The Protection of Human Rights in Africa: Agenda 2063

Human rights and enforcement by international courts are broadly debated in academic, legal and political circles, in Africa, Asia, South America and the West. The role and application of human rights and social and economic rights are reflected in major legal documents: The Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), and the African Charter on Human and Peoples' Rights - the Banjul Charter (1981).

Since 1990, international criminal courts have been set up to charge individuals for genocide and war crimes.[1] This paper argues that the recent international criminal courts have not rendered justice but rather served as neocolonial instruments of the United States and Europe. The countries which directed and profited from the slave trade and then undertook the outright colonization of Africa, India and the rest of the world are now giving lessons "in law and human rights" to countries now emerging from the colonized past and neocolonial control and exploitation. We are at a historical crossroads. The end of the 'Columbian epoch' and the five-hundred-year domination of the world by Europe[2] accompanied by a relative decline in global inequality provides Africa with a chance to develop its own system of human rights protection welcomed by this author.

These international courts have not rendered justice and have not served the needs of human rights. Rather, they operate in opposition to the United Nations's principle of sovereign equality of nations. The contrary appears to be true for the African Court on Human and Peoples' Rights and some recent judgments. Africa can move ahead and develop and implement its own system of human rights without Western intervention. The Malabo protocol adopted by the African Union on 27 June 2014 includes the creation of an African Court of Justice and Human and Peoples' Rights with an international criminal section having a broad jurisdiction beyond the narrow scope of international humanitarian law.[3]¤

[1] International Criminal Tribunal for Rwanda, International Criminal Court for the Former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court to mention the major ones.
[2] Domenico Losurdo, Class Struggle, A Political and Philosophical History, (New York, Palgrave, Macmillan, 2016), translation from Italian, La Lotta di classe: Una Storia politica e filsofica, Editori Laterza, 2013, 294-295
[3] The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights**.** https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, Adopted by

International Human Rights Charters

The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948,[4] emphasized individual human rights over collective rights. The International Covenant on Civil and Political Rights adopted by the United Nations General Assembly in 1966[5] expanded on the civil and political rights and underlined the importance of the right of self-determination to determine political status to guarantee these rights. In a similar vein, the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly in 1966[6] broadened the scope of social, economic and cultural rights and stressed the right of the self-determination of peoples as a tool to guarantee these rights.

The African Charter on Human and Peoples' Rights[7] went further, stressing that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples", that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. It emphasized that the peoples are still struggling for their dignity and genuine independence, and are undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions.

These human rights charters are a useful basis for defining human rights and their protection in Africa. African countries may see fit to change these charters to adapt them to modern circumstances.

Human rights particularly as enshrined in the African Charter on Human and Peoples' Rights do not exist in a vacuum but require political and legislative means to ensure the respect for the rights provided therein. Enforcement can be guaranteed by national public policy. Governmental action should be inspired by such charters in legislative and administrative policy. A national or

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the Twenty-third Ordinary Session of the Assembly of the African Union, held in Malabo, Equatorial Guinea, 27 June 2014

[4] http://www.un.org/en/universal-declaration-human-rights/

[5] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[6] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[7] http://www.achpr.org/instruments/achpr/

international criminal court can help enforcement and punish individuals who commit serious crimes affecting individuals or collectivities.

This paper is limited. It will describe some major flaws in recent international criminal justice and look at African international justice with a perspective for the future. As lawyers, judges and jurists, we know that the rule of law requires a tribunal to be neutral and not subject to political pressure. All potential litigants/accused must be treated equally regardless of race, ethnic or tribal identification. These principles apply to criminal courts, human rights courts, and civil courts. An international court should have the full endorsement of the countries over which it has jurisdiction. The international court must not be subject to control by external countries and must not be imposed over the will of the concerned country or countries. An international court must not be partial in any aspect of its constitution or functioning.

