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ARTICLE

# The Crisis of International Criminal Law in Africa: A Regional Regime in Response?

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**Abstract**
This article considers the African Union's (AU) proposal for a regional court for international crimes under the Malabo Protocol 2014 (Protocol). It places that within the AU's rejection of the International Criminal Court's (ICC) arrest warrants for African Heads of States that are not party to the Rome Statute and a more general protection of incumbents. It argues that the enthusiasm for establishing a regional criminal court, which lacks jurisdiction to prosecute incumbents, has not been sustained and African states remain committed to the ICC. It shows that nevertheless the Protocol's provisions on genocide, crimes against humanity and war crimes, although imperfect, better address the specific character of armed conflicts in Africa than current international law, including the Rome Statute of the ICC. It concludes that the regional court for international crimes is unlikely to be established unless the ICC takes further action against incumbent leaders but that the Protocol's provisions could be used in the development of a more Africa-centric international law.

**Keywords** African Union · International Criminal Court · Malabo Protocol · African Criminal Court · Immunity of Heads of State · Core international crimes

## 1 Introduction

In 2005 and 2011 respectively, the UN Security Council (UNSC) referred to the International Criminal Court (ICC) the situation in Sudan (Darfur) under Resolution 1593 (2005) and in Libya under Resolution 1970 (2011). Within the resolutions, the African Union (AU) placed on these states an obligation to 'comply fully with and provide any necessary assistance to the Court and the Prosecutor'.[1] Those

[1] UNSC Res. 1593, UN Doc. S/RES/1593 (31 March 2005), para. 2 and UNSC Res. 1970, UN Doc. S/RES/1973 (26 February 2011), para. 5.

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referrals proved controversial because these two African states are not party to the Rome Statute of the ICC. Nevertheless, they are generally accepted as legal because they were made under Chapter VII of the UN Charter and Article 13 of the Rome Statute which sets out a legal framework for such referrals. The referrals triggered the ICC's jurisdiction and ultimately led it to issue a total of three arrest warrants for the Heads of these states, Omar Al Bashir of Sudan (in 2009 for war crimes and crimes against humanity and in 2010 for genocide), and Muammar Gaddafi, the Head of State of Libya (in 2011 for crimes against humanity). The ICC has required states parties to the Rome Statute to cooperate in effecting these ICC warrants. That includes 33 African states which have ratified the Rome Statute.

The AU, which formally replaced the Organisation of African Unity (OAU) in July 2002, rejects these warrants.[2] The AU's legal position is that incumbent heads of non-party states are entitled to immunity from arrest in third states under customary international law. It argues that the immunity subsists irrespective of the nature of the crimes and that was established, a priori, by the International Court of Justice (ICJ) in the *Arrest Warrants* case (2002) and the Rome Statute has not affected that immunity. The AU further argues that Article 98 of the Rome Statute recognises that limitation. That article provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

At the political level, the AU in 2009 adopted a policy of non-cooperation with the ICC in the execution of the ICC's warrants of arrest for Bashir.[3] The policy was extended to Gaddafi of Libya in 2011 but he was killed soon afterwards.[4] As a result of the AU's policy, Bashir has been able to make a series of visits to ICC member states in Africa without arrest. These are to Chad (July 2010, August 2011, February and May 2013, March 2014), Djibouti (May 2011, May 2016 and July 2018), the Democratic Republic of the Congo (DRC, February 2014), Kenya (August 2010), Malawi (October 2011), Nigeria (July 2013), South Africa (June 2015) and Uganda (May 2016).

[2] Du Plessis (2012).

[3] See AU Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)', 3 July 2009, AU Doc. Assembly/AU/Dec. 245(XIII) Rev. 1, para. 10—Chad entered a reservation to this paragraph—and 'Decision on the International Criminal Court', 28–29 January 2018, AU Doc. Assembly/AU/Dec. 672(XXX), paras. 2(iii)–3(i) and 5.

[4] See AU Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', 30 June-1 July 2011, AU Doc. Assembly/AU/Dec. 366(XVII), paras. 5–6.

These visits have led the ICC to issue findings of non-compliance against those states.[5] Key among these are the ICC rulings against Malawi (12 December 2011), Chad (13 December 2011), DRC (9 April 2014) and South Africa (6 July 2017). In these rulings, the ICC found these states, as parties to the Rome Statute, to be in breach of their obligations to cooperate under that treaty in failing to bring the issue of Bashir's immunity before the court and in failing to arrest and surrender Al Bashir to the court when he visited their respective state territories.[6] In these decisions, the ICC rightly made clear that it has jurisdiction over the Heads of States which are party to the Rome Statute by virtue of the waiver of immunities under Article 27 of the Rome Statute. That: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

More problematic is the ICC's assertion of jurisdiction over the heads of non-party states. Alongside that, the Court has provided different and contradictory positions on why third states would not breach customary international law immunities in executing the ICC arrest warrants for Bashir. In the *Malawi* and *Chad* decisions, the ICC decided that states must comply with the ICC cooperation requests because Heads of State have no immunity in proceedings before international courts and that extends to any act of cooperation by states which is essential for those proceedings.[7] In contrast, in the *DRC* and *South Africa* rulings the Court found that a Head of State

[5] The ICC also referred these states to the UNSC and the Assembly of States Parties, with the exception of Nigeria and South Africa. *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decisions informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute of visits: Chad—ICC-02/05-01/09-109, 27 August 2010, p. 3; Kenya—ICC-02/05-01/09-107, 28 August 2010, p. 3; Djibouti—ICC-02/05-01/09-129, 12 May 2011, p. 3; Pre-Trial Chamber I, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of 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, 12 December 2011, para. 5 (hereinafter *Refusal of Malawi*); Pre-Trial Chamber I, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG, 13 December 2011, para. 3 (hereinafter *Refusal of Chad*); Pre-Trial Chamber II, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-151, 26 March 2013, para. 23(c); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 April 2014, paras. 16, 25–27 and 34 (hereinafter *DRC Cooperation*); Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, ICC-02/05-01/09-267, 11 July 2016, para. 15 (hereinafter *Refusal of Uganda*); Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, ICC-02/05-01/09-266, 11 July 2016, para. 15 (hereinafter *Refusal of Djibouti*).

[6] *Refusal of Malawi*, paras. 47 et seq.; *Refusal of Chad*, para. 14; *DRC Cooperation*, paras. 16 and 34, all three n. 5 above; Pre-Trial Chamber II, 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-02/05-01/09-302, 6 July 2017, para. 123 (hereinafter *Refusal of South Africa*).

[7] *Refusal of Malawi*, para. 44; *Refusal of Chad*, paras. 13–14, both n. 5 above.

of a non-state party may be immune from prosecution. To prevent other states from acting inconsistently with their international obligations towards a non-party state, Article 98 of the Rome Statute requires the Court to first obtain a waiver or lifting of immunity of its Head of State.[8] In that the ICC concurred in general terms with the AU's argument.[9] Paradoxically, the Court has nevertheless asserted that the UNSC resolution provides an exception to that rule. In the *DRC*, *Uganda* and *Djibouti* rulings, the Court concluded that the UNSC had implicitly waived Bashir's immunities and the requirement for a waiver under Article 98(1) by virtue of the language used in resolution 1593 which required the cooperation of Sudan, and so states are able to arrest him.[10] However, the Court could find no waiver of immunities in resolution 1593 in the *South Africa* ruling. Instead, it concluded that the requirement for cooperation in resolution 1593 places Sudan in an analogous position to states which have ratified the Rome Statute. For the Court that meant that Sudan is bound under Article 27 of the Rome Statute and as a result cannot rely on immunities, and as Bashir's immunity as Head of State is inapplicable so is the requirement for a waiver under Article 98.[11] That means that third states may arrest him.

Significantly, a 2016 decision of the South African Supreme Court of Appeal (SCA) supports the AU's general position. That decision followed an appeal by the government of South Africa against a ruling of the South African High Court that the government had breached its obligations when it failed to arrest Bashir during his June 2015 visit to Johannesburg.[12] For our purposes, its most important conclusion was that Bashir would ordinarily enjoy customary international law immunities in South Africa.[13] In its decision, the SCA declined to recognise an international crimes exception to immunity at the domestic level under customary international law.[14] Nor did the SCA find that the ICC's jurisdiction to try Bashir under the Rome Statute created an exception to immunity at the national level for states cooperating with the ICC. Instead, the SCA recognised that only states parties to the Rome Statute have obligations under it. Critically, the SCA declined to comment on whether the UNSC created an implicit waiver of Bashir's immunity under the UNSC resolution.[15] For the SCA, the tension between Articles 27 and 98 had not yet been authoritatively resolved.[16]

Nevertheless, the SCA decided that Bashir was not immune from arrest in South Africa because the Implementing Act 2002 (effecting the Rome Statute) specifically

[8] *DRC Cooperation*, n. 5 above, para. 27.

