Faculty of Humanities

The African Quest for an inter-African Jurisdiction: Looking Beyond the International Criminal Court versus Africa Debate

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In June 2014, the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights, often referred to as the Malabo Protocol. The Malabo Protocol extends the jurisdiction of the African Court of Justice and Human Rights (ACJHR) and empowers it to try serious crimes of international concern such as genocide, crimes against humanity and war crimes. Although the ACJHR with its criminal chamber is not yet an operational court, it has the potential to bring positive contributions to a continent tormented by persistent conflicts and a culture of impunity. The AU, whose main objective is to coordinate and intensify cooperation for development of the African region, presents itself as an energetic and ambitious driving force for change in the continent's human rights landscape. With a renewed focus on inter-African jurisdiction, African states can put their ambitious plans to the test and design legal mechanisms for the protection of human rights that best suit the scenery of the continent. However, the institutional human rights landscape in Africa, comprised of a multitude of continental, sub-regional and international courts, is already profoundly complex and multi-layered as it is and the prospect of an African regional court with international criminal jurisdiction portends hard times ahead for its global counterpart the International Criminal Court (ICC), which operates on behalf of the principle of universal jurisdiction (Abass 2013a, 13). A total of 34 African countries are States Parties to the Rome Statute of the ICC and as a result it acts as a vital referral mechanism for criminal cases of the African region. With human rights as a relatively new currency on a unique and distinctive continent, there is an ongoing debate about the approaches that should be taken with respect to the operationalization and realization of these human rights norms and concepts. With new regional developments in African criminal justice a regime complex is emerging that has the potential to pull AU member states in competing directions presented by late regional ambitions and the universal system set by the United Nations and ICC. AU member states now stand before various paths in the realization of human rights and they have been involved in an ongoing discussion on Universal Jurisdiction and its life-form, the ICC. Through a study of the historical antecedents of human rights norms and regimes on the continent we can gain knowledge about the preceding events that sparked the region's interest for the path of an inter-African jurisdiction. A thorough consideration of all the grounds for the AU's decision to give the African Court jurisdiction

over international crimes will then show that the process has been motivated by other reasons than late anti-ICC sentiment alone. In order to provide a more in-depth look into grounds for an African court with international criminal jurisdiction, this study will not only examine the ICC versus Africa debate, it will also go beyond it. In this way, an African perspective will be offered that explains a larger focus on regional processes of African human rights law not only as a result of growing anti-ICC sentiment but it will also be argued that there is a legal and historical necessity for the development of an African perspective to international human rights law that is not necessarily meant to duplicate or impede on the work of the ICC.

International Human Rights Law and Africa

Studies of international human rights law find a general agreement that human rights in Africa are a relatively new currency on the continent (Werle & Vormbaum 2017, 4; Obi 2012, 1; Heyns & Killander 2006). It was not until 9 July 2002, when the African Organization for African Unity (OAU) was disbanded and replaced by the AU, that the concept of human rights truly gained momentum and became part of an expanded mandate for the active pursuit of human rights norms and rules (Obi 2012, 1). The inadequate and dissatisfactory results of the OAU in the promotion and protection of human rights in Africa are frequently ascribed to the passive role the regional institution played in the transfer of legal power to make effective human rights mechanisms (Enonghong 2002, 197; Umozurike 2007, 181). With the adoption of the African Charter on Human and Peoples' Rights in 1986, a provision was made for the African Commission on Human and Peoples' Rights. The commission was inaugurated a year later in Addis Ababa, Ethiopia and was charged with three major functions; the protection of human rights, the promotion of human rights and the interpretation of the African Charter (African Commission on Human and Peoples' Rights 2017). In accordance with Article 58 of the African Charter (1986, 15), the commission is intended to deliberate on severe human rights violations and it draws the attention of the Assembly of the Heads of State and Government (the Assembly) to special cases. However, the application of this provision proves to be particularly problematic as any direct measures taken by the commission are to be kept confidential until the Assembly shall decide otherwise. This precondition deprives the commission from an important enforcement tool, which is the use of publicity. Due to these legal restrictions to its function, the commission was denied in taking an active stance in the expression and condemnation of extensive human rights violations. These inadequate and dissatisfactory practices and results of the African commission under OAU's regulation prove that particularly in early formations of human rights regimes in Africa, we can witness

obstacles to the transfer of legal power needed to make human rights organs fulfill the duties they were set up to serve. Hence, with human rights as a relatively new currency on a unique and distinctive continent, there are questions about the approaches that should be taken with respect to the operationalization and realization of these human rights norms and concepts.

International human rights norms and concepts find their historical origins in Western liberal traditions and discourses (Aluko 1981, 234; Goonesekere 2013, 1). The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the United Nations (UN) General Assembly, represented the first global expression of what its founding fathers believed to be rights concerned with the dignity of all human beings. Accordingly, the first two articles of the declaration state that all human beings are born free and equal in dignity and rights, without distinction of any kind (UDHR 1948). Historically, all regional human rights systems emanated from these universal foundations laid by the UN and the African human rights system is regarded the newest of regional arrangements (Kabange Nkongolo 2008, 2; Church et al. 2007, 259). Despite this early universal approach to human rights, there is an ongoing debate among scholars on the modern concept of human rights as a Western notion (Cobbah 2005, 309; Wai 1979, 116; Donnelly 1982). The concept has been criticized for being a Western construct designed to accompaniment the Western political agenda with respect to non-Western societies. Although the concept of human rights is gaining momentum on the African continent, there seems to be a gap in the literature when it comes to approaches to human rights from an African perspective (Cobbah 2005, 309). According to Dunstan M. Wai African societies have traditionally shaped and practiced human rights according to own classical conceptions of rights and freedoms that should be protected within society. "Traditional African attitudes, beliefs, institutions, and experiences sustained the 'view that certain rights should be upheld against alleged necessities of state'" (Wai 1980, p. 116). These traditional African adaptations on human rights are often not translated in modern human rights policies of states. On 21 October 1986, the African Charter on Human and Peoples' Rights entered into force. With the African Charter in place, AU member states openly reaffirmed "their adherence to the principle of human and people's rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations" (African Charter 1986, 15). Hereby AU member states turn to UN human rights norms and practices for guidance as they create human rights instruments that are unique to the continent. However, the danger lies in an over-reliance on Western-oriented human rights concepts and

norms as this leaves smaller room for approaches from an African perspective and this might contribute to an ill-fitted operationalization of human rights.

At its thirteenth ordinary session in July 2009, the Assembly of the AU requested the Commission "in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity" (AU Assembly 2009, Ordinary Meeting XIII). The request resulted in the endorsement of the Malabo Protocol in June 2014, extending the jurisdiction of the African Court of Justice and Human Rights (ACJHR) and empowering it to try internationally codified crimes. It is commonly assumed that the international fall-out over al-Bashir has motivated the AU to start a process of establishing an African Court with jurisdiction over international crimes (Abass 2013b, 28; Aja Agwu 2014, 40; du Plessis 2012, 3; Murungu 2011, 3). More so than other parts of the world, the Africa continent finds itself in a significant period of perceivable dissent towards the ICC. The 2003 violent outbreak in Darfur and the United Nations and ICC response to the conflict that led to a warrant of arrest against Sudanese President al-Bashir, is often seen as a breaking point in ICC – Africa relations. Therefore, the AU's call for an inter-African criminal jurisdiction is considered to be a direct aftereffect of the international fall-out over al-Bashir. However, this perspective would suggest that the Malabo Protocol purely represents an anti-ICC move on behalf of the AU. The court has been the subject of increased criticism as the far-reaching universal jurisdiction of the ICC has never produced an investigation or prosecution outside of Africa. This growing criticism raises concerns whether the new African court is merely meant to serve as a substitute of ICC activities.