Hypothetically, we can imagine a criminal court in the United States trying only black Americans. This court would never be respected. A national and international campaign would no doubt strive to have such a court eliminated and all prisoners released. This principle should apply to international courts. An international court which creates impunity for a party to a conflict, judges only one ethnic or national group, one nation or which absolves one party of criminal or civil liability for war crimes should not exist. Unfortunately, in international law, this type of discriminatory court is the rule not the exception. They merit no respect for this reason alone.

International criminal courts established since 1990 have not been successful in providing neutral, impartial justice but rather have been partial in their justice controlled by a political agenda aiming to serve the interests of dominant powers. We will comment on the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) with a short reference to the Special Court for Sierra Leone (SCSL). These international experiences will be contrasted with some recent decisions of The African Court on Human and Peoples' Rights (ACHPR) and with the future African Court of Justice and Human and Peoples' Rights and its international criminal jurisdiction.

In the 1990’s after the collapse of the Soviet Union and the western-inspired wars on Yugoslavia and on Rwanda, two international criminal tribunals were created by the Security Council of the

United Nations, namely, the International Criminal Tribunal for the Former Yugoslavia (ICTY) [8] and the International Tribunal for Rwanda (ICTR).[9]

Former United States Ambassador-at-Large for War Crimes Issues, attorney David Scheffer wrote unabashedly about the ICTY:

> "the tribunal was an important judicial tool, and I had enough support from President Clinton, Secretary of State Madeleine Albright, Secretary of Defense William Cohen, and other top officials in Washington to wield it like a **battering ram** in the execution of US and NATO policy."[10] (Our emphasis)

Scheffer who became United States Ambassador-at-Large for War Crimes Issues, was involved in the ICTR[11] and even testified against Jean Bosco Barayagwiza at the IVTR to prevent his release on a habeas corpus application.[12] Former Attorney General of the United States, Ramsay Clark was quoted as saying: "The ICTR is war by other means.[13]

The war on Rwanda by the Rwanda Patriotic Front lasted from 1 October 1990 to July 1994. The crimes of the Rwandan Patriotic Front and its army have been well documented by many sources including the Mapping Report of the Office of the UN High Commissioner for Human Rights (OHCHR).[14] No charges have been brought against members of the Rwandan Patriotic Front even though the crime was likely one of genocide.

The new meticulous scholarship of Canadian researcher Ms. Judi Rever – *In* Praise of Blood, *the* Crimes *of the* Rwandan Patriotic Front[15] – adds many details showing the conscious policy of the Rwandan Patriotic Front to exterminate the Hutu population of Rwanda. Her work is almost entirely based on information from Rwanda Patriotic Front sources and internal sources in the

[8] http://www.icty.org/
[9] http://unictr.unmict.org/
[10] David Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals, (Princeton University Press, Princeton, 2012). 321
[11] David Scheffer, "Staying the Course with the International Criminal Court" Cornell International Law Journal, Volume 35 Issue 1 November 2001 - February 2002 fn 24
[12] Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), March 31, 2000, No. TPIR-97-19-AR72, para. 56, subparagraph 2.
[13] Phil Taylor, ""The ICTR is war by other means" -Ramsay Clark" in Justice Belied, The Unbalanced Scales of International Criminal Justice, ed. Sébastien Chartrand and John Philpot. (Montreal, Baraka Books, 2014)
[14] DRC: Mapping human rights violations 1993-2003, http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx.
[15] Judi Rever, *In* Praise *of* Blood, *The* Crimes *of the* Rwandan Patriotic Front. (Random House Canada, 2018). This book is available also on Amazon.ca.