[9] Ibid., paras. 25–27; *Refusal of South Africa*, n. 6 above, paras. 81–82. For an in-depth analysis of the AU-ICC legal dispute, see Omorogbe (2017), p. 37.

[10] Omorogbe (2017); *Refusal of Uganda*, para. 15 and *Refusal of Djibouti*, paras. 10–13, both n. 5 above.

[11] *Refusal of South Africa*, n. 6 above, paras. 87–89 and 107.

[12] *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others* (27740/2015) (2015) ZAGPPHC 402, paras. 33–34.

[13] *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) ZASCA 17 (15 March 2016), para. 85 (hereinafter *Minister of Justice*).

[14] Ibid., para. 69.

[15] Ibid., paras. 76–82 and 106; Ventura (2015), pp. 1011–1015; Tladi (2015), p. 1027.

[16] *Minister of Justice*, n. 13 above, paras. 60 and 78.

provided for a removal of immunities both in respect of prosecutions of international crimes and South Africa's obligations to the ICC.[17] Significantly, the SCA acknowledged that its decision was 'progressive' and possibly inconsistent with customary international law and the practice of other states, but the State Constitution allowed it to depart from following customary international law rules.[18] The implication is that in the absence of permissive national laws, states parties are required to respect Bashir's immunities. On this reading, the arrest of Bashir is unlikely given that 26 of 33 African state parties have not yet incorporated the Rome Statute into domestic law.[19]

The AU is aware of the importance of clarity on the legal position. In early 2018, it asked the African Group of Ambassadors to the UN to request from the UN General Assembly an advisory opinion from the ICJ on the issue of immunity in relation to Articles 27 and 98 of the Rome Statute of the ICC.[20] That was done later that year by Kenya which, acting on behalf of all African states, requested that the matter be included on the agenda of the UN General Assembly's 73rd meeting, from September to December 2018. Regrettably, that request was denied.[21] The challenge is that in the absence of a decision from the ICJ, doubts about Bashir's status persist. That lack of legal certainty also undermines the credibility of the ICC. It is therefore important that the ICC's Assembly of States Parties (ICC-ASP) join with African states in requesting an ICJ advisory opinion on the matter.

## 2 Towards a Regional Regime?

The AU has previously rejected the idea of an international criminal section within the African Court on Human and Peoples' Rights, outside the ICC context.[22] For our purposes what is significant is that the idea was put forward twice in 2009. The first was as a result of the AU's general displeasure at the use of the principle of

[17] Ibid., para. 102.

[18] Ibid., paras. 87, 91 and 103.

[19] The latest information available to the author is that eight states have incorporated the Rome Statute into domestic law. These are Burkina Faso, Central African Republic (CAR), Comoros, Kenya, Mauritius, Senegal, South Africa, and Uganda. Coalition for the International Criminal Court, '2013 Status of the Rome Statute Ratification and Implementation around the World', http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.

[20] 'Decision on the International Criminal Court', n. 3 above, para. 5(i).

[21] United Nations General Assembly, 'Request for the inclusion of an item in the provisional agenda of the seventy-third session', UN Doc. A/73/144 (18 July 2018); 'Annotated draft agenda of the seventy-third session of the General Assembly** Addendum**', UN Doc. A/73/100/Add. 1 (18 September 2018).

[22] See AU Assembly, 'Decision on the Seats of the African Union', 6–8 July 2004, AU Doc. Assembly/AU/Dec. 45 (III) Rev. 1; AU Executive Council, 'Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union', 24–28 January 2005, AU Doc. EX.CL/162 (VI), para. II(3); AU Assembly, 'Decision on the Habre Case and the African Union', 24 January 2006, AU Doc. Assembly/AU/Dec. 103 (VI), paras. 2 and 4 respectively; AU, 'Report of the Committee of Eminent African Jurists on the Case of Hissene Habre', paras. 1 and 3–4, https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf.

universal jurisdiction by Western states over crimes committed within African states because of the nature of the crime alleged. At the time, Germany had executed an international arrest warrant issued by a French judge for Rose Kabuye for complicity in the murder of Juvenal Habyarimana (President of Rwanda 1973–1994).[23] The challenge was that Kabuye at the time of her arrest was an aide to Paul Kagame, the incumbent President of Rwanda. Ultimately, the warrant was lifted.[24] The idea of a regional criminal court was considered again when the AU adopted its policy of non-cooperation with the ICC.[25] In 2011, the ICC issued an arrest warrant for Gaddafi.[26] That led the AU Assembly to question how 'Africa's interests can be fully defended and protected in the international judicial system'.[27] Throughout, the AU Assembly instructed the AU Commission, the African Commission on Human and Peoples' Rights alongside the African Court on Human and Peoples' Rights to investigate whether the African Court on Human and Peoples' Rights should be empowered to try core international crimes.[28] In May 2012, the Ministers of Justice and Attorneys General of the AU states endorsed a draft Protocol extending the jurisdiction of the African Court on Human and Peoples' Rights over core crimes. No protection of Heads of States was provided under that draft. The AU Assembly meeting in January 2013 chose not to proceed.[29] One issue seems to have been the costs of establishing a revised court.[30]

Ironically, the final trigger for a regional treaty providing for a criminal court in Africa was ICC proceedings relating to Kenya, a state which is party to the Rome Statute. The background to that is that Uhuru Kenyatta and William Ruto were among a total of six suspects who had been charged with the commission of grave crimes during post-election violence in 2007–2008. The ICC in 2011 refused to transfer the matter to Kenyan national authorities under the principle of complementarity, which was in response to Kenya's admissibility challenge.[31] In March 2013, Kenyatta and Ruto were democratically elected President and Vice President respectively. Following that, the ICC commenced its proceedings against Ruto in

[23] See, as an example, AU Assembly, 'Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction', 1-3 February 2009, AU Doc. Assembly/AU/Dec. 213(XII), para. 9.

[24] 'French Court lifts Kabuye Indictment', *The New Times*, 1 April 2009, https://www.newtimes.co.rw/section/read/7893.

[25] 'Decision on the Meeting', n. 3 above, para. 5.

[26] AU, 'Decision on the Implementation', n. 4 above, para. 6.

[27] Ibid., para. 8.

[28] Ibid., para. 8; AU, 'Decision on the Meeting', n. 3 above, para. 5.

[29] AU, 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights', 9–11 and 14–15 May 2012, AU Doc. Exp/Min/IV/Rev. 7; Abass (2013a), pp. 933–934 and 937; Abass (2013b), pp. 28–29.

[30] Ibid. (both).

[31] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, 30 May 2011. For a discussion of this point, see Sriram and Brown (2012).

September 2013 and scheduled its trial of Kenyatta for February 2014.[32] The AU's response to the ICC proceedings was swift. In October 2013, the AU Assembly in extraordinary session expressed its reservation about the effect of these ICC proceedings on the sovereignty, stability, peace and security of that state and the wider region.[33] It called for the suspension of ICC proceedings against Ruto and Kenyatta until they leave office.[34] It also widened its policy of non-cooperation, declaring:

> to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.[35]

It is clear that this provision is intended to protect Kenyatta and Ruto in their roles. But the effect of the AU's policy is to protect all incumbent Heads of African States and their deputies from all courts and tribunals, irrespective of whether the target state had ratified the treaty under which that court is established.[36]

Significantly, the AU Assembly also requested the speeding up of the process of including international crimes within the mandate of the African Court on Human and Peoples' Rights.[37] Ultimately, on 27 June 2014, the AU Assembly adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol). That provides, *inter alia*, for the African Court of Justice and Human and Peoples' Rights to be divided into three sections, being the international human rights section (in line with that court's current jurisdiction), the general matters section (for example disputes on the interpretation and application of AU treaties in line with the jurisdiction of the ACJ), and the International Criminal Law section (ICL).[38]

Certain provisions of the Protocol reflect the AU-ICC conflict. The key provision is Article 46A *bis* of the Protocol which provides:

> No charges shall be commenced or continued before the Court against any serving Head of State or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

In parallel, the obligation of states to cooperate with the ICL is limited in Article 46L(g) to 'Any other assistance not prohibited by the law of the requested State' in respect of the arrest, surrender and transfer of accused persons to the Court.[39] These provisions when read alongside the AU's policy of non-cooperation with the ICC in

[32] See Abass (2013a), pp. 933–934; Abass (2013b), pp. 28–29.
[33] AU Assembly, 'Decision on Africa's Relationship with the International Criminal Court', 12 October 2013, AU Doc. Ext/Assembly/AU/Dec.1(Oct.2013), paras. 6–7.
[34] Ibid., para. 10(ii).
[35] Ibid., para. 10(i).
[36] Ibid., para. 10(i).
[37] Ibid., para. iv.
[38] Malabo Protocol Annex, Art. 7.
[39] Ibid., Art. 46L (G).

the arrest of *any* African Head of State shows that the objective is to remove incumbent leaders from the overview of all international courts and tribunals.

