the Rome Statute have not been respected.[340]

Regarding, the first accusation, it hinges on the fact most of the situations under investigation before the ICC are located in Africa. During the first 15 years of the existence of the ICC, all the cases were in Africa. It also comes from the fact that the UNSC while referring to situations in Libya and Sudan, has refused to do the same for similar situations notably in Gaza, Sri Lanka, and Syria.[341] The UNSC has also refused to defer situations in Sudan and Libya while using the same deferral powers to grant immunities to UN-keeping missions as well as international armed forces intervening in the conflicts in Liberia, Sudan, and Libya.[342] Besides, the ICC has not respected the principle of complementarity which is at the core of the intervention of the ICC.[343]

[338] n 10, as above.
[339] n 19, as above.
[340] Gissel (n176) as above.
[341] n 113, as above.
[342] As above.
[343] Articles1; 17 and 53 of the Rome Statute.

The study has demonstrated that it is imperative for the ICC to expand further its focus from Africa to other continents. This should be done not only by opening investigations but also vigorously prosecuting non-Africans criminals to truly curve the accusation of selectivity against the ICC.[344] However, the great number of investigations in Africa before the ICC may be somehow explained by the fact that most of the situations are self-referrals. Besides, African states represent the largest regional group to have ratified the Rome Statute, and there is a high prevalence of conflicts and human rights violations on the continent. Furthermore, of 17 situations currently investigated by the ICC, seven are located on different continents namely Europe, South America, and Asia.[345] The study has also shown that even if the principle of complementarity was not fully respected in the situations of Uganda and DRC,[346] recently the Court has shown more propensity in abiding by this principle notably regarding the previous situation in Guinea Conakry[347]. Moreover, some African states have tried to use the principle of complementarity to escape the action of the ICC as was the case for the SCCED which never tried any alleged perpetrator the serious crimes in the situation in Darfur.[348] The study has also demonstrated that the use of referral and deferral powers by the UNSC was guided not by the imperatives of justice but rather by geopolitical interests.[349]

With respect to the immunities of heads of State which are absolute personal immunities, there is not debate on the fact they have been rejected by all the provisions and the decisions of the international criminal tribunals including the ICTR, the ICTY, and the SCSL.[350] This position has been supported by the ICJ in the Arrest Warrant Case decision mentioning article 27 of the Rome Statute as a model provision to support the impossibility of state officials' immunities to bar prosecutions of an international tribunal.[351] However, the controversy is more about Article 98 of the Rome Statute and the indictment of nationals of non-state parties to the Rome Statute. The most convincing interpretation of article seem to argue for the imperative of a non-state party to remove the immunities of a head of State without which a State party to the Rome Statute will not be able to proceed with the arrest and surrender of that head of State.[352] African countries like South Africa have relied on that arguments and even more agreements with the AU, conventions and domestic laws on privileges and immunities to refuse to arrest Al Bashir regarding the situation in Darfur.[353] The South African domestic Courts have found this position

[344] Mutua (n118) as above.
[345] n 252, as above.
[346] Olugbo (126) as above; n 131, as above.
[347]n 38, as above.
[348] n 134, as above.
[349] n 133, as above.
[350] n 65, as above.
[351] n 104, as above.
[352] Akande (n140) as above.
[353] n 156, as above.

inconsistent with the constitution and domestic law. The courts have focused on the fact that South on contrary to the OAU Convention has ratified the Rome Statute whose domesticate Act, the implementation Act, enjoy pre-eminence in the constitutional legal order and was in conformity with international human rights law obligations. The courts have then held that in conformity with the Implementation Act, Al Bashir should have arrested and surrendered to the ICC.[354]

Regarding the ICC itself, the Court held inconsistent positions in its decisions on finding of non-compliance against Chad and Malawi, South Africa, and DRC. The most persuasive decisions have been issues on South Africa and DRC. In its decision on DRC,[355] the Court has found that the UNSC referral waived the immunities of Al-Bashir and in its decision on South Africa,[356] the Court has held that the UNSC referral has placed Sudan in analogous situations than state parties to the Rome Statute. These positions have been contested by some leading scholars[357] and the debate is still on. However, all these debates simply show that the heads of state in Africa are making use of legal and political technicalities to escape justice in the sense that the alleged crimes they are suspected of have been widely documented.