Research Question and Methodology

In light of the discussed developments and growing speculations about the motives behind the AU's call for an inter-African jurisdiction, the research question arises: 'What have been the preceding events that sparked the region's interest for the path of an inter-African jurisdiction?' This study will show that it would be inaccurate to assume that the Malabo Protocol represents the start of a process to substitute ICC activities in the course of time. Although the grounds for the AU's decision to set up an own regional court with a criminal chamber are set in the ICC versus Africa debate, an in-depth analysis of the debate will

explain that there is a need for an African perspective in international human rights law in ways that go beyond the ICC versus Africa debate. Thus, the hypothesis of this research is: 'The regional process towards an inter-African jurisdiction has not been motivated by late anti-ICC sentiment alone'. For the purpose of testing this hypothesis, the first chapter will examine the seemingly unproblematic character of ICC practices in relationship to the African continent through qualitative research methods. A qualitative analysis of the principles on which the ICC is build will provide an African perspective that explains why the ICC's international practice of human rights, despite its uncomplicated personality on paper, does not run without implications and in light of the African continent leads to an increase in tensions and critiques. The analysis will primarily include views on the ICC from an African perspective that become increasingly complex as the court finds itself and its practices caught between the development of international and national human rights norms. Moreover, in the case of Africa, these views are subjected to deep-seated anti-imperialist sentiments that are reinforced by the lack of ICC investigations and prosecutions outside of the continent. As a result, the previous positive stance of the AU Assembly towards the ICC has changed to stance of increased awareness on the abusive trades of the court.

In order to gain a deeper understanding of the reasons why much of Africa has become critical of the ICC and its abusive practices, the second chapter will discuss African cases of universal jurisdiction. These cases are narrowed down to three separate case studies on Côte d'Ivoire, Chad and Sudan that will be subjected to a qualitative research approach. By diving into the context of the different conflicts and ways in which international human rights law has been applied, we can gain a deeper understanding of the AU's late ambitions to take a regional approach to human rights. The three cases studies will be analyzed in a qualitative manner that highlights critical views with respect to the ICC from an African perspective. The ICC trial against Ivorian ex-President Gbagbo has been the topic of much controversy, was viewed as one-sided and failed to hold all responsible parties involved in the conflict accountable for serious human rights violations. The 2010-2011 post-election outbreak of violence in Côte d'Ivoire resulted in the arrest of ex-President Gbago, while the sitting President Alassane Ouattara, who also engaged heavily in the conflict and holds responsible for several crimes against humanity, has so far been exempt from persecution. The case proves that international arrangements and prosecutorial selectivity can become uncomfortable and the focus of increased controversy. The second case revolves around Kenya, which further reveals that the international practice of the ICC and its principles does

not run without implications. The court has been skeptical of Kenya's domestic investigations and prosecutions its application of the prosecutor's proprio motu power represents a direct threat to the national sovereignty of African states in the eyes of the Kenyan government. The last case that will be examined is the case of Sudan. It is commonly assumed that the international fall-out over al-Bashir has been the direct motivation for the AU to start a process of establishing an African Court with jurisdiction over international crimes.

Although these African cases of universal jurisdiction have undoubtedly been a catalyst for the AU's call for an inter-African criminal jurisdiction, the need for a regional approach to human rights law in Africa should also be explained beyond the ICC versus Africa debate. If we neglect the motivations for an inter-African jurisdiction that lie beyond the growing anti-ICC sentiment, the danger lies in assuming that the Malabo Protocol represents the start of a process to substitute ICC activities in the course of time. The third chapter will therefore look beyond the ICC versus Africa debate through a qualitative analysis of the historical antecedents that sparked the region's interest for the path of an inter-African jurisdiction. A thorough descriptive, qualitative analysis of Africa's post-colonial history and consequential issues with democratic consolidation will then show that the process has been motivated by other reasons than late anti-ICC sentiment alone. Instead there has been a historical necessity for human rights law to continue its natural development, for example through the expansion of international crimes that are peculiar to the region such as crimes that defy the process of democratic consolidation on the continent. In contrast to the cases of Côte d'Ivoire, Kenya and Sudan, the case of Chad will then be discussed as it represented the first time a country in the Global South exercised universal jurisdiction. It is often argued that the case of Hissène Habré paved the way to the idea of establishing an African Criminal Chamber. The case study on Habré will take the shape of a descriptive analysis that highlights the lingering obstacles to the regional practice of criminal jurisdiction in Africa. In light of these concerns, it will then be argued that African human rights practices require further development for the consolidation of made commitments to human rights norms and rules. The Rome Statute leaves room for such developments without the need to duplicate or impede on the work of the ICC. It is therefore of vital importance that we see beyond the ICC versus Africa debate when looking for an explanation for modern human rights developments in Africa.

Chapter 1. The International Criminal Court versus Africa Debate

In October 2016, AU member states Burundi, South Africa and Gambia initiated a process to leave the International Criminal Court (ICC). As President Pierre Nkurunziza officially appended his signature to the Burundian's decision to pull out of the Rome Statute, an unprecedented process of withdrawal from ICC activities had been set into motion. Burundi's announcement followed The United Nations Human Rights Council declaration to set up a commission of inquiry into human rights abuses since Nkurunziza's re-election in April, 2015. South Africa soon followed in Burundi's footsteps and approached the UN Secretary-General in absence of parliamentary consent with plans of its own to leave the ICC. Four days later, Gambia would be the third African state within that same month willing to disengage from the ICC. The announcements were met with public expressions of concern from activists and ICC officials that called for the continued support of the ICC as a crucial court of last resort. The president of the Assembly of States Parties of the ICC, Sidiki Kaba, stated that "The withdrawal from the Statute by a State Party would represent a setback in the fight against impunity and the efforts towards the objective of universality of the Statute" (Assembly of States Parties 2016). States Parties to the Rome Statute were requested to openly express their concerns in the Assembly and to keep the withdrawing states engaged in a dialogue. While Burundi's plans of withdrawal came as less of a surprise, due to its previous inadequate stance towards the promotion and development of human rights and accountability, South Africa's withdrawal had been much more noteworthy. Unlike the other withdrawing states, South Africa has never been under investigation by the ICC and the 'rainbow nation' has been a leading figure for justice and reconciliation on the continent. Therefore, the South African expression to explore its exit options, forms a momentous turnabout in ICC-Africa relations that sharpens the ICC versus Africa debate. The ICC however, is a crucial court of last resort that functions as a complementary court that is not meant to replace national courts. Ever since the founding treaty of the ICC, the Rome Statue, entered into force on July 1, 2002, African states have increasingly supported the ICC as the responsible court for international criminal accountability. This chapter will discuss the principles under which the ICC acts ever since its establishment. Despite the initial unproblematic character of these principles, it will then be argued that the international practice of universality does not run without implications and in light of the African continent can lead to an increase in tensions and critiques.

1.1 The Core Principles of the International Criminal Court

The core principles of the ICC, as formulated under the Rome Statute, have been the subject of extensive studies in international law. The ICC was established in July 1998 with the adoption of the Rome Statute and ever since it acts in accordance with the principle of complementarity and the principle of universal jurisdiction. The principle of complementarity entails that the ICC will only prosecute when an individual or state is unwilling or unable to do so. This would imply that the state in which the crime occurs has the first responsibility to take the case to its national court and the ICC will only step in place after a national court has proved to be unable or unwilling to prosecute. With the principle of universal jurisdiction in place, a case can be brought to any court that is willing to prosecute regardless of the place where the crime occurred and the nationality or place of residence of the perpetrator. Due to the transparent and unproblematic nature of the principles it has been challenging to entice a compelling political debate on the subject (Philippe 2006, 376; Steiner 2004, 200). Many studies on the principle of universal jurisdiction take a descriptive approach and focus their research on the exercise, application and historical origin of the principle. This descriptive approach is often accompanied by a positive outlook and strong confidence in state courts and universal efforts to achieve criminal accountability and break cultures of impunity. With the principles in place, the jurisdiction of the ICC is limited to "the most serious crimes of concern to the international community as a whole" (Rome Statute of the ICC 2002, 3). The crimes that are considered the most serious and of concern to the international community as a whole are narrowed down to; the crime of genocide, crimes against humanity and war crimes. Advocates of universal jurisdiction often find that there is still a substantial fight ahead with respect to persistent cases of impunity in domestic courts. Domestic courts with lower developed hindrances to impunity and lacking judicial tools often struggle to successfully bring cases of severe human rights violations to justice. Therefore, the prevention and punishment of the most serious crimes relies on both international and domestic prosecution. In the event of domestic circumstances that allow perpetrator of severe crimes to go unpunished, the ICC will play a complementary role that is meant to deter perpetrators of crimes and protect the victims that otherwise would be left behind (Roth 2001, 150).