Finally, no reference is made in the Rome Statute or the ICC in the Protocol. That silence is intentional. Selemani Kinyunyu, one of the drafters of the Protocol, claims that the legal reason for the omission is that making reference to the ICC would have required engagement with it.[40] That suggests that the AU intends to sideline the ICC in Africa.

A remaining question is whether the ICL, if established, could be used for the prosecution of Heads of State after they leave office. The Protocol does not prohibit that. At the same time the AU may be open to it. As we have seen, the AU has limited its requests for a deferral of ICC actions against AU Heads of State until they leave office. However, African Heads of States may resist that. President Barrow of Gambia is reported to have recently expressed his significant reservations about prosecuting ex-President Jammeh because 'To prosecute a person who has chosen to leave power might be a bad idea politically'.[41] The implication is that peaceful transfers of power in African states may be endangered. The argument that peace should trump justice is not new.[42] But immunity in perpetuity is troubling, particularly in the context of the region's many armed conflicts in which grave violations are committed, including by government forces.

At present, it is unlikely that the regional regime will be established. The main reason is that the ICL is not a key priority for African states. That conclusion is supported by states' failure to ratify the Protocol, which needs 30 AU state ratifications to come into effect. However, as of 28 February 2018, no state has ratified the treaty, and only 11 states have signed it (Benin, Chad, Comoros, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, Sao Tome and Principe, Sierra Leone, and Uganda).[43] The AU Assembly continues to request the quick ratification of treaties which would provide the African Court on Human and Peoples' Rights with jurisdiction over criminal cases.[44] It is also reflected in the lack of a funding provision. Following a January 2015 decision of the AU Assembly, a Special Fund for donations from states and organisations has been established, and a donor conference was held in May 2015, specifically for the establishment of the ICL.[45] That decision was made in the context of the Assembly's opposition to the ICC arrest warrants for President

[40] S. Kinyunyu, Annual Meeting of the African Experts Group on International Criminal Justice organised by Konrad Adenauer Stiftung, Lilongwe Malawi, 24 August 2017.

[41] R. Maclean and S. Jammeh, 'Yahya Jammeh, former leader of Gambia, could face extradition', *The Guardian*, 25 January 2018, https://www.theguardian.com/world/2018/jan/25/yahya-jammeh-former-leader-gambia-extradition-adama-barrow.

[42] See the argument of Uganda on why it could not arrest Al Bashir and the ICC's conclusion in this respect. *Refusal of Uganda,* para. 14; *Refusal of Djibouti*, para. 14, both n. 5 above.

[43] AU, 'Ratification Status: Protocol on Amendments on the Protocol on the Statute of the African Court of Justice and Human Rights', https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf.

[44] Most recently in 'Decision on the International Criminal Court', n. 3 above, para. 3(iii).

[45] AU Assembly, 'Decision on the Progress Report of the Commission on the Implementation of previous decisions on the International Criminal Court, 30–31 January 2015, Assembly/AU/Dec.547(XXIV), para. 17(b).

Bashir of the Sudan and the continuation of proceedings against William Ruto, Vice President of Kenya.[46] At the donor conference, Kenya pledged US$1 million towards the establishment of the Court, and President Kenyatta urged AU states to ratify the Protocol so that 'the resulting court is fully owned, financed and driven by Africa'.[47] So far, Kenya has not honoured its pledge, nor followed through on its own recommendation. Nor has any other African state pledged financial or other support to the criminal chamber.

One reason for this is that when not threatened by ICC legal actions, African states are committed to that institution. Significantly, Kennedy Ogeto, the Solicitor-General of Kenya, recently twice affirmed his state's support for the ICC.[48] That followed the discontinuance of ICC proceedings against Kenyatta in December 2014 for lack of evidence and non-cooperation of the state and Ruto in April 2016 for mistrial due to witness tampering and political meddling.[49]

It is true that senior officials of the AU have criticised the ICC's exclusive focus on African states, and accused it of neo-colonialist objectives.[50] In this respect, it is perplexing that 10 of the 11 situations currently under investigation are in Africa (the exception is Georgia), all 26 ICC prosecutions to date relate to the African region, and so far only African leaders have been indicted.[51] The argument however minimises the fact that in half of these situations, it was the state itself which invited the ICC's involvement by referring the situation to the ICC (Uganda December 2003, Central African Republic (CAR) December 2004 and May 2014, DRC

[46] Ibid., paras. 3–4, 8–9, 17(d)–17(e) and 18–19.

[47] Amnesty International (2016), p. 11; O. Obonyo, 'Questions beg over President Uhuru Kenyatta's Sh93m pledge to African Union Court as other states keep off', *Standard Digital*, 17 May 2015, https://www.standardmedia.co.ke/article/2000162493/questions-beg-over-president-uhuru-kenyatta-s-sh93m-pledge-to-african-union-court-as-other-states-keep-off; J. Ngirachu, 'Uhuru Kenyatta: Let's Have an African-funded Court', *Daily Nation*, 31 January 2015, http://www.nation.co.ke/news/politics/Uhuru-Kenyatta-African-Court-of-Justice-and-Human-Rights/-/1064/2609206/-/format/xhtml/-/yi2b3nz/-/index.html.

[48] J. Kamau, 'ICC on its deathbed, prosecution desperately in need of overhaul', *Star*, 22 September 2018, https://www.the-star.co.ke/news/2018/09/22/icc-on-its-deathbed-prosecution-desperately-in-need-of-overhaul_c1822658; 'Kenya appears at State Parties Conference of the ICC', *Capital News*, 7 December 2018, https://www.capitalfm.co.ke/news/2018/12/kenya-appears-at-state-parties-conference-of-the-icc/.

[49] ICC, *Situation in the Republic of Kenya, Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V-B, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983, 5 December 2014; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for judgments of acquittal, ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, para. 464; *Prosecutor v. Uhuru Mugai Kenyatta*, Second Decision on Prosecutor's Application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11, 19 September 2016, p. 18 (finding of non-compliance with the obligation to consult with the court and by not taking all reasonable steps to effect a cooperation request from the Court).

[50] See, for example, A. Laing, 'International Criminal Court is "hunting" Africans', *Daily Telegraph*, 27 May 2013; 'African Union condemns "unfair" ICC', *BBC News*, 11 October 2013; 'Africa must set up own ICC to try Europeans, says Mugabe', *News 24*, 19 June 2016, https://www.news24.com/Africa/News/Africa-must-set-up-own-ICC-to-try-Europeans-says-Mugabe-20150619; 'Rwanda's Paul Kagame accuses ICC of bias against Africa', *Aljazeera*, 29 April 2018, https://www.aljazeera.com/news/2018/04/rwanda-kagame-accuses-icc-bias-africa-180429050656022.html.

[51] ICC, 'Situations under Investigation', https://www.icc-cpi.int/pages/situation.aspx.

April 2004, and Mali July 2012). Of the remainder, two were referred by the UNSC (Darfur 2005 and Libya 2011), and only three situations were initiated by the ICC Prosecutor under *proprio motu* powers (Kenya March 2010, Ivory Coast October 2011 and Burundi 2017).[52] The argument also fails to note that only three of 10 ongoing preliminary investigations relate to the African region.[53] Of these three, one was referred by the state (Gabon May 2016) and the others were initiated by the ICC Prosecutor (Guinea October 2009 and Nigeria November 2010).[54] Overall, in respect of all the above, the ICC's focus has been on lower-level defendants and non-state actors in African states. Finally, six African states ratified the Rome Statute after the first warrant of arrest was issued for Bashir on 4 March 2005. Kenya ratified on 15 March 2005, Chad on 1 November 2006, the Seychelles on 10 August 2010, Tunisia on 24 June 2011, Cape Verde on 10 October 2011, and the Ivory Coast on 15 February 2013.

