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Debating the AU's proposal to create new African Criminal Court

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New Haven: On September 14, 2012, Yale University and Yale Law School held an event, entitled *The International Criminal Court and the Future of International Law in Africa*, to discuss the creation and implications of an African criminal court, which would prosecute mass human rights violations and other international crimes occurring in Africa. There has been a long standoff between the African Union (AU) and the International Criminal Court (ICC) regarding prosecuting mass human rights abuses in Africa.

And recently, the AU proposed that all international crimes be tried by a new African court - the African Court of Justice and Human Rights (the African Court), which would be a merger of the African Court on Human and People's Rights (ACHPR) and the Court of Justice of the African Union (the Court of Justice).

Speakers at the Yale event included Professor Charles Jalloh from the University of Pittsburg, Professor Ademola Abass from the United Nations University Institute for Comparative Regional Integration Studies, both of whom spoke about the AU's decision to create such a new African court and the likelihood of its success; and Dr. Dire Tladi, Permanent Mission of South Africa to the United Nations and Member of the International Law Commission, who spoke about the development of the crime of aggression at the Review Conference of the Rome Statute (which is not discussed here).

Prof. Jalloh specifically supported the AU's push to create the African Court while recognizing that there would still be difficulties in its implementation. He believes that any proposal for an African court that adds to, but not undermines or detracts from, the Rome Statute and the ICC should be welcome. He used the term "Rome Statute Plus," explaining the proposal's effect of complementing the jurisdiction of the ICC.

The AU's proposal provides jurisdiction to the African Court for not only crimes against humanity, war crimes, crimes of aggression, and genocide, but also trafficking (in persons, drugs, and

hazardous wastes), corruption, and the crime of unconstitutional change of government. According to Prof. Jalloh, it would be difficult to deny a system which would prosecute additional international crimes, until looking at the plausibility of the new African Court coming to fruition.

Nevertheless, he hopes that the African States have the ability to accomplish their goals and that with an understanding of what the AU would like to do, there could at least be open discussion about different ways of accomplishing the common goal of international justice.

Although Professor Abass shared his colleague's stance on the motivation of the AU and the possible benefits of the AU's proposal, he was less optimistic about its successful implementation. He noted three key difficulties that would need to be addressed in establishing such a new African Court with such expansive jurisdiction:

- First, Africa may not have enough resources to fund such a court, especially considering the expansive list of crimes included in the proposal. Currently, the cost to the ICC for just one case amounts to the entire budget for the current Court of Justice for all cases. If the African Court could not even financially support the cases currently in front of the ICC, it would be difficult to imagine how it would prosecute an additional ten crimes not addressed in the Rome Statute. Prof. Abass also questioned the addition of so many crimes arguing that an international court should be reserved for the most heinous crimes, like those in the Rome Statute.
- Second, there may be lack of political will by African States to create their own independent international court. Considering the outrage over the arrest warrants issued by the ICC against President Omar al-Bashir of Sudan, it is difficult to imagine African States advocating and supporting an African Court that could prosecute other African heads of state.
- Third, the merger of civil and criminal jurisdictions (from the ACHPR and Court of Justice) into one court could prove challenging and is a feat that has never been done before. The concern is that the major differences in both systems, including evidentiary rules, would make it impossible for the African Court to function properly or function at all.

While these three issues raised by Prof. Abass give cause for concern about the African Court, there is a fourth issue that we must also consider - the impact of such a court on the *victims of international crimes*. The ICC takes a very progressive approach to victim participation, allowing for victims to apply to participate in different stages of the proceedings and to apply to receive reparations, thus not only incorporating measures of restorative justice but also ensuring the voices of the victims are heard at all levels.

While the AU's proposal allows for victim participation, taking the language from the Rome Statute, there are still many questions regarding implementation. For example, how plausible it is to ask victims of heinous crimes to return to a place that they may have fled in fear so that they could participate in court proceedings? Or, in the case of prosecuting government officials or military leaders, how would victims still living in their home countries be protected? What exactly would victim participation look like in practice?

Although it is important that the international community engage in conversations to assess the AU's proposal, it is equally important for the AU to recognize that its proposal is not without flaws and to reconcile any such proposal with the justice being sought at the ICC.

The answer cannot be "create a new court" when little or no effort has been made to cooperate with the existing ICC. And, the AU's continued defending and protecting of President Bashir,

despite his mass human rights abuses, does not reassure victims and the international community that the AU's true intention is the pursuit of justice and not to be a barrier to it.

Background

The ICC has issued two arrest warrants for President Bashir of Sudan for the violence committed in Darfur—the first was issued in March 2009 for war crimes and crimes against humanity; the second was issued in July 2010 for genocide against the Fur, Masalit, and Zaghawa tribes in Darfur. These arrest warrants marked the first time that the ICC indicted a sitting Head of State for these crimes.

U.N. Security Council Resolution 1593 provided the ICC with jurisdiction over the international crimes committed in Darfur, despite Sudan not being a party to the Rome Statute which established the Court, and obligates Sudan to cooperate with the ICC.

The AU has urged the U.N. Security Council to delay or “defer” the proceedings against President Bashir, arguing that this action would harm peace efforts. This stance, however, fails to consider the on-going violence in Darfur, the Nuba Mountains, Blue Nile, and South Kordofan in which civilians are being killed and forced from their homes in the face of such “peace efforts.” There are reports that Bashir continues to attack these areas with the same disregard for life that existed well before any peace talks began.

- **To read the Protocol on the Statute of the African Court of Justice and Human Rights, click [here](#).**
- **For additional information, click [here](#).**

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