ICTR Prosecutors' office. Many of the crimes were committed in the calendar year 1994 for which the ICTR has jurisdiction. Her work was dangerous: Ms. Rever documents many of the threats she received from Rwandan secret services during her research.[16] Ms. Rever shows conclusively that the ICTR Prosecutor had ample evidence of war crimes, crimes against humanity and genocide to charge members of the winning side, the Rwandan Patriotic Front, namely, to mention a few examples:

1. A former investigator estimates that Kagame's army murdered hundreds of thousands of civilians in 1994.[17]
2. United Nations investigator, Robert Gersony, documented massive killings of returning Hutu refugees at the rate of 10,000 per month.[18]
3. In eastern Rwanda near the border of Tanzania, wanton mass killings and kidnapping of Hutu civilians documented in Refugees International, excerpts from UNHCR Ngara Protection Report, May 17, 1994.[19]
4. Many of the bodies floating down the Kagera River were likely Hutu and not Tutsi as is commonly claimed.[20]
5. And it goes on and on.[21]

The ICTR had a Special Investigations Unit (SIU) responsible for investigating crimes committed by the Rwandan Patriotic Front.[22] The ICTR Prosecutor failed in his duty to bring charges for the Gabiro killings,[23] the Gakurako Seminary massacre[24], the killings in Gikongoro[25], the Gitarama killings,[26] events in Giti and Rutare,[27] the Nyambubumba-led operations,[28] the Rambura killings.[29]

The ICTR Prosecution led by the Canadian, Louise Arbour, had also obtained convincing evidence that Paul Kagame and the RPF on 6 April 1994 had shot down the airplane of President

[16] Ibid.195-213
[17] Rever, *In* Praise *of* Blood, 76,77
[18] Ibid. 96-97
[19] Ibid. 102
[20] Ibid. 102-103
[21] Ibid. 108-9, 126-127, 170, 172
[22] Ibid, 119, 154-165, 175,176, 180, 204
[23] Ibid. 95
[24] Ibid. 170, 172
[25]Ibid. 95-96
[26] Ibid. 175-176
[27] Ibid. 108-109, 126-127
[28] Ibid. 95-96
[29] Ibid. 101-102

Juvenal Habyarimana as part of its final military assault on Rwanda. This assassination set off the genocide or mass interethnic killings beginning on 7 April 1994. The ICTR covered up the cause of the genocide: the investigation into the assassination of President Habyarimana was shut down by the Prosecutor Arbour.[30]

Had the leaders of the Rwandan government been charged and convicted as they should have been, one can imagine that there would have been a much greater chance for peace in the region in the last twenty years.

There are many other valid criticisms of this court not mentioned in this paper. Despite the "common" belief that the Rwandan genocide was meticulously planned, no judgment has proven planning, nor has it been proven that there was a nationwide agreement in Rwanda to kill Tutsi beginning on April 7, 1994. The existence of this one-sided tribunal perpetuates unproven and dishonest stereotypes that Rwandan Hutu planned to exterminate Tutsi.

The Tribunal has failed to relocate many of the acquitted prisoners who spent many years in prison before their acquittal. Common sense says that acquitted prisoners be returned to their former situations or that they be reunited with their families in Europe or North America.

The Prosecution breached its obligation to lay charges against a category of major criminals who invaded Rwanda and implemented a plan to exterminate part of the Hutu population of Rwanda. For this reason, the ICTR falls in the category of a biased one-sided tribunal which removes any legitimacy to its judgments and its heritage. The International Criminal Tribunal for Rwanda does not deserve the respect lawyers and judges should have for tribunals and the judicial process. It is not a model for African justice. When a court is unjust, the convicted persons should be released, and the convictions voided.

Many, including this author, consider that this tribunal controlled by the United States and other western countries is a simple exercise in neocolonialism serving to maintain the Rwandan Patriotic Front in power in Rwanda.