That African states are committed to the ICC is also supported by the failure of the strategy of mass withdrawal from the ICC, which was adopted by the AU Assembly in January 2017.[55] Immediately, 16 states entered reservations to the policy (Benin, Botswana, Burkina Faso, Cape Verde, Gambia, Ivory Coast, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia).[56] The following month, Dr. Clement Aduku, the spokesperson for Nigeria's Ministry of Foreign Affairs, openly challenged the AU when he declared that: 'if each country wants to withdraw, it has the right to do that individually. … [The] AU, which was not a party to the Rome Statute that established the court, should not be developing a strategy for a collective withdrawal for something that each country entered into individually.'[57]

Similarly, only one of three states, Burundi, Gambia and South Africa, which threatened to withdraw from the Rome Statute has so far done so. That state is Burundi, and its withdrawal took effect in October 2017 following the issuance of a formal notice of intention to withdraw from the ICC on 11 October 2016, by the government of President Pierre Nkurunziza.[58] The ICC Prosecutor in April 2016 had opened a preliminary investigation of the situation in that state since April 2015.[59]

[52] Ibid.

[53] The seven non-African states are Afghanistan (2017), Colombia (2004), Iraq/UK (the investigation, initially terminated in February 2006, was reopened in May 2014), Palestine (January 2015), The Philippines (February 2018), Ukraine (April 2014) and Venezuela (February 2018) at ICC, 'Assembly of State Parties', https://www.icc-cpi.int/pages/pe.aspx#.

[54] ICC, 'Preliminary Examination': Gabon, https://www.icc-cpi.int/gabon; Guinea, https://www.icc-cpi.int/guinea; Nigeria, https://www.icc-cpi.int/nigeria.

[55] 'Decision on the International Criminal Court', 30–31 January 2017, AU Doc. Assembly/AU/Dec. 622(XXVIII), paras. 3 and 6.

[56] Ibid., fn 1.

[57] C. Jannah, 'Nigeria will not withdraw from ICC—FG insists', *Daily Post*, 2 February 2017, http://dailypost.ng/2017/02/02/nigeria-will-not-withdraw-icc-fg-insists/.

[58] UN, 'Burundi: Withdrawal', Reference: C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification) (27 October 2016).

[59] ICC-OTP, 'Report on Preliminary Examination Activities', paras. 19 and 22–40, https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

In contrast, the other two states whose motivation for the notice was ICC action against Bashir have changed course. Gambia's government, led by Yahya Jammeh, gave formal notice of withdrawal from the ICC on 10 November 2016.[60] However, following the handover of power to Adama Barrow, the notice was rescinded on 10 February 2017.[61] Similarly, the South African government, led by Jacob Zuma, gave notice of its intention to withdraw from the ICC on 19 October 2016.[62] That notice was revoked in March 2017 following a successful challenge on procedural grounds in a national court.[63] Whether the government of Cyril Ramaphosa, which came to power in February 2018, will initiate the withdrawal process once again remains to be seen.[64]

What is clear is that there is a crucial split between the AU, on the one hand, and its members, on the other, concerning the way forward. Given the lack of support from African states for establishing the ICL, the ICC remains the only court providing international criminal justice in Africa. That is likely to remain the case, in the absence of a further threat or action by the ICC against Africa's incumbent leaders.

## 3 The Challenge of African Conflicts

Since the 1990s, non-international armed conflicts (NIACs) have become more prevalent than international armed conflicts (IACs).[65] That change in the character of armed conflict is not limited to the African continent, and reflects a global trend.[66] It is accepted that conflicts in Africa are multifaceted. However, certain characteristics found across conflicts serve to make these distinct. One is that the majority of African conflicts are mixed conflicts, meaning they have both internal and international dimensions.[67] As an illustration, at least eight states intervened in the 1998–2000 NIAC in the eastern DRC conflict between, on the one hand, the government of Laurent Kabila and, on the other, rebel forces. External actors fighting alongside

[60] UN, 'Gambia: Withdrawal', Reference C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification) (11 November 2016).

[61] UN, 'Gambia: Withdrawal of Notification of Withdrawal', Reference C.N.62.2017.TREATIES-XVIII.10 (Depositary Notification) (16 February 2017).

[62] UN, 'South Africa: Withdrawal', Reference: C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification) (19 October 2016).

[63] UN, 'South Africa: Withdrawal of Notification of Withdrawal', Reference: C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification) (7 March 2017).

[64] N. Pillay, R. Goldstone and M. Kersten, 'A plan for South Africa to Stay in the ICC', *Mail & Guardian*, 10 September 2018, https://mg.co.za/article/2018-09-10-a-plan-for-south-africa-to-stay-in-the-icc.

[65] UNGA, 'The Causes of Conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary-General of the UNSC', UN Doc. A/52/871-S/1998/318 (1998), para. 4.

[66] Cryer (1996), p. 177.

[67] Mixed conflict scenarios are sometimes found outside the African region in *Military v. Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986, p. 14, para. 219; *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 72 and Judgment, IT-94-1-A, 15 July 1999, para. 84.

the Kabila government were Angola, Namibia, Zimbabwe, Chad and Sudan, while Rwanda and Uganda fought against.

A second quality is the prolonged nature of some conflicts, including in Angola (1975–2002), Burundi (1993–2005), the Central African Republic (2012–ongoing), Chad (2005–2010), eastern DRC (1996–1997 and 1998–2003), Liberia (1989–1996), Nigeria (North-east 2013–the present), Sierra-Leone (1991–2000) Sudan (1983–2005, Darfur region 2003–2015, Southern Kordofan 2011–the present) South Sudan (2013–the present) and Uganda (1987–2006). In some of these, states and rebel groups have an economic interest in perpetuating the violence as that enables access to natural resources of the territorial state including oil (Angola, Sudan and South Sudan) and minerals (Angola, DRC, Liberia and Sierra Leone).[68]

A third quality is that the state is not party to many conflicts. In 2017, there were 50 non-state armed conflicts in Africa.[69] That is compared to nine armed conflicts in Africa in which at least one party is a state in the same year (CAR, DRC, Egypt, Ethiopia, Libya, Mali, Nigeria, Somalia and South Sudan).[70] The fourth is the involvement of Islamist militant jihadist groups in some of Africa's conflicts including in Algeria, Cameroon, CAR, DRC, Egypt, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Somalia, South Sudan, Sudan, Tunisia, Uganda and Western Sahara.[71] A fifth characteristic is that both rebel and government forces forcibly recruit children into armies for combat and support duties, and some children volunteer.[72] The impact on Africa is significant. In 2016, 40 per cent of the world's child soldiers operated there.[73] The sixth characteristic is that armed groups target women and girls for abduction, rape and other gender-based sexual violence.[74] Gender-based violence in armed conflict is not limited to the African region.[75] But the scale of abuse is troubling. As an example, Amnesty International conservatively estimates

[68] See Ross (2003), p. 18; Kishi (2014).

[69] Bakken and Rustad (2018).

[70] *SIPRI Yearbook 2018 Online*, http://www.sipriyearbook.org/view/9780198821557/sipri-9780198821557-chapter-2-div1-013.xml and http://www.sipriyearbook.org/view/9780198821557/sipri-9780198821557-chapter-2-div1-014.xml.

[71] See Lionel (2018).

[72] Coalition to Stop the Use of Child Soldiers (2015). UNSC/UNGA, 'Report of the Secretary-General: Children and Armed Conflict', UN Doc. A/72/865–S/2018/465 (16 May 2018), para. 9. UNICEF Nigeria, 'Use of children as "human bombs" rising in north-east Nigeria', 22 August 2017, https://www.unicef.org/nigeria/media_11621.html; UNSC, 'Tenth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo', UN Doc. S/2002/169 (2002), para. 64.

[73] Dudenhoefer (2016); J. Burke and P. Hatcher-Moore, 'If you're old enough to carry a gun, you're old enough to be a soldier', *Guardian*, 24 July 2017, https://www.theguardian.com/global-development/2017/jul/24/south-sudan-child-soldiers.

[74] See as an example, *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-A, 2 September 1998, para. 507; P. Landemann, 'A Woman's Work', *NY Times* Magazine, 15 September 2002, p. 13; D. Glynn, 'Congo War: 48 women raped every hour at height of conflict', *The Irish Times*, 30 April 2016, https://www.irishtimes.com/news/world/africa/congo-war-48-women-raped-every-hour-at-height-of-conflict-1.2629444; Human Rights Watch (2017).