The principle of universal jurisdiction derives its authority and strength from the unlawful and inhumane character of war crimes (Joyner 1996, 155; Cowles 1945, 194). An international community dedicated to the future prevention of war crimes started taking shape after the end of the Second World War. The Second World War had been the deadliest war in human

history and in order to prevent such a devastating war from ever occurring again, the international community increasingly adopted a common, universal stance towards war crimes. Studies on war crimes have shown that these crimes more often than not occur in turbulent and violent environments that lack suitable jurisdiction and capable courts (Joyner 1996, 162). In the heat of battle, the parties involved are often not subjected to humanitarian restraints or familiar with recognized laws of war. Armed military forces unfamiliar with humanitarian customs and procedures add an exceptionally hazardous and unpredictable element to armed conflicts that may result in grave human rights violations as a result of insufficient calculations and planning. Early research on war crimes had already found that these type of crimes usually occur in states with an ineffective police and law apparatus unfit to administrate and execute the persecution and prosecution of war criminals (Cowles 1945, 194). This would imply that a deterioration of state control over its law enforcement mechanisms lays fertile soils for potential war crimes. However, armed military forces are not the only party capable of committing crimes in times of war. Regardless of one's function, every actor involved in an armed conflict is capable to resort to crimes against humanity. Hence, no actor that engages in war crimes should be able to claim immunity and resist a fair trial. However it can become extremely difficult for a domestic court to prosecute a criminal that occupies a high political office, such as a country's head of state or commander of chief, if such an actor makes a claim of immunity based on its political position. With the ICC in place, any actor who has committed war crimes can be brought to trial under the principle of universal jurisdiction and complementarity whereby claims of immunity and powerless national courts no longer form a barrier in the realization of justice.

Although the core principles of the Rome Statute receive widespread support, there has been an emerging debate on their growing controversies (Philippe 2006, 376). With the principles in place, the ICC is permitted to interfere in the domestic affairs of a signatory state of the Rome Statute, leading to tensions between international criminal jurisdiction and state sovereignty. The principles are often regarded forceful instruments that work for the pragmatic exercise of universal jurisdiction (Philippe 2006, 376). Furthermore, while the principles facilitate the global fight against impunity, there are still various international crimes that are not brought to justice. Despite made commitments to universal jurisdiction by signatory states of the Rome Statute, it still occurs that states refuse to extradite or prosecute criminals that have committed severe international crimes. It would seem that these states did not foresee the obstacles that the regular practice of politics and diplomacy would pose to

their commitment and exercise of universal jurisdiction (Philippe 2006, 398). Due to these problems with the implementation of the principles, there has been an increased focus on the constraints and controversies surrounding universal jurisdiction. It is argued that the principle of universal jurisdiction greatly contributes to the fight against impunity in theory, while in practice its heightened use could lead to abuse and instability (Kissinger 2001, 86). In light of these concerns, the principle must not borrow itself as a tool to settle political scores. Furthermore, the successful translation of the theoretical principles as formulated in the Rome Statute to actual implementation at the state level is dependent on the input and motivation of involved states. Without the right political or diplomatic incentives it becomes less probable for a prosecution with the endorsement of the principle of universal jurisdiction to materialize, even in the presence of strong pressure coming from civil society actors (Steiner 2004, 227).

1.2 Growing Controversy: The International Criminal Court and Prosecution Discretion

Modern studies on universality indicate that African states have come to be increasingly critical of ICC operations (Jalloh 2010, 2; Geneuss 2009, 1). Yet despite the increase in tensions between African states and the court, African leaders have initially been very supportive of the ICC's fight against impunity and have widely backed the principle of universal jurisdiction. The AU Assembly of Heads of State and Government shares the ICC's concerns with respect to impunity as African criminals have too long been able to escape accountability for the serious crimes they committed. However, as the number of court interventions on the African continent grew, the principle of universal jurisdiction was progressively viewed as a concealed stratagem of Western states to threaten the sovereignty of African states. The court has been skeptical of domestic investigations and prosecutions in Africa and has shown little confidence in their abilities, leaving less room for the principle of complementarity to take effect (Roestenburg-Morgan 2013, 4). As a result, the AU Assembly has changed its supportive stance on universal jurisdiction to an increased awareness on the abusive traits of the principle. In addition to these developments, The AU assembly is increasingly concerned with the negative impact of abusive court practices against African criminals with respect to stability within the region. The Assembly has argued that "the abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations" (Assembly of the AU 2008, 1). In light of these concerns the AU Assembly has requests an urgent meeting with the European Union to discuss their concerns and to come to a long-term solution for the problem (Assembly of the AU 2008, 2).

AU member states repeatedly felt to have been the subject of unfair uses of universal jurisdiction by national Western courts. The amount of charges against states of the Global South are a sharp contrast to the small number of charges against criminals in Anglo-Saxon parts of the world (Jalloh 2010, 13). This asymmetry in charges however, can partly be explained by dissimilarities in the type of crimes that are committed by actors of different regions. Yet, there is a deeper underlying cause for imbalances in cases of universal jurisdiction. With the start of the war on terror in 2011, there have been several cases, such as Afghanistan, Guantanamo Bay and Iraq that involved the engagement of Western officials in war crimes. In response to the crimes committed, these cases were met with lengthy confinements and arrests but not under the initiative of Global South states. In practice, we therefore witness that universal jurisdiction is exercised by developed states at the expense of lesser developed countries. It has not yet occurred, that a domestic court of a developing country exercised universal jurisdiction in response to a severe crime committed by a Western state and its officials (Jalloh 2010, 56). Furthermore, while the United States (US) has been a leading nation in global politics, it has not ratified the Rome Statute and hereby finds itself in the company of countries including India, China and Saudi Arabia. The absence of a complete and worldwide ratification of the Rome Statute has its implications for the fairness of ICC practices as it leads to asymmetry and irregularities in international law. The jurisdiction of the ICC is limited to crimes committed by a national of a signatory state or crimes committed on the territory of a signatory state (Goldsmith 2003, 91). This implies that leaders of non-signatory states that are engaged in human rights violations within their domestic sphere, are invulnerable to universal jurisdiction even if they visit a signatory state of the Rome Statute. As the US has never ratified the Rome Statute, it is therefore invulnerable to the ICC's jurisdiction if it were to engage in human rights violations within its domestic sphere.

There have been many cases where political imparities have affected efficient ICC decision-making with respect to Western states. Because the ICC depends on the support and cooperation of states for its successful operation and to secure of the custody of persons wanted for trial, it is contingent on political motivation (Akande 2004, 432). In the global world power matters and states with the most power find themselves in a position where they can undermine the court and limit its reach. So far, the US has been the only major power that has adopted a policy of active marginalization. Between 2001 and 2005 the US openly discouraged other states from supporting the ICC through the use of diplomatic efforts (Bosco 2014, 178). This brings forth concerns about the United Nations Security Council which

enabled the US, as a veto power, to pass several resolutions that limited ICC jurisdiction during its war on terror (Bosco 2014, 178). In this time, the other Security Council members with veto power, including China, Russia, India and Japan, chose the path of passive marginalization whereby the legitimacy of the court was not directly undermined, but its ability to operate was systematically limited through reduced state funding and resource contribution. Due to the ICC's dependence on the support and cooperation of states, the court has chosen not to challenge powerful states (Bosco 2014, 185). This became particularly apparent in the court's initial years when it avoided situations involving powerful states. While the court had full jurisdiction to conduct an investigation in the US-led Iraq war, Afghanistan and Colombia, these cases never materialized.