[30] Ibid. 177-182

The Special Court for Sierra Leone. (SCSL)

A few comments concerning the Special Court for Sierra Leone are appropriate. Chief Charles Taku, counsel at the SCSL, and a prominent member of the African Bar Association has written a quite complete criticism of the SCSL : Charles Taylor: The Special Court for Sierra Leone and Questionable Verdicts.[31] He argues that an examination and analysis of the evidence, law, and jurisprudence generated at the Special Court raises many issues concerning the evidentiary basis of the lengthy convictions, the soundness of the jurisprudence, and the questionable interpretation and application at the SCSL of international jurisprudence produced in other courts. Issues raised include the problem of the harmony of judicial decisions and judgments, and the consistency of decisions in international courts and tribunals. Chief Taku argues it is unsafe for these tribunals to apply untested and unverified jurisprudence developed from a questionable evidential basis. The jurisprudence of the Special Court for Sierra Leone in the Taylor case (or other cases before that court as demonstrated) have potential risks of rendering serious injustice to accused parties and to the integrity of International Criminal Justice.

The silencing of the Alternate Judge Malick Sow of Senegal and his comments show the shaky foundations of the Taylor judgment. An alternate judge participates in the entire case along with the three judges as a replacement judge if one judge falls sick or dies. Alternate Judge *Sow* stated in court after the judgment was rendered on April 26, 2012:

> The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and pursuant to the Rules. When there is no serious deliberations, the only place left for me is in the courtroom. I won't get—because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.

[31] Charles Taku, "Charles Taylor: The Special Court for Sierra Leone and Questionable Verdicts" in Justice Belied, The Unbalanced Scales of International Criminal Justice, ed. Sébastien Chartrand and John Philpot. (Montreal, Baraka Books, 2014), p. 77-97.

Thank you for your attention.[32]

As he spoke, the metal grate for the public gallery and the media was lowered, muzzling Judge Sow.[33]

Why was the Taylor trial held in The Hague?

Taylor was tried in The Hague not by the International Criminal Court but by the Special Court for Sierra Leone. This court based in Sierra Leone was supposed to hold all its proceedings in Sierra Leone, to allow victims of these alleged crimes to see justice at work. However, the case was moved to the Netherlands at the request of the United Nations Security Council which considered that the "the continued presence of former President Taylor in the sub-region is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region.[34] This seems to say he was very popular in the region and that his trial was not appreciated.

Mr. Taylor, President of Liberia, was found guilty only of aiding and abetting crimes committed in Sierra Leone.[35] Politicians in France and Britain are likely criminally responsible for crimes committed by the terrorists in Syria by aiding and abetting them materially and with their special forces on the terrain. The facts and principles of the Charles Taylor case have been quickly forgotten.

The International Criminal Court (ICC)

The International Criminal Court (ICC) raised great hopes for some many in its early days. These hopes have been shattered. There is a great deal of literature criticizing the International Criminal

[32] John Philpot, "International Criminal Law: An Instrument of United States Foreign Policy"" in Justice Belied, The Unbalanced Scales of International Criminal Justice, ed. Sébastien Chartrand and John Philpot. (Montreal, Baraka Books, 2014), p. 255

[33] The Statement was removed from the record as described in the appeal judgment at paragraphs 630 and 631, Appeals judgment, Charles Taylor **http://www.scsldocs.org/documents/view/6981-6981** SCSL-03-01-1389

[34] http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1688%20%282006%29 S/RES/1688 (2006) Resolution 1688 (2006) Adopted by the Security Council at its 5467th meeting, on 16 June 2006

[35] As confirmed on appeal. *Prosecutor v. Taylor*: Case No. SCSL-03-01-A: Appeals Judgment, 26 September 2013 http://www.scsldocs.org/documents/view/6981-6981

Court.[36] We will comment on impunity for the powerful who commit war crimes daily, the failure of the ICC to criminalize aggression, and the neocolonial nature of the court with the withdrawal of some countries from the ICC.

Impunity

The International Criminal Court was created by the Rome Statute. Jurisdiction over a country is subject to the country signing and ratifying the Rome Statute. The United States has not ratified the Rome Statute and is virtually immune from prosecution. The same applies to Israel which persecutes the Palestinian population violating a multitude of United Nations Resolutions and has bombarded Lebanon, Gaza and Syria with impunity since the coming into force of the Rome statute in 2002.