[75] Similar violations occurred in the former Yugoslavia conflict. See, *Prosecutor v. Ratko Mladic*, Judgment, IT-09-92-T, 22 November 2017, para. 4633.

that a total of 2000 women and girls were abducted by Boko Haram between 2013 and early 2015.[76]

It is also arguable that the African region has suffered disproportionately from NIACs:

- By 2014, 52 per cent of the world's armed conflicts were in Africa[77];
- At the end of 2016, approximately 40 per cent of persons internally displaced by conflict worldwide were in Africa (12.6 million persons)[78];
- At the end of 2017, the Africa region had 6.3 million refugees, about 33 per cent of the world's refugee population.[79]

Problematically for the African region, current international law provides wider protections against violations occurring in IACs than in NIACs. The four Geneva Conventions of 1949 on the laws and customs of war are applicable to IACS, and these regulate the means and methods of warfare. These are Geneva Convention I: 'for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field', II: 'for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea', III: 'relative to the Treatment of Prisoners of War' and IV: 'relative to the Protection of Civilian Persons in Time of War'. These four treaties are widely regarded as forming customary international law and breaches of the rules entail individual criminal responsibility under customary international law. The four Geneva Conventions are the basis of the statutes of the ICC, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). However, only Common Article 3 of each is formally applicable to NIACs. It does not deal with the conduct of hostilities and is limited to outlining the minimum obligation of humane treatment which parties to conflicts are required to exercise (discussed below). The reason that NIACs are less regulated is that traditionally such conflicts are regarded as falling within the domestic domain of states and are therefore inappropriate for international overview. As Fox notes, the rules of traditional international law favour incumbent governments, and creating a space for law in the unregulated sphere of civil conflicts would mean that governments recognised legal entitlements for rebels, even though the national criminal law of every state would allow these to be prosecuted for treason.[80]

Nevertheless, many African states are signalling a preference for the regulation of *all* classes of armed conflicts. That conclusion is supported by the fact that the Geneva Conventions have been ratified by 33 African states. In addition, the majority of African states have agreed to stricter regulations by binding themselves under supplementary treaties to the Geneva Conventions which are only applicable to states which have ratified these. One is the Additional Protocol I 1977 (API) for the protection of civilians in IACs. API has been ratified by 50 of 55 African states. The other is Additional Protocol II 1977 (APII) for the protection of civilians in NIACs

[76] Amnesty International (2015), p. 59.
[77] Cilliers (2015), p. 4.
[78] IDMC (2017), pp. 8, 9, 17 and 50.
[79] UNHCR (2018), pp. 3–4 and 13–14.
[80] Fox (1994), pp. 652–653.

and which extends the list of acts prohibited under Common Article 3. APII has been ratified by 51 African states, meaning that only 4 states are outside it.

Key AU treaties, in particular Article 4(h) of the AU Constitutive Act 2001, provide the AU with a right to intervene using military or other measures in Member States on the occurrence of grave circumstances, namely: genocide, crimes against humanity and war crimes. The AU Constitutive Act does not define the meaning of these terms. However, according to Article 7(1)(e) of the Protocol of the Peace and Security Council (PSC), these are 'as defined in relevant international conventions and instruments'. That would include the Rome Statute of the ICC established under the treaty and the Statute of the ICTY and the Statute of the ICTR, both established by the UNSC under its Chapter VII powers.[81] The Malabo Protocol is clearly intended to add a regional dimension to these definitions and to provide the AU with a mechanism for judicial intervention.[82]

### 3.1 Genocide

Article 28B of the Protocol defines the crime of genocide as:

> …any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group;
> (f) Acts of rape or any other form of sexual violence when these are committed with the intent to destroy a national, ethnic or religious group.

Subsection (f) of Article 28B, above, distinguishes the AU's definition of rape from that found under international treaties. One of these is Article II of the Genocide Convention 1948. That treaty is taken to reflect customary international law and

[81] See Roberts and Guelff (2000), p. 196.

[82] It is accepted that genocide and crimes against humanity can occur outside the context of armed conflict. However, for the purposes of this work, the focus is limited to occurrences during armed conflict. Nine other crimes within the jurisdiction of the ICL are excluded from this work. These are piracy, the crime of unconstitutional change of government, terrorism, corruption, illicit exploitation of natural resources, trafficking in hazardous waste, trafficking in persons, and trafficking in drugs. It is accepted that genocide and crimes against humanity can occur outside the context of armed conflict. However, for the purposes of this work, the focus is limited to occurrences during armed conflict.

has been ratified by 35 African states.[83] The others are Article 6 of the Rome Statute of the ICC and Article 2 of the Statute of the ICTY and the Statute of the ICTR.[84] The African regional definition reflects the jurisprudence of the ICTR in *Prosecutor v. Akayesu* that rape and other forms of sexual violence can constitute genocide if committed with the intent to destroy a particular and targeted group of people.[85] Like the ICTR in *Prosecutor v. Akayesu* and the ICTY in *Prosecutor v. Karadzic,* the Protocol would allow a determination that rape and other forms of sexual violence involving acts which constitute serious bodily and mental harm can amount to the genocidal destruction of a group.[86] The ICC would seem to support this progressive definition. Its 2010 indictment of Al Bashir for genocide, *inter alia*, included subjecting 'thousands of civilian women, belonging primarily of the Fur, Massalit, and Zaghawa groups to acts of rape' and this supports that position.[87]

Subsection (f) of Article 28B is in line with the position set out in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Women's Protocol), which was adopted in 2003, and came into effect in November 2005, after 15 AU states had ratified it.[88] As of end-June 2019, 41 AU states had ratified it.[89] Article 11(1) of the Women's Protocol provides for the protection of women and girls in armed conflicts. Under Article 11(3) states parties are required, *inter alia*, to treat as genocide, war crimes or crimes against humanity rape and other forms of sexual exploitation and violence against asylum seekers, refugees, returnees and the internally displaced. Article 28B(f) would also enable the transfer of cases of sexual violence for prosecution at the ICL. The Women's Protocol Article 11(3) provides that states must bring the perpetrators of such abuse before a competent criminal court. Currently that is provided at the national level, with the African Commission on Human and Peoples' Rights issuing resolutions and statements to ensure the compliance of member states or referring the matter to the African Court on Human and Peoples' Rights for adjudicative remedies. The same would hold true in relation to the second instrument, the Genocide Convention 1948. Article VI of the Convention provides that: 'Persons charged with genocide or any of the other acts enumerated in article III shall be tried

[83] Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, in force 12 January 1951. African states which have not ratified the Genocide Convention are: Angola, Botswana, Cameroon, CAR, Chad, Congo, Djibouti, Equatorial Guinea, Eritrea, Kenya, Madagascar, Mauritania, Mauritius, Niger, Sao Tome and Principe, Sierra Leone, Somalia, South Sudan, Swaziland and Zambia. UN Office on Genocide Prevention and the Responsibility to Protect, 'The Convention on the Prevention and Punishment of the Crime of Genocide 1948–2018', http://www.un.org/en/genocideprevention/documents/Appeal-Ratification-Genocide-FactSheet_final.pdf.

[84] On the general point, see Roberts and Guelff (2000), pp. 180, 570, 615 and 673.

[85] *Akayesu*, n. 74 above, para. 731; *Prosecutor v. Radovan Karadic and Ratko Mladi*, Indictment, IT-95-5-I, 24 July 1995, para. 22; *Prosecutor v. Radovan Karadic*, Judgement, IT-95-5/18-T, 24 March 2016, para. 545.

[86] Ibid., *Akayesu* and *Karadic* (Judgment). See Ellis (2007), pp. 225–234.

[87] Powell (2017), p. 27. See *Al Bashir*, Pre-Trial Chamber I, Second Arrest Warrant for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 12 July 2010, pp. 6–7.

[88] Ratification Table at 28 June 2019: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf.