In order to avoid tense situations with powerful states, the ICC directed its focus on cases of internal violence and opened its initial investigations in African states such as Congo and Uganda. However this trend is still apparent in ICC decision making and operations today. There have been many studies on the 2003 US and United Kingdom-led Iraq invasion and war in Iraq as a form of state crime that has never been investigated by the ICC. While the invasion of Iraq has often been promoted as a legitimate move in response to the 9/11 terrorist attacks on the US and human rights violations by the then President of Iraq Saddam Hussein, there is now a strong case that the invasion was an act of aggression in violation of the United Nations Charter and international law (Kramer & Michalowski 2005, 446; Maersheimer & Walt 2003, 51). During the US political campaign in search of support for an invasion in Iraq, the Bush administration warned the international community of connections between Saddam Hussein and Al Qaida, the terrorist organization behind the 9/11 terrorist attacks on the US (Waxman 2004, 23). Despite doubts of intelligence agencies, President Bush claimed in November 2002 that Saddam Hussein is "a threat because he is dealing with Al Qaida … [and] an Al Qaida-type network trained and armed by Saddam could attack America and not leave one fingerprint" (White House 2002). As the connections between Hussein and al Qaida remained questionable, later evidence revealed that the Bush administration was never in possession of data to support their claims (Corn 2003, 93). The Bush administration counted on Article 51 of the UN Charter to find a legal basis for its invasion based on the right to self-defense. To strengthen the legal basis for an Iraq invasion, the US adopted a new National Security Strategy by claiming it had the right to attack another nation if it formed a potential threat. Finally, in the absence of UN Security Council approval and with the support of the United Kingdom, the US invaded Iraq on the claim that Hussein was in possession of

Weapons of Mass Destruction (WMDs). Later evidence revealed that WMDs were never found in Iraq, and Tony Blair, the then Prime Minister of the United Kingdom supported the invasion, knowing no evidence was found of WMDs. This case is just one of many examples where powerful states escape impunity due to the ICC's avoidance of entanglements with these states.

In light of the ICC strategy to avoid entanglements with powerful states, Western nations are rarely punished for their deeds. As a result, all the cases under investigation or prosecution by the ICC are in Africa. This selectivity in ICC jurisdiction contributes to an increase in anti-ICC sentiment on the African continent. In addition to this selectivity in ICC cases, the cases under investigation or prosecution by the ICC do not always tell the full story and focus on African governments without taking into account other contributing factors that help to fuel human rights violations in these countries. The next chapter will discuss the African cases under investigation by the ICC. One of these cases revolves around the ICC dispute over Sudanese President Omar al-Bashir. There have been two international reports on violence in Darfur, a region in the West of Sudan. After the 2003 violent outbreak in Darfur, the United Nations set up a commission on Darfur and in 2008 the ICC followed suit with its own report on the crisis and issued a warrant of arrest against al-Bashir. However, the reports mainly focus on the post-2003 conflict and pay little attention to the historical antecedents of the conflict that in its two preceding decades took the shape of a civil war. With the ICC case against al-Bashir the spotlight has been on the Sudanese government while the role of other actors involved in the militarization of the preceding civil war has been largely overlooked. The following chapter will provide a historical analysis of the conflict and discusses the role of international powers and their global context in intensifying the Darfur conflict. With the analysis of two other cases under investigation by the ICC, the case of Chad and Cote D'Ivoire, we can further our understanding of recent developments in African international law and the AU's decision to give the African Court jurisdiction over international crimes.

Chapter 2. Universal Jurisdiction in Practice: African Cases

Ever since the establishment of the AU, the concept of human rights has truly gained momentum and became part of an expanded mandate for the active pursuit of human rights norms and rules. In this pursuit, AU member states have continuously reaffirmed their rejection of human rights violations and they have made commitments to answer the legal obligations as codified under the Rome Statute of the ICC. However, the far-reaching jurisdiction of the ICC has never produced an investigation or prosecution outside the African continent. And while there have been cases fit for ICC investigation where Western leaders engaged in human rights violations, they never materialized in order to avoid entanglements with powerful states. The cases that did materialize often focus on African governments and human rights violations by African leaders. This chapter will discuss three of these cases in order to provide a more in-depth look into the issues these African cases are accompanied by. An African perspective will be offered that explains growing anti-ICC sentiment and a larger focus on regional processes of international criminal jurisdiction in Africa. The case of Côte d'Ivoire will expose increased tensions and complications in ICC – Africa relations and explains the growth of criticism in Africa. The case of Chad represented a watershed moment in international justice as this would be the first time a country in the Global South would exercise universal jurisdiction. Furthermore, with a case study of Sudan and the warrant of arrest against al-Bashir it will be argued that the ICC's focus on the Sudanese leader fails to take into account other contributing factors to the intensification of human rights violations in Darfur. As a result, AU member states repeatedly felt to have been the subject of unfair uses of universal jurisdiction by national Western courts. The ICC cases produced international outcries and the AU's call for an inter-African criminal jurisdiction is often seen as a direct aftereffect of the international fall-out over al-Bashir.

2.1 The Case of Côte d'Ivoire and the Obstacle of Impartial Justice

Following the 2010-2011 post-election outbreak of violence in Côte d'Ivoire, the ICC brought the country's former President Laurent Gbagbo and Youth minister Charles Blé Goudé to trial. The political leaders were suspected of criminal responsibility for crimes against humanity, including murder and rape, persecution of enemies of the state and other inhumane acts committed in Côte d'Ivoire between December 2010 and April 2011 (Amnesty International 2016). After years of unrest and internal divisions the presidential elections of

2010 were seen as an important democratic step to bring legitimacy to the country's political system and start a process of peace and reconciliation (Malu 2016, 832). After the second round of presidential elections were held, former President Gbagbo of the Ivorian Popular Front (IPF) and Alassane Ouattara of the Democratic Party of Côte d'Ivoire - African Democratic Rally (RDR) were the two remaining candidates (Sidibé 2013, 1). However, tensions between the two candidates soon led to an electoral dispute and an armed confrontation followed between military forces loyal to Gbagbo and Republican forces in support of Ouattara. Despite efforts of the AU and Economic Community of West African States (ECOWAS) to come to a solution while persuading Gbagbo to accept his defeat, hostilities between the two candidates continued. Together with the European Union (EU) and the US the AU and ECOWAS dismissed Gbagbo's claim of victory as the Independent Electoral Commission further declared that it was Ouattara who received a majority in electoral votes. Regardless of international pressures, Gbagbo was sworn into office by the Constitutional Court in December 2010. In response, Ouattara formed a government of his own that operated from the Abidjan Golf Hotel (Malu 2016, 833). A few months later and with the support of France, the Ivorian movement against Gbagbo, *Forces Nouvelles*, launched a military offensive which led to the arrest of Gbagbo in April 2011.