There is a third argument about the fact that the intervention of the ICC undermines the efforts of peace in conflict situations in Africa. First, it was demonstrated that most of these countries including Burundi, Kenya, and Sudan about which such claims have been made are either still experiencing crises[358] and conflicts or could not provide genuine justice[359] to the victims despite the arrest of the intervention of the ICC.

However, contrary to the policy paper of the ICC OTP, it is important for the prosecutor to consider genuine alternative and complementary forms of justice than criminal prosecutions which may prove to be more efficient. Some examples are the gacaca courts in Rwanda and the TRC in South Africa.[360]

4.2. Capacity of selected justice mechanisms to deliver address the specificities and deliver justice on the continent:

From the available scholarship, four specificities or criteria have been developed to assess the capacities of the mechanism under study to deliver international criminal justice on the continent. The first one is their capacity to address the increase of the NIACs on the continent. Another one is their ability to address the phenomenon of child soldiers and

[354] n 159, as above.
[355] n 173, as above.
[356] N 174, as bove.
[357] N 143 (above).
[358] N 31, as above.
[359] N 34, as above.
[360] n 194, as above.

sexual and gender-based violence during armed conflicts. The third one is their ability to address the causes and roots of violence and conflicts in Africa. The last one is about their capacity to be sheltered from political influence.

Regarding their capacity to address the increase of the NIACs on the continent, the study has shown that the four justice mechanisms have been empowered to have jurisdiction over war crimes in the context of NIACs. However, the statutes of the EAC and the ICTR offer the greatest protection to civilians during the NIACs as they include Additional Protocol II to the Geneva Conventions.

Regarding the second criterion, the founding instruments of the EAC and the ICTR are silent on the issue of the conscription of child soldiers and direct participation in armed conflicts. The Rome Statute and the Malabo Protocol address widely the issue by prohibiting them as war crimes. When it comes to sexual and gender-based violence, all the justice mechanisms have been empowered and have issued positive decisions and judgments on the matter. The innovation brought by the Malabo Protocol is that it affords greater protection to women and children in the context of conflicts and aligns with African standards.

With respect to addressing the roots of violence, conflicts, and atrocities in Africa, only the Malabo Protocol contains provisions that cover crimes and conduct which address this issue. Except for the EAC, all mechanisms are also empowered to function jointly with community-based and alternative forms of justice to criminal trials to address root causes of the situation which has or would trigger their jurisdiction.

About the guarantee of independence, the EAC has showcased the most independent jurisdictional triggers. The criminal chamber of the African Court of Justice and Human Rights risks being submitted to the same backlash as the ACtHR in case of opposition to its judgments by the African States. The ICC's credibility and impartiality are affected by the biases which characterizes the use of the referral and deferral powers by the UNSC. In terms of funding, it has been underscored that the criminal chambers of the African Court of Justice and Human Rights will be similarly funded than the ICC. Indeed, the major contributors of the AU which will fund the criminal chambers are the European countries. The latter are also the major contributors to the ICC.

In conclusion, the Malabo protocol presents several innovations notably the fact it covers crimes that may be at the root of the atrocities on the continent and offers wider protection to civilians during the NIACs, in alignment with African standards. However, the political backlash the ACtHR is suffering and the source of the funding of the criminal chambers will negatively impact the capacity of the chambers to be independent and efficient, among other reasons.

The ICTR has also proved to be a very innovative justice mechanism, in terms of substantive legal framework and important jurisprudence. Nevertheless, the ICTR's work was one-sided and politically biased because of pressure of the then-leadership of Rwanda showing that such a mechanism may not easily resist political influence.

The ICC, as a permanent international court and the EAC as a hybrid tribunal constitute the most efficient mechanisms of justice for the continent. However, it is important to reform the ICC in order notably to grant the UNGA with the power of deferral and referral, in case of a blockade at the level of the UNSC. Besides, before the opening of an investigation, the ICC should carefully consider alternative forms of justice according to the principles of complementarity and the interests of justice. Furthermore, it is important when the situation requires it that the hybrid tribunal like the EAC integrate the possibility of complementarity with community-based and restorative justice mechanisms. It is an imperative to address the root causes of the gross-human rights violations and the specificities of the African continents.

20303 words.

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