[89] Ibid.

by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

### 3.2 Crimes Against Humanity

Article 28C of the Protocol states:

> …'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This definition replicates Article 7(1) of the Rome Statute, which is the most widely accepted definition of the crime.[90]

The Protocol adds to the Rome Statute the definition of how the crime is committed. Under the Protocol, crimes against humanity are committed as part of a widespread or systematic attack *or enterprise* directed against any civilian population, with knowledge of the attack *or enterprise*.[91] The term 'enterprise' is not defined in the Protocol.[92] It is possible to argue that the term means a 'joint criminal enterprise'.[93] That refers to participation by multiple persons in a common plan, design or

[90] See on the Rome Statute, Dixon et al. (2011), p. 536.
[91] Emphasis added to highlight the change in wording.
[92] Amnesty International (2016), p. 17.
[93] *Prosecutor v. Dusko Tadic* (Judgment), n. 67 above, paras. 185 et seq. in particular at para. 226.

purpose with the aim of committing an international crime. If that interpretation is correct, each participant would be criminally liable irrespective of the level of his or her contribution to it.[94]

More broadly, both the Protocol and the Rome Statute give the respective courts jurisdiction over natural legal persons under Article 46 and Article 25(1) respectively. That means that the courts are able to prosecute individuals who are 18 years of age and above at the time of the crime. The Protocol is however unique in also providing jurisdiction over legal persons under Article 46C. In this respect, the provision specifically excludes states from its overview, but fails to make clear what is covered. But the article does make clear that corporations are included. The general consensus is that the term includes business corporations.[95] If that interpretation is correct, Article 46C of the Protocol when read alongside Article 28C would enable the prosecution of multinational corporations for crimes against humanity. And if this interpretation is correct, the Protocol would be the first international treaty to do so as a judicial response is currently limited to the national level.[96] That would provide a response when multinational corporations for economic reasons fuel the commission of gross crimes in armed conflict as a result of their trading practices or through the provision of arms and material to conflict parties in the fight for access to and control of state resources.[97]

### 3.3 War Crimes

The Protocol follows the Rome Statute in recognising that war crimes can be committed in the context of an IAC or NIAC. A key difference in both classes of conflict is that the regional protection of young people is greater at the regional level. Under the Protocol, the use of children under 18 years of age in armed conflict is a war crime. That age limit is consistent with two pre-existing regional treaties. One is the AU's 2003 Women's Protocol (discussed above); Article 1(k) thereof makes clear that the term women includes girls and Article 11(4) prohibits the recruitment or direct participation in conflict of those under 18 years of age. The other is the African Charter on the Rights and Welfare of the Child (Children's Charter) adopted by the OAU in July 1990.[98] It came into force in November 1999 after 15 states had ratified it.[99] By 28 February 2019, 48 out of 54 African states had ratified it.[100]

[94] See generally *Prosecutor v. Radislav Kristic*, Judgment, IT-98-33-T, 2 August 2001. For a discussion of joint criminal enterprise, see Bantekas and Nash (2007), pp. 29–34; Cassese (2007), p. 109.

[95] Kyriakakis (2019), pp. 793–794 and 806–812; Colvin and Chella (2012), pp. 299 and 302.

[96] See Amnesty International, 'Nigeria: Shell complicit in the arbitrary executions of Ogoni Nine as writ served in Dutch court', 29 June 2017, https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/.

[97] Kyriakakis (2019), pp. 793–794 and 799–801; Colvin and Chella (2012), pp. 297–300 in particular p. 299; N. Cumming-Bruce, 'Oil companies may be complicit in atrocities in South Sudan, UN Panel says', *New York Times*, 20 February 2019, https://www.nytimes.com/2019/02/20/world/africa/south-sudan-oil-war-crimes.html; Global Witness (2009).

[98] OAU Doc CAB/LEG/153/Rev.2 (1991).

[99] Ratification Table at 15 June 2017: African Charter on the Rights and Welfare of the Child, https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf.

[100] Ibid.

Article 2 defines a child as a person under 18 years of age, and Article XXII prohibits the recruitment or direct participation of children in armed conflicts including intra-state conflicts. In contrast, Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the ICC provide that it is a war crime to conscript or otherwise use children under the age of 15 years actively in IACs and NIACs respectively.[101] That same age limit is to be found under Article 77(2) of API and Article 4(3)(c) of APII, as well as the 1989 UN Convention on the Rights of the Child and its Optional Protocol of 2000.[102]

There are other critical differences between the Protocol and the Rome Statute in relation to each class of conflict.

### 3.3.1 International Armed Conflicts

Article 28D of the Protocol, like Article 8 of the Rome Statute, lists acts which constitute grave breaches of the 1949 Geneva Conventions in IACs. These include wilful killing, torture, wilfully causing great suffering, unlawful deportation and the taking of hostages 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.

The Protocol lists slavery and deportation to slave labour in IACs as a war crime under Article 28D(b)(xxxi). In contrast the Statutes of the ICC, ICTY and ICTR refer to 'enslavement' and treat that as a crime against humanity.[103] Nevertheless, slavery is implicitly recognised as a war crime under the provisions of the Geneva Conventions which limit how occupying powers may use prisoners of war and civilians.[104]

Another peculiarity is that the Protocol specifically includes six offences from Additional Protocol I (API) 1977. These are:

- Knowingly attacking works or installations which contain dangerous forces which would cause excessive injury to civilians or civilian objects in excess of the anticipated military advantage from such an attack, even if these are legitimate military targets (Article 28D(b)(v)).[105] However, while Article 56 of API specifically limits the term 'works and installations' to dams, dykes and nuclear electrical generating stations, the Protocol is silent on what is included.[106] It is

[101] Rome Statute Art. 8(b)(xxvi); Malabo Protocol Art. 28D(b)(xxvii).

[102] For an extended discussion on API and the UN Convention, see ICRC (2003), pp. 1–2.

[103] See generally, ICRC, 'Rule 156. Definition of War Crimes', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156; Kolb and Hyde (2008), p. 168.

[104] ICRC, 'Rule 94: Slavery and Slave Trade', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94.

[105] That provision reflects API Art. 85(3)(c). The ICRC position is that API Art. 56 is derived from customary international law (CIL), see 'Works and Installations containing dangerous forces', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule42; *contra* Dinstein (2016), pp. 227–228 which argues that CIL requires proportionality while Art. 56 totally prohibits such attacks if they are likely to cause severe losses among the civilian population.

[106] ICRC, 'Works and Installations containing dangerous forces', https://casebook.icrc.org/glossary/works-and-installations-containing-dangerous-forces; see also Protocols to the Geneva Conventions of 12 August 1949, https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf.

possible to argue that the term includes nuclear installations, in line with the regional position set out in Article 11 of the OAU African Nuclear Free Zone Treaty (discussed below).[107] It may cover factories manufacturing toxic products, incendiary weapons and oil production installations and storage facilities, although these were rejected for API.[108]

- Attacks on non-defended localities and demilitarized zones (Article 28D(b)(xxx)). This Protocol and API covers all such attacks. However, API does allow for other types of military operations in demilitarised zones, subject to the prior express agreement of the conflict parties.[109]
- Collective punishments of non-combatants and prisoners (Article 28D(b)(xxxii)). This provision does not make clear whether, as under API, the threat of such an act is also criminalised.[110]
- Wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination (Article 28D(b)(xxix)).[111] The term race is not defined but the link to practices of apartheid suggests biological categorisations. It is not clear whether ethnicity, which is instead linked to shared culture, would fall within the term 'race'. That lack of clarity is regrettable given that ethnic identity has been a key driver in post-colonial conflicts including in the Central African Republic, the Democratic Republic of Congo, Chad, Kenya (2007–2008), Mali, Nigeria, South Sudan, Sudan (Darfur), Rwanda (1994) and Uganda.
- The despoliation of the wounded, sick, shipwrecked or dead (Article 28D(b)(xxxiii)).[112] That is in line with Geneva Conventions I, Article 15 (for those on land) and II, Article 18 (for those at sea).
- An unjustifiable delay in the repatriation of prisoners of war or civilians (Article 28D(b)(xxviii)). The provision is aimed at detaining powers and is applicable at the end of hostilities. The Protocol is silent on whether intent is required. In contrast, Article 85(4)(b) requires wilful commission. As a result it is possible to argue that the Protocol provides for strict liability, and as a result is more con-

[107] African Nuclear-Weapon-Free Zone Treaty (The Treaty of Pelindaba, signed 11 April 1996, in force 15 July 2009) (hereinafter NTFZ), Arts. 5 and 11 respectively.

[108] This widened meaning was rejected for API after discussions at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, 1978. Dinstein (2016), p. 227 text to fn. 1368; ICRC, 'Commentary of 1987: Protection of Works and Installations Containing Dangerous Forces', https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B071F91A3BD55FD7C12563CD00434E3E.

[109] API Arts. 59 and 60; ICRC, 'Commentary of 1987: Repression of Breaches of this Protocol', https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805.

[110] API Art. 75(2).

[111] API Art. 85(4)(c).

[112] That is in line with API Arts. 8–10, 34(1) and 41, GCI Art. 15 (for those on land) and GCII Arts. 12–13 (for those at sea).

tiguous to Geneva Conventions III, Article 118 (for prisoners of war) and IV, Article 133 under which intent is dispensed with. As to what constitutes a justifiable delay, the ICRC Commentary to API states that 'Only material reasons such as circumstances making transportation impossible or dangerous are acceptable'.[113] What is clear is that the repatriation of refugees and combatants is a cornerstone of peace agreements and reconciliation in African states in the post-conflict period.