With its active practice of universal jurisdiction in West-Africa, the ICC plays a deterring role in Côte d'Ivoire. The case against Gbagbo and Goudé works to promote accountability for serious crimes and respect for international law. Furthermore, ICC involvement in Côte d'Ivoire has contributed to the de-escalation of violence (Malu 2016, 51). Yet, the impact of the ICC in Côte d'Ivoire is undermined by a growing perception of the court's prosecutorial strategy as one characterized by partiality. The ICC prosecution solely targets crimes committed by one side of the conflict, that of former President Gbagbo, and fails to examine the context of the post-election violence in its entirety. The court has refrained from prosecuting crimes committed by the current President Ouattara and the republican forces loyal to him. In the aftermath of the post-election crisis, Ouattara received unconditional international support, allowing Côte d'Ivoire to quickly recover its economy through the cancellation of debts and provision of new loans (Koepf 2013, 1). However, international pressure on Ouattara has thickened as a result of late developments in Côte d'Ivoire's transitional justice. The Ivorian judicial system has so far only prosecuted forces loyal to Gbagbo while largely ignoring forces loyal to Ouattara responsible for war crimes and likely crimes against humanity (Wells 2012). In response, various human rights organizations have

expressed their concerns and accused the Ivorian government and national courts of administering 'victor's justice', which forms a barrier to the achievement of political reconciliation in the absence of justice for victims of both sides.

With the exception of Uganda and some qualification among African states, much of the international community endorsed Ouattara as Côte d'Ivoire's legal victor of the presidential elections while rejecting Gbabgo's claim of victory (Cook 2011, 11). The international community has responded to the post-election crisis both through multilateral and bilateral efforts in an attempt to obligate Gbagbo to concede defeat. These efforts include diplomatic sanctions against the Gbagbo government, economic sanctions such as a freeze of funds and other financial assets and the threat of military intervention. In December 2010, ECOWAS suspended the participation of Côte d'Ivoire in the sub-regional economic organization for an undetermined period of time. The AU soon gave strength to the ECOWAS decision by further suspending Côte d'Ivoire's participation in all AU activities "until such a time the democratically-elected President effectively assumes State power" (AU Peace and Security Council 2010, 1). However, opposition to Gbagbo's persistent and unjust claim to power not only came from within the African region. In a press release that same month, The UN Security Council members called on the Ivorian Stakeholders to show "respect for the outcome of the presidential election as recognized by the Economic Community of West African states (ECOWAS) and the African Union" (UN Security Council 2010). Later that month, the 192 member states of the UN General Assembly officially recognized Ouattara as the legitimate President of Côte d'Ivoire and through an anonymous vote the Assembly accepted the diplomats submitted by Ouattara as the sole and official representatives of the country (Cook 2011, 13).

As a result of the unconditional support of the international community for the Ouattara camp, fear exists that leaders of the Ouattara administration will continue to engage in violence and human rights abuses with impunity. The Republican Forces of Côte d'Ivoire (FRCI), Côte d'Ivoire's military created by decree of President Ouattara in March 2011, were faced with the daunting task of uniting fighters of both sides of the post-election conflict after the arrest of Gbagbo a month later. Remaining suspicion among FRCI soldiers and lingering loyalties to Gbagbo further complicate the process of peace and reconciliation as an effective state security apparatus seems remote. Furthermore, the Ivorian government's prevention of a coup détat in June 2012 produced concerns about the way Ouattara's administration framed the issue. In an conducted by Human Rights Watch an Ivorian diplomat stated: "the language they

use is very concerning: ‘eradication,’ ‘terrorism,’ ‘clean the country up’. They’re so convinced they’re right … that they’ve decided to put reconciliation aside” (Human Rights Watch 2012). This type of language is quite similar to that of the Gbagbo government in the aftermath of the 2002 coup d’état when the rebellion was accused of committing ‘foreign terrorist attack’ (International Crisis Group 2003, 4). In light of these concerns, the credibility of the ICC as an impartial and independent court has become subjected to growing criticism in Africa.

2.2 The Case of Kenya and the Implications of the Principle of Complementarity

Following the 2007 presidential elections in Kenya, a significant outbreak of violence erupted in the most stable country of Africa. International observers were shocked as the conflict resulted in the deaths of approximately 1000 people and over a hundred thousand people were displaced (Sriram & Brown 2012, 219). Two years later, ICC prosecutor Luis Moreno-Ocampo commenced a formal investigations into the post-election violence. The ICC stepped into place as the Kenyan domestic court seemed unable or unwilling to commence a trial against the senior politicians and businessmen responsible for the crimes against humanity that occurred. Hereby, the ICC stepped in under the principle of complementarity, leaving the first responsibility up to Kenya to take the case to its national court. The investigation of Kenya represented a first time case initiated by the ICC prosecutor, rather than a state referral or a United Nations Security Council request. However, the case has been one of increased tensions between the African state and the ICC as the Kenyan authorities challenged the admissibility of the ICC case. In response, the ICC dismissed Kenyan demands for more time and space so it could investigate the controversial post-election incidents without interference of the Hague-based court. The court has been skeptical of Kenya’s domestic investigations and prosecutions and has shown little confidence in their abilities, leaving less room for the principle of complementarity to take effect. The official Judgment of the ICC Appeals Chamber on Kenya stated that: “If a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing” (ICC Appeals Chamber 2011, 3).

The case presents an opportunity to examine the pressure African states can experience due to the ICC’s impatient practice of the principle of complementarity. The principle of complementarity regulates a healthy, coexistent relationship between the ICC and national

courts. But in the case of Kenya the principle raised several issues of law and procedure. Before the Hague-based court, Kenya expressed that it was willing and able to commence investigations and a subsequent trial. Hereby Kenya argued that its domestic justice was superior to international justice instead of the other way around. In the eyes of Kenyan authorities its national court had become complementary to the ICC, which directly threatened the national sovereignty of the African state. In a formal application on behalf of the Government of the Republic of Kenya submitted to the ICC, Kenyan authorities stressed that the newly adopted constitution of 2010 significantly strengthened its national trial processes through the comprehensive reform of Kenya's judicial system. In its appeal, the Kenyan government argued that the case was being investigated by the national authorities (Government of the Republic of Kenya 2011, 19). However, the ICC Pre-Trial Chamber determined that the mere statement that 'the case is being investigated' did not provide a solid ground for an admissibility claim. Instead, it referred to Article 17 of the Rome Statute and stated that "for a case to be admissible before the Court, a national jurisdiction must be investigating the same person and for the same conduct as in the case already before the court" (ICC Appeals Chamber 2011, 9). And so, the Rome Statute became the subject of diverse theoretical interpretations that were utilized in a battle of different legal interpretations between the ICC and the government of Kenya to bring the case of 2007 post-election violence to justice.

The ICC's application of the prosecutor's *proprio motu* power to initiate an investigation into the situation in Kenya, has provided the court with more certainty in its international fight against impunity. Instead of awaiting for a national court to start sluggish proceedings against individuals within its territory that have engaged in human rights abuses, the United Nations Security Council can refer a criminal case to the ICC. However, the ICC's involvement in Kenya takes place in an environment of heightened suspicion under African leaders (Sing'Oei 2010, 17). In this environment, The ICC is increasingly seen as a Western instrument of domination that acts at the expense of African states (Sing'Oei 2010, 17). Furthermore, The ICC has been skeptical of Kenya's domestic investigations and prosecutions and has denied Kenya's request for more time. As a result, the principle of complementarity did not materialize. The case of Kenya hereby proves that despite the uncomplicated nature of the core principle of the ICC on paper, its international practice does not run without implications and in light of the African continent it can lead to an increase in tensions and critiques.