Tony Blair, Jack Straw and members of the British military have not been charged for their crimes committed in the illegal invasion and occupation of Iraq beginning in 2003 despite complaints received more than twelve years ago.[37]

The United States has taken additional measures to ensure impunity for Americans. The United States has signed some 102 bilateral agreements under Article 98 of the Rome Statute guaranteeing that US citizens in the country signing the agreement will not be turned over to the ICC for crimes committed by Americans. [38] The United States of America occupies Syria and bombs Pakistan and Yemen with drones in total violation of international law. The lawlessness of this major power and its immunity is in glaring contradiction with the zeal of the ICC Prosecutor to charge African leaders who stand in the way.

These political leaders of France and Britain are unpunished despite the considerable evidence that France and Britain and their special forces are involved in the war on Syria and on its civilian population.

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[36] One of the best critical overviews is , David Hoile, Justice Denied, The Reality of yhe International Criminal Court, (The Africa Research Centre, Copyright © David Hoile 2014 First published in 2014 by The Africa Research Centre Communications House, 26 York Street, LONDON W1U 6PZ Revised by the addition of a preface, 2017, Distributed by Gardners Books, 1 Whittle Drive, Eastbourne, East Sussex, BN23 6QH)

[37] https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

[38] John Philpot, "International Criminal Law: An Instrument of United States Foreign Policy"" in Justice Belied, The Unbalanced Scales of International Criminal Justice, ed. Sébastien Chartrand and John Philpot. (Montreal, Baraka Books, 2014), p. 265

The Crime of Aggression

The treatment of the crime of aggression is a telling example of the institutional impunity enshrined at the ICC. The crime of aggression became the supreme international crime in the Nuremberg judgment rendered on 1 October 1946:

> To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[39]

The ICC claims that there is an agreement on the application of the crime of aggression with the provision coming into force on 17 July 2018.[40] But has it agreed to endorse the Nuremberg principles and give some teeth to the principle? The answer is a resounding no. According to James Hendry, the jurisdiction will apply only to the nationals and territories of States that explicitly accept or ratify the amendments.[41] This is obvious in paragraph 2 of the Draft resolution proposed by the Vice-Presidents of the Assembly Activation of the jurisdiction of the Court over the crime of aggression adopted on 14 December 2017.[42] Criminal liability for the crime of aggression is optional.

The ICC and the Rome State is far from being universal, but for the crime of aggression the jurisdiction of the Court is even narrower since countries bound by the Rome statute must also ratify the amendment to be held liable for aggression. Otherwise, a country benefits from impunity for the crime of aggression. Notably, the United Kingdom and France, bound by the Rome statute, participated in the crime of aggression when they bombed Syria with the United States on 14 April 2018. It is doubtful that they will adopt and ratify the new amendments. The United States is doubly immune for its bombardment and occupation of one third of Syria since it is not bound by the Rome Statute and, furthermore, not bound by the recent amendments to the Statute.

The Neocolonial Nature of the ICC

[39] https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf . Judgement of the International Military Tribunal 1 October 1946, para. 421
[40] See the resolution at http://www.ejiltalk.org/wp-content/uploads/2017/12/ICC-ASP-16-L10-ENG-CoA-resolution-14Dec17-1130.pdf
[41] http://www.kirschinstitute.ca/activating-the-jurisdiction-of-the-icc-over-the-crime-of-aggression-2/
[42] See the resolution at http://www.ejiltalk.org/wp-content/uploads/2017/12/ICC-ASP-16-L10-ENG-CoA-resolution-14Dec17-1130.pdf

Côte d'Ivoire

The persecution of Africans by the ICC Prosecutor is common knowledge since only Africans have been charged since the court opened some sixteen years ago. President Laurent Gbagbo and minister Charles Blé Goudé, members of the Government overthrown by the French Army in 2011, have been charged at the ICC.[43]