### 3.3.2 Non-International Armed Conflicts

The Protocol's Article 28D(f) defines a non-international armed conflict as a serious and protracted armed conflict between governmental authorities on the one hand, and organised armed groups on the other, or a serious protracted armed conflict solely between non-state armed groups. That is the same definition adopted under Article 8(2)(f) of the Rome Statute of the ICC and Common Article 3 of the 1949 Geneva Convention. The ICTY in *Prosecutor v. Dusko Tadic* (1995) also used that definition.[114] The alternative, a more traditional and narrower formulation found under APII, requires that the state must be a party to the conflict, and the armed groups must be organised, have control of territory and the ability to implement APII.[115] It is clear that the narrower formulation would exclude the majority of armed conflicts occurring in the African region.

Like Article 8(2)(c) of the Rome Statute, Article 28D(e) of the Protocol defines serious breaches of Common Article 3 of the Geneva Convention as war crimes. That includes targeting non-combatants and people who are no longer taking an active part in the conflict (*hors de combat*), inhumane and discriminatory treatment, violence to life and persons, the taking of hostages, outrages on personal dignity and a lack of due process, as well as a failure to collect and care for the wounded and sick. Just as the Rome Statute, the Protocol lists as acts which constitute war crimes intentionally directing attacks against civilians, civilian objects or UN peacekeeping missions, committing rape, sexual slavery and pillaging.[116]

The crucial difference is that the Protocol's list of war crimes includes 11 acts not found in the Rome Statute's list. Four of the 11 acts are:

- The despoliation of the wounded, sick, shipwrecked or dead (Article 28(e)(xxii)). That provision integrates obligations in APII Articles 4(2)(a) and 8.
- Slavery (Article 28 (e)(xx)) and collective punishment (Article 28(e)(xxi)). In these the Protocol incorporates the fundamental prohibitions found under Article 4 of APII. One challenge is that in contrast to APII, the Protocol fails to make clear whether threats to commit these acts would be within the jurisdiction of the ICL.

[113] ICRC, 'Commentary of 1987': Repression, n. 109 above.
[114] *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion), n. 67 above, para. 70.
[115] ICRC, 'Treaties, State Parties and Commentaries: APII at 4 July 2018', https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.
[116] Provided under the Rome Statute Art. 8(2)(e).

- Starving civilians, including through impeding relief supplies (Article 28D(e)(xvi)). Article 14 of APII rejects starvation as a military strategy but it makes no reference to relief supplies. In contrast, Article 8(b)(xxv) of the Rome Statute does include hindering relief supplies within its list of acts but that provision is only applicable in the context of IAC. The Protocol would enable a prosecution where warring parties in NIACs block the delivery of food and humanitarian aid adding to the widespread suffering and starvation of the civilian populace, a problem we have seen in Somalia in the 1990s and more recently in South Sudan in 2017.

It is of course open to the ICC to exercise its jurisdiction in NIACs on the occurrence of slavery, collective punishment and the starvation of civilians as breaches of Common Article 3 of the Geneva Convention specifically within the jurisdiction of the ICC under the Rome Statute. These are the commission of outrages on personal dignity in particular humiliating and degrading treatment, and the commission of violence to life and persons, in particular cruel treatment and torture (and murder if death occurs) (Article 8(2)(c)(ii) and 8(2)(c)(i) respectively). Although not mentioned in the Rome Statute, Common Article 3 of the Geneva Conventions imposes an obligation on conflicting parties to protect the dead from being desecrated.

Three other acts reflect provisions under API and therefore would otherwise be applicable only in IAC. These are:

- The launching of indiscriminate or non-proportionate attacks (Article 28D(e)(xviii)).[117] This is the rule of proportionality. That means that a conflict party that launches an attack against a lawful military target would commit a war crime if the attack were expected to result in civilian harm that is excessive to the concrete and direct military advantage that is anticipated. The Protocol's application of the rule to NIACs is innovative.
- Attacks on non-defended localities and demilitarized zones (Article 28D(e)(xix)),[118] and the use of civilians or other protected persons as shields against military operations (Article 28D(e)(xvii)).[119] These provisions maintain the general obligation for armed actors to distinguish between military targets and the civilian population. At the same time, it responds to the use of civilians to protect military targets in some NIACs in Africa including in CAR, Liberia, Rwanda, Sierra Leone and Somalia.[120]

Another three acts relate to the use of weapons known to cause indiscriminate harm and unnecessary suffering, and echo the prohibitions applicable to IAC under customary international law and treaty law.[121] Similarly, the ICC's jurisdiction over

[117] API Arts. 82(5) and 51(4).

[118] API Art. 59.

[119] API Art. 51(7). See Rusinova (2017), p. 454.

[120] See ICRC, 'Rule 156', n. 103 above; and UNHCR, 'Central African Republic', p. 3, https://www.refworld.org/pdfid/5b56e2c47.pdf.

[121] The treaties include the 1925 Geneva Protocol for the Prohibition of Poisonous Gases and Bacteriological Warfare and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).

these was originally limited to IAC.[122] That jurisdiction has recently been extended to NIACs. That happened in July 2018, when the ICC's Assembly of States Parties' (ICC-ASP) 2010 amendments to the Rome Statute came into effect.[123] These are:

- Poison or poisoned weapons (Article 28D(e)(xiii))[124];
- Asphyxiating, poisonous or other gases, liquids, materials or devices (Article 28D(e)(xiv)); and
- Bullets which expand or flatten in the body ('dum-dum' bullets) (Article 28D(e)(xv)) in NIACs.[125]

Finally, the Protocol criminalises the use of nuclear weapons or other weapons of mass destruction (Article 28(g)). This applies to NIAC's absolute prohibition found under Articles 55 and 35(1) of API in IAC.[126] It also fits with the regional position confirmed in the OAU/AU African Nuclear-Weapon-Free Zone Treaty (NFZT) and its three supplementary Protocols for IAC. These treaties prohibit, *inter alia*, the use and testing of nuclear devices or attacks on nuclear installations in Africa,[127] the threat or use of nuclear weapons against states party to the treaty and the threat or use of nuclear weapons against territories for which state parties have *de facto* or *de jure* international responsibility.[128] In this respect it is interesting to note that France and Spain continue to have responsibility for some African state territories. The treaties are geared towards protecting African states from potential and excessive human and environmental damage.[129] Forty-one African states have ratified the NFZT.[130] The exceptions are CAR, Cape Verde, Djibouti, DRC, Egypt, Eritrea, Equatorial Guinea, Madagascar, Sao Tome and Principe, Sierra Leone, Somalia, South Sudan, Sudan, and Uganda. It is not clear why the Protocol prohibits the use of nuclear weapons given that African states currently lack that capability. One suggestion is that the prohibition is directed at more powerful Western states which

[122] Rome Statute Art. 8(2)(b)(vii), 8(2)(b)(viii) and 8(2)(b)(xix).

[123] Under Rome Statute Art. 8(2)(e)(xiii), 8(2)(e)(xiv) and 8(2)(e)(xv) respectively. See resolution RC/Res. 5; see Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 (International Criminal Court publication, RC/11), part II.

[124] Prohibited under the 1899 Hague Declaration Concerning Expanding Bullets (29 July 1899) in relation to IACs; ICRC, 'Expanding Bullets', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule77#Fn_F4806E5_00003; Dinstein (2016), pp. 79–80.

[125] Henckaerts et al. (2005), pp. 252–253.

[126] For a discussion on these API provisions, see Fleck (2008), pp. 132–134.

[127] NTFZ, n. 107 above, Arts. 5 and 11 respectively.

[128] Ibid., Protocol 1, Art. 1(1).

[129] NTFZ, n. 107 above, Preamble; see also, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 226, para. 36.

[130] AU, 'List of Countries which have signed, ratified/Acceded to the African Nuclear-Weapon-Free Zone Treaty at 15 June 2017', https://au.int/sites/default/files/treaties/7777-sl-the_african_nuclear-weapon-free_zone_treaty_the_treaty_of_pelindaba_3.pdf. See also, AU PSC, 'Press Statement', 10 April 2018, AU Doc. PSC/PR/BR.(DCCLXXIII).

possess nuclear weaponry and are known to have interfered routinely in Africa states for geopolitical and strategic interests, particularly during the Cold War.[131] Significantly, China, France, Russia and the UK have ratified the NTFZ treaty and Protocols to varying levels, while the US and Spain have not.[132] What is clear is that the blanket criminalisation of the use of nuclear weapons departs from *The Legality of Use of Nuclear Weapons* advisory opinion in which the International Court of Justice could not rule out the legality of the use of nuclear weapons in self-defence.[133]

As we have seen, overall the Protocol provides greater restrictions in armed conflicts than the Rome Statute. It closes gaps in the current international law's protection of civilians and *hors de combat*, particularly in the context of NIACs. That is particularly important in the context of Africa's mixed conflicts and would avoid the current situations where IAC rules apply to relations between some parties to the conflict and NIAC rules apply to others.