2.3 The Case of Sudan and the International Fall-Out over al-Bashir

On July 14, 2008, ICC Prosecutor Luis Moreno-Ocampo called for the warrant of arrest against Sudanese President Omar al-Bashir. The United Nations Commission on Darfur, that was set up three years earlier, presented the prosecutor with sufficient evidence against al-Bashir for ten counts of serious crimes in international law. According to the ICC press release on the day of the proposed arrest warrant "the Prosecution evidence shows that Al Bashir masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity" (ICC Press Release 2008). Based on the evidence provided by statements from victims, eyewitnesses and government officials, the prosecutor was convinced that the intent of the Sudanese President was genocide. The government of Sudan had not been cooperative in the distribution of humanitarian aid to ravaged villages and blocked food supplies to Darfur (Falligant 2010, 740). Ongoing violence between government forces, militias and rebel groups led to the internal displacement of 2.7 million people and the number of people in Darfur in need of humanitarian aid grew to approximately 4.7 million (Security Council Report 2008). Furthermore, the Sudanese government was held responsible for bomb attacks on its civilian population, war crimes whereby individuals were killed in their sleep, mass executions, rape incidents and pollution of water supplies with corpses (Falligant 2010, 740). The case against Al-Bashir was a watershed moment in universal jurisdiction as it represented the first time a sitting head of state was prosecuted. As a result, the case was met with outcries from several states that were mainly from the Global South, which had a delaying effect on the release of the arrest warrant. However, despite increased global rejections to the prosecution of a head of state, the ICC pre-trial chamber issued the warrant of arrest for al-Bashir on March 4, 2009. The pre-trial chamber gave strength to its decision by stating: "Omar Al Bashir's official capacity as a sitting Head of State does not exclude his criminal responsibility, nor does it grant him immunity against prosecution before the ICC" (ICC Press Release 2009).

The warrant of arrest against al-Bashir has been met with growing opposition and there have been several regional organizations that pushed for a deferral. The AU was accompanied by the Arab League, Non-Aligned Movement and Organization of Islamic Conference in its campaign for a binding Security Council deferral (Falligant 2010, 744). The AU argued that the warrant of arrest undermined the peace process in Darfur and have a negative effect on the already fragile foundations for stability in the country. In the mid-1980s a civil war erupted in Sudan and for the next two decades Darfur would be the scene of spiraling violence. The

international focus on Sudanese government officials and their corresponding statistics and casualty figures makes the accusations against al-Bashir on account of serious international crimes seem self-explanatory. Yet in spite of striking evidence of human rights violations by Sudanese government officials, the legal proceedings against al-Bashir seems to fail to take into account the historical causes of the conflict and the contemporary political climate and sub-regional context in which the crimes occurred. This becomes particularly evident when we compare two international reports published on the Darfur case and their different outcomes whether the Sudanese government had committed the crime of genocide. The first international report on violence in Darfur after the insurgency of 2003 had been published by the United Nations International Commission of Inquiry on Darfur in 2005. The report concluded that "the Government of Sudan has not pursued a policy of genocide" as their policies proved to have no intent of murdering civilians in such a systematic and widespread manner that it acquired the legal features of extermination as a crime against humanity (UN Commission on Darfur 2005, 132). The report hereby examined the context of the violence and concluded that the factor "genocidal intent" was missing as the government intended to drive civilians away from their homes through planned attacks as part of a counter-insurgency strategy (Mamdani 2010, 3). However, when the case was referred to the ICC to commence legal proceedings, the prosecutor charged the Sudanese President with genocide. Hereby, the ICC report on Darfur focused on the figures and casualty outcomes that the violence produced, instead of the context in which the violence occurred (Mamdani 2010, 3).

The genocide label has been highly politicized and as a result it is susceptible to abuses (Herman & Peterson 2010, 11). According to Mahmood Mamdani (2007, 1) the politics of naming becomes particularly evident when comparing the case of post-2003 violence in Darfur with the US-led invasion of Iraq within that same year. Both cases produced roughly the same amount of deaths related to violence, yet the international community responded to the cases in different ways. While the violence in Iraq has been referred to as a case of insurgent and counter-insurgent violence, the violence in Darfur is called genocide. In the past two decades there has been much scholarly work on the usage of the word "genocide". It has been found that the genocide label is rarely applied when the perpetrators are citizens of the US or its allies while the term has been used extensively when political enemies of the Unites States and its national interests commit murders (O'Connor 2012, 177). This politicized usage of the genocide label becomes particularly prone to misuses as we live in an age of heightened sensitivity to human rights abuses. With the 2002 entry into force of the ICC and the 2005

global political commitment to the Responsibility to Protect (RtoP) a broad group of governments was determined to take an active stance with respect to the most serious crimes in international law. Yet, as a result of these international efforts of human rights norm-setting, all indictments of the ICC have been issued against Africans. In addition to the ICC's one-sided selection of African cases, the court seems to carefully exclude Ugandan President Yoweri Musevi and Rwandan President Paul Kagame (Herman & Peterson 2010, 20). Despite a dismal human rights record, both African leaders have succeeded in avoiding condemnation as valuable clients of Western states (Reyntjens 2004, 177). It is even argued that "Kagame especially is an adored figure throughout much of the West … at home he plays host to visiting members of the global – and particularly the American – power elite" (Herman & Peterson 2010, 20). These politicized and partial practices have taken a toll on the credibility of the ICC in Africa.

Chapter 3. The Quest for an inter-African Jurisdiction: Looking Beyond the International Criminal Court versus Africa Debate

This chapter discusses the grounds for the AU's decision to give the African Court jurisdiction over international crimes. It is commonly assumed that the international fall-out over the warrants of arrest issued by the ICC against Sudanese President Omar Al-Bashir is the immediate factor that motivated the process of establishing an African Court with jurisdiction over international crimes (Abass 2013b, 28; Aja Agwu 2014, 40; du Plessis 2012, 3; Murungu 2011, 3). The ICC Case Information Sheet on Al-Bashir states that the Sudanese President is "suspected of five counts of crimes against humanity, two counts of war, and three counts of genocide allegedly committed in Darfur, Sudan" (ICC Case Information Sheet 2017). Due to international frictions the case against the president of Sudan and head of the National Congress Party has remained in the Pre-Trial stage. So far, the ICC has issued two warrants for arrest against Al-Bashir; the first in March 2009 and the second in July 2010. In response, AU Member States reaffirmed their opposition and argued that the case against Al-Bashir would impair all efforts to find a peaceful solution to the conflict as the Government of Sudan displayed a continued willingness to support the AU/UN Hybrid Operation in Sudan (UNAMID), which contributes to the halting of crimes against civilians (Ciampi 2008, 888). Considering this broadly-shared opposition, the AU has officially requested the UN Security Council to defer the proceedings against al-Bashir. In the midst of these international tensions, Al-Bashir has called for the establishment of an African court with jurisdiction over international crimes which "depends in its rulings on evidence and not on fabrications and political considerations" (Sudan Embassy 2017).

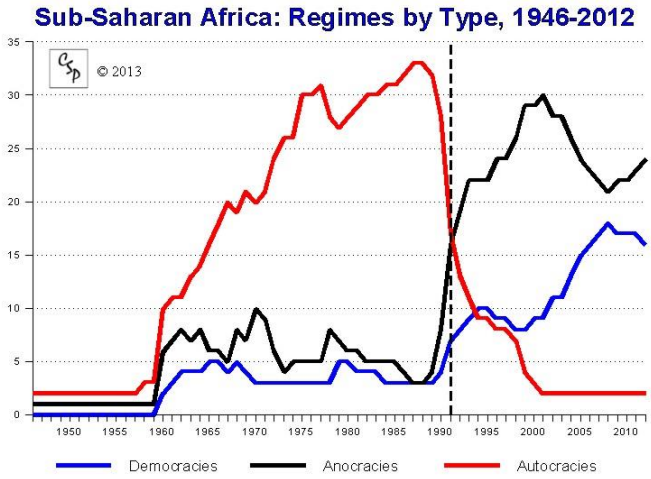
However, this chapter will show that it would be inaccurate to assume that the AU's call for an inter-African criminal jurisdiction is a direct aftereffect of the Al-Bashir fall-out. As will be shown in the following sections, the process of establishing an inter-African jurisdiction cannot be explained in the context of the ICC versus Africa debate alone. In fact, there are multiple grounds in support of an African regional court with jurisdiction over international crimes. In the following sections it will be argued that there is a historical and legal necessity for an inter-African jurisdiction to cover crimes distinct to and occurring on the continent. Given Africa's post-colonial history and subsequent struggles for democratic consolidation, there seems to be a need for an African court with jurisdiction over international crimes

peculiar to the continent. In addition, AU member states have made commitments to the protection of human rights without establishing the legal tools to realize these aims. Furthermore, an over-reliance on Western-oriented human rights concepts and norms leaves smaller room for approaches from an African perspective and this might contribute to an ill-fitted operationalization of human rights. With the Malabo Protocol, AU member states seek to improve upon the limitations of the ICC framework of universal jurisdiction with respect to region-specific human rights concerns.