The bias of the Prosecutor is flagrant when examining the ICC treatment of La Côte d'Ivoire. In the decision to authorize the investigations for Ivory Coast, the Court noted that there was a broad spectrum of evidence that the pro-Ouattara forces, installed by France after its invasion, had committed crimes within the ICC jurisdiction.[44] Despite important evidence against the pro-Ouattara forces provided to the ICC prosecutor by the attorney from Côte d'Ivoire, Ange Rodrigue Dadje, the Ouattara camp has not been charged. The rule once more is impunity for the friends of the West, in this case of France.[45] For a further analysis, of the flaws of the Gbagbo trial, see an article by Canadian analyst, Bernard Desgagné.[46] The Côte d'Ivoire-ICC neo-colonial judicial experience is not a positive model for Africa in 2063 or in even in 2018.

In his encyclopedic book, Justice Denied, The Reality of the International Criminal Court, David Hoile describes the ICC as a court serving primarily European interests which has disappointed its supporters and has failed in all possible ways. The ICC has become a bystander to history and Africa is acting independently of the ICC and the West.[47]

Withdrawals From the ICC

There have been some courageous reactions to the political nature of the Prosecutor at the ICC. Fatou Bensouda, elected in 2012, has not provided serious change from the policies of former prosecutor Luis Moreno Ocampo. She has been involved in the attempts to intervene in Burundi at least since April 2015 but has never condemned the Rwanda inspired attempted coup on 13

[43] https://www.icc-cpi.int/cdi/gbagbo-goude
[44] Pre-Trial Chamber III, Situation in the Cote D'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire. ICC-02/11. 3 October 2011, para. 95, 108, 111, 127, 157, 61, 165, 169, 172.
[45] Les défis d'une coopération efficace entre la CPI et les États Africains. Le cas de la Côte d'Ivoire. Par Maitre Ange Rodrigue Dadjé https://www.youtube.com/watch?v=zfmCqvNLCnE
[46] http://www.lequebecois.org/le-tribunal-de-blancs-qui-juge-des-noirs-coute-cher-aux-contribuables-canadiens/
[47] David Hoile Justice Denied, The Reality of the International Criminal Court, (first published in 2014 revised by the addition of a preface, 2017 Gardners Books, Eastbourne)

May 2015 nor on the persistence of Rwanda inspired terrorism in Burundi since 2015.[48] On 18 October 2016, Burundi had the courage to withdraw from the ICC Senate effective 27 October 2017.[49] The Prosecutor rushed ahead and filed an application for preliminary investigation authorized at the last possible moment, apparently on 25 October 2017. On 9 November 2017, the ICC issued a public version of a Trial Chamber decision authorizing a preliminary investigation of Burundi.[50] On 10 November 2017, the Embassy of Burundi in the Netherlands issued a press release explaining the reasons for the withdrawal.[51]

> It had become apparent to Burundi that rather than being an independent and impartial judicial institution, the ICC had become more of a politicized instrument and weapon, used by stronger countries, to coerce weaker countries into doing what they deemed fit for their own individual interests.
>
> As a sovereign country recognized under international law, Burundi had exercised its right to join the ICC from 1 December 2004. Burundi similarly exercised its right as a sovereign country to withdraw from the ICC on 27 October 2016. According to the relevant texts of the ICC, this withdrawal took effect after 26 October 2017.