## 4 Conclusion

The African Union's Malabo Protocol sends a strong political message about legitimate concerns on the shortcomings of the ICC's decisions on the question of immunities. Having sent that message, African states have proved reluctant to implement the Protocol and overall have demonstrated their continuing commitment to the ICC. As a result, the ICC retains its responsibility for the provision of international criminal justice for Africa. The position of African states is likely to change only if the ICC gains custody of Bashir or takes action against another incumbent leader, in particular the head of a state that is not party to the Rome Statute.

What of the future of the Malabo Protocol? Irrespective of the lack of ratification, the Malabo Protocol remains an important legal and security document.[134] It highlights critical gaps in the international law provision for African conflicts. Critically, it improves on the definitions found under the Rome Statute and international law in respect of genocide, crimes against humanity and war crimes.[135] In that way it better aligns with human security threats in armed conflicts in the African region. The Protocol's provisions are not perfect and require revision. For that reason it can only be a prototype for any future treaty. Looking forward, the AU could use the Protocol as a starting point for discussions on an international criminal law which better addresses African concerns. One way is for African states to put the Protocol's progressive ideas before the ICC-ASP to influence future amendments of the Rome Statute.

[131] Jalloh (2017), p. 818.

[132] NTFZ Protocol I Art. 4(4), NTFZ Protocol II Art. 4 and NTFZ Protocol III Art. 3. France has ratified all three NTFZ Protocols and China, UK and Russia have ratified NFZ Protocols I and II. 'List of Countries', n. 130 above.

[133] *Legality of the Threat*, n. 129 above, para. 36; for a fuller discussion of the decision, see Dinstein (2016), pp. 94–98.

[134] See Amnesty International (2016), p. 16; Asaala (2017), p. 111.

[135] Abass (2013a), p. 940; Jalloh (2017) pp. 813–814.

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## References

Abass A (2013a) Prosecuting international crimes in Africa: rationale, prospects and challenges. Eur J Int Law 24:933–946

Abass A (2013b) The proposed international criminal jurisdiction for the African Court: some problematical aspects. NILR 60:27–50

Amnesty International (2015) 'Our job is to shoot, slaughter and kill': Boko Haram's reign of terror in North-East Nigeria. AFR 44/1360/2015 (14 April 2015). https://www.amnesty.org/en/documents/afr44/1360/2015/en/. Accessed 13 Aug 2019

Amnesty International (2016) Legal and institutional implications of the merged and expanded African Court. AFR 01/3063/2016 (22 January 2016). https://www.amnesty.org/en/documents/afr01/3063/2016/en/. Accesses 13 Aug 2019

Asaala EO (2017) A critique of the subject matter jurisdiction of the African Court of Justice and Human and Peoples' Rights. In: van der Merwe JJ, Kemp G (eds) International criminal justice in Africa 2016. Konrad Adenauer Stiftung/Strathmore University Press, Nairobi, pp 101–128

Bakken IV, Rustad SA (2018) Conflict trends in Africa, 1989–2017. June 2018. Peace Research Institute, Oslo. https://www.prio.org/utility/DownloadFile.ashx?id=1609&type=publicationfile. Accessed 1 Mar 2019

Bantekas I, Nash S (2007) International criminal law, 3rd edn. Routledge Cavendish, London

Cassese A (2007) Proper limits of individual liability under the doctrine of joint criminal enterprise. J Int Crim Justice 5(1):109–133

Cilliers J (2015) Future (im)perfect? Mapping conflict, violence and extremism in Africa. ISS Paper 287 (October 2015). https://issafrica.org/research/papers/future-im-perfect-mapping-conflict-violence-and-extremism-in-africa. Accessed 1 Mar 2019

Coalition to Stop the Use of Child Soldiers (2015) The use of children as soldiers in Africa. 21 January 2015. https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Use%20of%20Children%20as%20Soldiers%20in%20Africa%20report.pdf. Accessed 1 Mar 2019

Colvin E, Chella J (2012) Multinational corporate complicity: a challenge for international criminal justice in Africa. In: Nmehielle VO (ed) Africa and the future of international criminal justice. Eleven International Publishing, The Hague, pp 297–318

Cryer R (1996) The Security Council and Article 39: a threat to coherence? J Armed Confl Law 1(2):161–195

Dinstein Y (2016) The conduct of hostilities under the law of international armed conflict, 3rd edn. Cambridge University Press, Cambridge

Dixon M, McCorquodale R, Williams S (2011) International law, 5th edn. Oxford University Press, Oxford

du Plessis M (2012) A case of negative regional complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes. EJIL: Talk, 27 August 2012. http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/. Accessed 1 Mar 2019

Dudenhoefer A-L (2016) Understanding the recruitment of child soldiers in Africa. Accord (16 August 2016). http://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/. Accessed 1 Mar 2019

Ellis M (2007) Breaking the silence: rape as an international crime. Case West Reserve J Int Law 38(2):225–247
Fleck D (2008) The handbook of international humanitarian law, 2nd edn. Oxford University Press, Oxford
Fox GH (1994) International law and civil wars. NY Univ J Int Law Politics 26(4):633–654
Global Witness (2009) Faced with a gun, what can you do?: War and the militarisation of mining in the eastern Congo. 31 July 2009. https://www.globalwitness.org/en/campaigns/democratic-republic-congo/faced-gun-what-can-you-do/. Accessed 1 Mar 2019
Henckaerts J-M, Doswald-Beck L et al (2005) ICRC: customary international humanitarian law, vol 1: rules. Cambridge University Press, Cambridge
Human Rights Watch (2017) They said we are their slaves: sexual violence by armed groups in the Central African Republic. 5 October 2017. https://www.hrw.org/report/2017/10/05/they-said-we-are-their-slaves/sexual-violence-armed-groups-central-african. Accessed 1 Mar 2019
ICRC (2003) Legal protection of children in armed conflict. Document 0577/002; 03 Jan 2003. https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet. Accessed 13 Aug 2019
IDMC (2017) 2017 Africa report on internal displacement. December 2017. https://reliefweb.int/sites/reliefweb.int/files/resources/20171206-Africa-report-2017-web.pdf. Accessed 1 Mar 2019
Jalloh CC (2017) The nature of the crimes in the African Criminal Court. J Int Crim Justice 15:799–826
Kishi R (2014) Resource-related conflict in Africa. ACLED (19 November 2014). http://www.crisis.acleddata.com/resource-related-conflict-in-africa/. Accessed 1 Mar 2019
Kolb R, Hyde R (2008) An introduction to the law of armed conflict. Hart Publishing, Oxford
Kyriakakis J (2019) Article 46C: corporate criminal liability at the African criminal court. In: Clarke K, Jalloh C (eds) The African court of justice and human and peoples' rights. Cambridge University Press, Cambridge, pp 793–837
Lionel E (2018) African conflict map 2019: a comprehensive guide. https://www.africanmilitaryblog.com/2018/07/african-conflict-map-a-comprehensive-guide. Accessed 1 Mar 2019
Omorogbe EY (2017) The African Union and the International Criminal Court: What to do with non-party Heads of State? In: van der Merwe HJ, Kemp G (eds) International criminal justice in Africa, 2016. Konrad Adenauer Stiftung/Strathmore University Press, Nairobi, pp 37–60
Powell C (2017) 'You have no God': an analysis of the prosecution of genocidal rape in international criminal law. Richmond Public Interest Law Rev 20(1):25–47
Roberts A, Guelff R (2000) Documents on the laws of war, 3rd edn. Oxford University Press, Oxford
Ross M (2003) The natural resources curse: how wealth can make you poor. In: Bannon M, Collier P (eds) Natural resources and violent conflict: options and actions. The World Bank, Washington, DC
Rusinova V (2017) Human shields. In: Lachenmann F, Wolfrumm R (eds) The law of armed conflict and the use of force: the Max planck encyclopaedia of public international law. Oxford University Press, Oxford, pp 453–458
Sriram CL, Brown S (2012) Kenya in the shadow of the ICC: complementarity, gravity and impact. Int Crim Law Rev 12:219–244
Tladi D (2015) The duty on South Africa to arrest and surrender President Al-Bashir under South African and international law. J Int Crim Justice 13:1027–1047
UNHCR (2018) Global trends: forced displacement in 2017. 25 June 2018. https://www.unhcr.org/globaltrends2017/. Accessed 1 Mar 2019
Ventura MJ (2015) Escape from Johannesburg? J Int Crim Justice 13:995–1025