3.1 The Historical Quest for an Inter-African Jurisdiction: Democratic Consolidation and the Phenomenon of Unconstitutional Change of Government

At the 8th Ordinary Session of the AU Assembly held in Addis Ababa, Ethiopia, the States Parties adopted the African Charter on Democracy, Elections and Governance (ACDEG). With the ACDEG African states reinforced their commitment to the protection of democracy, good governance and the rule of law and human rights (ACDEG 2007, 1). The charter presents an important reaffirmation of African governments to cooperate and revitalize their efforts in combatting the democratic deficit and instability the continent is faced with. Since a democratic wave swept across the continent just a few decades ago, often referred to as the 'Third Wave', many states have made the transition to a democratic state-structure. Beginning in 1989, the relatively young African states engaged in the build-up of formal democratic institutions such as political parties, a representative parliament and legal courts. However, formal institutions are only one of the many necessary steps to take towards a truly democratic state-system. In order for a successful democracy to be established there is a broader set of factors to take into consideration seeing that the success of democratic institutions cannot be guaranteed without necessary financial contributions for the active implementation and pursuit of democratic norms. African scholar J. Shola Omotala (2011, 7) argues that with the basic institutions of democracy in place, a process of political inclusion can be facilitated, however the African continent has witnessed the squander of democratic institutions by political actors that undermine the active pursuit of democratic norms to utilize and retain their power-positions. Hence, partly due to the absence of an active pursuit and implementation of democratic norms, institutional weakness and inefficiency has been widely documented. Institutional weakness and inefficiency seems to be an ongoing political headache on the African continent that holds the ever-present threat of eradicating the democratic gains that have been made so far.

According to data from the Polity IV project, published by the Center for Systemic Peace in 2014, many African countries have progressed from having an autocratic government to having an anocratic government with the latter referring to a type of government that is in between an autocracy and a democracy. As can be seen in the line chart below, the total number of autocracies in Sub-Saharan Africa has witnessed a rapid decline in autocracies since the end of the Cold War in 1989 which paved the way for the Third Wave of democracy. From the year 2000 onward we can even witness a flatline in the number autocracies, indicating that the number of autocracies has decreased to a stable and fixed all-time low. In contrast, ever since 1989 the number of democracies has greatly risen from an average of just below 5 to an average of around 15. While we can see an extensive improvement in the number of democracies, there have been some fluctuations in the period of 1989 - 2010, representing setbacks in the continuation of democratic regimes.



Source: Systemic Peace (2014)

The number of anocratic regimes however, represent an even greater rise resulting in the establishment of many more African in-between regimes that now form the majority. What might be disconcerting, is the fact that the fluctuations in the period of 1989 – 2010 are stronger for the anocratic regimes. And more specifically, from 2008 onward there has been a small decline in democracies, and in return a modest upsurge in the number of anocracies. This could ultimately mean that, while there is some sort of consolidation of democracies to be witnessed, a relapse to a more autocratic regime is an ever-present and conceivable threat that cannot be overlooked.

Studies on democracy in Africa often speak of a long-term African challenge with respect to the consolidation of democratic governance, resulting in the recurring phenomenon of unconstitutional changes of government (Omotola 2011, 9; Schmitz 2006, 2; Sturman 2011, 2). There are different shapes that unconstitutional changes of government can take; the illegal overthrow of a government by military or other opposition forces within the state-apparatus (coup d'état), the suspension of term limits through illegal amendments of the constitution by sitting leaders, the assumption of power in the absence of transparent and fair elections or the refusal to accept an electoral defeat through the manipulation of elections or conduct of violence-backed resistance. Concerned about the phenomenon of unconstitutional changes of government, the African region has worked on a set of common values and principles for democratic governance. With the Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government, African member states were early to express their grave concern about the resurgence of coup d'états on the continent and recognized that this phenomenon presents an alarming trend that negatively effects the ongoing process of democratization (UN High Commissioner for Human Rights 2017). The Lomé Declaration is often seen as the first regional instrument used by the OAU for the development of procedures and sanctions that prohibit unconstitutional changes of government. Since the Lomé Declaration the African region has taken an increasingly active stance for the codification of regulatory norms and values against unconstitutional changes of government. Before the OAU would be replaced by the AU in 2002, Article 3 of the Constitutive Act of the AU (2000) had already provided a promise of continued regulation to combat unconstitutional changes of government.

Despite the increase in regulatory norms and values, the phenomenon of unconstitutional changes of government has not been codified as a crime in international law. However, with Africa's post-colonial history and subsequent struggles for democratic consolidation in mind, the AU's decision to give the African Court jurisdiction over international crimes, including the crime of unconstitutional changes of government, falls into place. In this light, it would be inaccurate to assume that the AU's call for an inter-African criminal jurisdiction is a direct aftereffect of the Al-Bashir fall-out. Instead, there has been a historical African desire to prosecute international crimes. According to Frans Viljoen (2004, 4) this desire was already present in the late 1970s when an African rights system began to take shape. The idea of an African Human Rights Court to redress human rights violations was proposed to the key drafters of the African Charter on Human and Peoples Rights. One of the key drafters, Keba

M'Baye addressed the idea and argued that it would be too premature to establish an African Court that would redress human rights violations. However, according to M'Baye the idea was "no doubt, a good and useful one which could be introduced in the future by means of an additional protocol to the Charter" (M'Baye 1979, 1).

3.2 The Legal Quest for an Inter-African Jurisdiction: The Case of Hissène Habré and the Need for an African Perspective in International Human Rights

Ever since the establishment of the AU, the concept of human rights has truly gained momentum and became part of an expanded mandate for the active pursuit of human rights norms and rules. In this pursuit, AU member states have continuously reaffirmed their rejection of human rights violations and they have made commitments to answer a growing set of legal obligations that have been codified under the Constitutive Act of the AU and other treaties and legal documents. One of these legal obligations can be found in Article 4 of the Constitutive Act (2000) as it speaks of "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity". Although these three crimes already fall under the universal jurisdiction of the ICC, AU member states feel a growing legal obligation to redress these grave violations within an African context. At present, the AU generates laws for crimes that cannot be prosecuted by its own regional court as it lacks the authority and required legal instruments. The omission of a regional court capable of prosecution became particularly evident in the international operation to bring Hissène Habré, the former President of Chad, to justice after allegations of crimes against humanity. The legal proceedings against Hissène Habré proved a legal necessity for an effective inter-African jurisdiction and formed a trigger for the AU's decision to give the African Court jurisdiction over international crimes (Nmehielle 2014, 14).

Hissène Habré has been the President of Chad from 1982 until he lost his presidency to Chad's current head of state, Idriss Déby Itno, in 1990. After he lost his presidency, a broad group of Chadian citizens and Western governments held him responsible for serious human rights violations, causing Habré to flee to Senegal where he has been living in exile ever since. A campaign to bring Habré to trial started in 1991 with the set-up of a Chadian truth commission; the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré. One year after its establishment, the Commission of Inquiry published a report revealing that the Habré regime had been responsible for the deaths of 40.000 people

(Commission of Inquiry 1992, 91). The case drew widespread attention from international human rights organizations pressing for the continuation of investigations against the former President of Chad. Together with the Chadian victims international human rights organizations, including Human Rights Watch and the International Federation of Human Rights, formed the international committee for the Fair Trial of Hissène Habré. With the aim of prosecuting Habré while in exile, the International Committee turned to the preceding London arrest of the former dictator of Chile, Augusto Pinochet for inspiration (Brody 2015, 210; Human Rights Watch 2017). One of the key elements in the Pinochet arrest has been the principle of universal jurisdiction, allowing for Pinochet to be brought to justice abroad. Inspired by the universal take on Pinochet's case, Chadian victims filed a criminal complaint in Senegal against Habré (Brody 2015, 210). In February 2000, Senegalese Judge Djemba Kandji found that there was sufficient evidence to indict Habré on charges of torture and crimes against humanity and placed him under nominal house arrest in Senegal. The legal proceedings against Habré now represented a watershed moment in international justice as this would be the first time a country in the Global South would exercise universal jurisdiction.

There were some lingering obstacles to the exercise of international jurisdiction by the Dakar Regional Court in Senegal. Jurisdiction over crimes that were committed abroad had not yet been established in Senegal. In order to establish international jurisdiction, the Chadian victims had to rely on the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The convention was ratified by Senegal in 1986 and presented the Dakar Regional Court with grounds for international jurisdiction over the crime of torture. However, the promise of a soon to be realized trial against Habré and the members of his government became seriously impaired as Habré's lawyers and supporters worked to reverse the course of justice. Moreover, the newly-elected President of Senegal, Abdoulaye Wade, would have a negative political impact on the progression of the case with the appointment of Habré's attorney, Madicke Niang, as a special advisor to the Senegalese government on judicial matters (Sansani 2001, 34). Following Habré indictment in February 2000, Habré's lawyers filed a motion to dismiss the prosecution for the reason that the UNCAT did not provide Senegalese courts with jurisdiction to try crimes that had been committed in Chad. Habré's lawyers referred to Article 669 of the Criminal Procedure Code restricting Senegal's jurisdiction over extraterritorial matters alike the Habré case.

On July 4, 2000, the Indicting Chamber dismissed the prosecution of Habré convinced that Senegal could not provide a suitable setting for the trial as the crimes had been committed in Chad (Brody 2015, 210; Sansani 2001, 34). However, the Chadian victims and their supporters were determined to bring Habré to justice and turned to Belgium to file a case. At that time Belgian courts had universal jurisdiction and wanted to prevent Habré from finding refuge in a country unsusceptible to Belgium's extradition demands. Senegal however, was not pleased with the political interference with the judicial process and refused to meet Belgium's extradition demands. Instead, Senegal turned to the AU for guidance on the affair. After a two-decade long process of inactivity on Senegal's side, a persistent and strong lobby of Chadian victims and international pressures to extradite Habré to Belgium, Senegal and the AU set up the 'Extraordinary African Chambers' (Brody 2015, 213). The extraordinary chambers were established for the sole purpose of trying international crimes committed during the regime of Habré, including the crimes of genocide, crimes against humanity, war crimes and torture. Due to the persistence of Chadian victims and with the involvement of the AU, the Habré case represents a first-time African approach to international criminal jurisdiction.

It is often argued that the case of Hissène Habré paved the way to the idea of establishing an African Criminal Chamber (Murungu 2011, 15). At the time the international committee for the Fair Trial of Hissène Habré was formed, it also considered the African Court of Human and Peoples' Rights and the African Court of Justice. However, the committee concluded that the regional African courts did not have universal jurisdiction and therefore could not host the trial against Habré. As a result, the Committee spoke of the necessity for an 'African solution' to serious crimes in international law and the headache of impunity (Habré Committee Report 2006, 4). With future cases of similar nature in mind, the committee further proposed that the two regional courts were to merge in order for it to be granted universal jurisdiction over the most serious crimes in international law. Furthermore, the committee stated that "… there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court" (Habré Committee Report 2006, 5). Yet, the case of Habré proved the legal need for an impartial, African court, free from all forms of political pressure, in order to consolidate made commitments to the pursuit of human rights norms and rules and the rejection of impunity on the African continent.

A proposal to establish an African court with jurisdiction over international and transnational crimes was first proposed in the 1980s during the drafting of the African Charter on Human

and Peoples' rights (Amnesty International 2016, 7). However, the idea of an African court with criminal jurisdiction was too far ahead of its time and seemed like a premature ambition. The proposal did offer a vision for the future that gave room for an African perspective to international human rights practices. International human rights norms and concepts have historically been shaped by Western liberal societies (Aluko 1981, 234; Goonesekere 2013, 1). The first global expressions of human rights concerns came in response to the devastating first World War. These first expressions were truly global in language and content. However, there is an ongoing debate among scholars on the modern concept of human rights as a Western notion (Cobbah 2005, 309; Wai 1979, 116; Donnelly 1982). The concept is increasingly criticized for supporting a Western political agenda with respect to societies of the Global South. Despite the increase in momentum of the global human rights agenda in Africa, there seems to be a gap in the literature when it comes to approaches to human rights from an African perspective (Cobbah 2005, 309). With the Malabo Protocol, the AU's call for an inter-African criminal jurisdiction has the potential to fill this gap. Hereby, the yet-to-be established court is not meant to replace or undermine the activities of the ICC. But instead, it provides an opportunity to complement the practice of international law of today while bringing an African approach to African problems with respect to universal jurisdiction.

Conclusion

There are several important insights that follow from the in-depth analysis presented above. The AU has proved to be an ambitious driving force for change in the continent's human rights landscape. In the pursuit of its ambitions, the call for an inter-African jurisdiction seems to have grown on par with an increase in tensions between African states and the ICC. As this study has shown, the increase in tensions is a result of different factors, most notably the disproportionate selectivity in ICC jurisdiction with respect to the African region. the far-reaching universal jurisdiction of the ICC has never produced an investigation or prosecution outside of Africa. In the global world power matters and states with the most power find themselves in a position where they can undermine the court and limit its reach. This became particularly evident in the case of the 2003 US-led invasion of Iraq. The case involved the engagement of Western officials in war crimes who were in breach of international law, yet a formal investigation never materialized. Despite the ICC's uncomplicated personality on paper, we witness that the practice of universal jurisdiction is often exercised by developed states at the expense of African countries. The ICC prosecutions of African leaders such as Gbagbo and al-Bashir have impaired the prestige of the ICC as an impartial and independent court. Prosecutorial selectivity in the case of Côte d'Ivoire refrains the ICC from exercising an exhaustive, all-encompassing investigation that attempts to fully understand the complexity of the context in which the conflict and the roles that different actors herein play. This results in an unbalanced exercise of universal jurisdiction leaving current Ivorian President Oattara in a state of impunity. In addition to an observable selective approach to investigations and prosecutions, the case of Sudan has found that the genocide label has been used in a politicized manner that resulted in accusations of genocide against Sudanese President al-Bashir even though the 'ingredient of genocidal intent' remained questionable. In light of these concerns, these cases of increased frustration with ICC activities have undoubtedly been a catalyst for the AU's call for an inter-African jurisdiction.

However, this study has argued that the Malabo Protocol and new regional developments in African human rights law should also be explained beyond the ICC versus Africa debate. While the motivations for an inter-African jurisdiction seem to have grown on par with an increase of anti-ICC sentiment we should be careful not to view the Malabo Protocol as a pure anti-ICC move on behalf of the AU. Instead, with Africa's post-colonial history and consequential problems with democratic consolidation in mind, the African call for jurisdiction over international crimes can be understood as more than a means to defy the ICC

and taint its global prestige. The case of Hissène Habré further underlines a legal need for the African region to tackle lingering obstacles to the regional practice of international criminal jurisdiction and to consolidate made commitments to the pursuit of human rights norms and rules. A regional court with international criminal jurisdiction will provide Africa with abundant opportunities to bring a long-missing African approach to international human rights and find solutions to crimes that are specific to the African continent, such as the alarming trend of unconstitutional change of government. Hereby, the African court is not meant to substitute or impede on the practices of the ICC. But instead, it provides an opportunity to complement international developments in human rights law while fulfilling the African quest for an inter-African jurisdiction.

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