The African Union, on 28-29 January 2018, condemned the ICC investigation of Burundi after the legitimate sovereign decision of Burundi to withdraw. It stated:

> TAKES NOTE of the sovereign decision made by the Republic of Burundi to withdraw from the ICC effective October 27th, 2017 and CONDEMNS the decision by the ICC to open an investigation in the situation prevailing in the Republic of Burundi as it is prejudicial to the peace process under the auspices of the East African Community, and constitutes both a violation of the sovereignty of Burundi and is a move aimed at destabilising that country. [52]

Venezuela and the Philippines

The examples of Venezuela and the Philippines are telling as to the political nature of ICC

[48] https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016
[49] https://www.presidence.gov.bi/2016/10/18/loi-n1014-du-18-octobre-2016-portant-retrait-de-la-republique-du-burundi-du-statut-de-rome-de-la-cour-penale-internationale-adopte-a-rome-le-17-juillet-1998/
[50] https://www.icc-cpi.int//Pages/item.aspx?name=pr1342
[51] http://www.ambabu-pays-bas.org/communique-de-presse-de-lambassade-de-la-republique-du-burundi-a-la-haye-sur-lautorisation-douvrir-une-enquete-sur-la-situation-au-burundi-par-le-procureur-de-la-cour-penale-internationale/
[52] https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf
Assembly/AU/Dec.672(XXX) para. 4, adopted at the 30th Ordinary Session of the Assembly, 28- 29 January 2018, Addis Ababa, Ethiopia

prosecutions. It is well known that the United States has been in growing conflict with the Philippines and Venezuela, probably because neither country accepts to have its independent policies dictated by the US administration led either by Trump or Obama. Not surprisingly, on 5 February 2018, ICC Prosecutor, Fatou Bensouda made a press release announcing the opening of Preliminary Examinations into the situations in the Philippines and in Venezuela.[53]

The Philippines reacted quickly and unequivocally on March 13, 2018, with a well-reasoned legal document withdrawing definitively from the ICC.[54] Issues raised included:

- Improper adoption of the Rome Statute in the applicable law in the Philippines making ratification null and void,
- Failure to respect of rules of complementarity,
- The crimes alleged not covered by ICC jurisdiction. The killing of drug traffickers is not a crime under the ICC jurisdiction and drug dealers are not a group.
- Presidential immunity,
- Slander by UN High Commissioner on Human Rights Zeid Ra'ad Al-Hussein suggesting that the president be subjected to a psychiatric evaluation,
- Violation of the presumption of innocence,
- Political prosecutions and lack of universality given the non-ratification of the Rome Statute by the Bush administration, and
- Violation of the right to self-determination.

Summary

Our cursory overview of some of the most egregious aspects of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court show us that these "human rights" courts do not help the protection of human rights but rather are fundamentally biased and help promote the interests of the dominant world while guaranteeing impunity for the powerful.

[53] https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat
[54] https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal

These are not models for the future of Africa, and for that matter, the future of the world. My perception is that there is a growing lack of respect for these courts in international academia and political institutions.

Africa and Prospects for the Future

The demise of the international criminal courts and the growing lack of respect for them is contrasted by advances the area of human rights and international criminal law created in Africa.

Two recent cases at the African Court on Human and Peoples' Rights concerning Victoire Ingabire Umuhoza and Leon Mugesera[55] have shown that independent justice is possible at this African Court. Furthermore, the Malabo Protocol adopted by the African Union on 27 June 2014 setting up an African Criminal Court bodes well for the future.[56]

On 24 November 2017, in the case of the Rwandan political prisoner Victoire Ingabire Umuhoza against the Republic of Rwanda, the Court rendered an important judgment dealing with her trial. Ms. Ingabire Umuhoza, Rwandan presidential candidate in 2010, is serving a fifteen-year sentence on charges of minimizing genocide and allegedly helping external insurgency attempting to overthrow the Rwandan government by force. The Court held that Rwanda had violated Article 7(1)(c) of the African Charter on Human and Peoples' Rights regarding procedural irregularities affecting rights of the defense and that it had violated Article 9 (2) of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of expression and opinion. The court ordered Rwanda to take all necessary measures to restore the rights of the applicant and to submit to the Court a report on the measures taken within six (6) months. [57]

Earlier, the Court had also shown remarkable independence when Rwanda attempted to withdraw from the proceedings just before the first hearing set for March 4, 2016. Rwanda had written to the Court to notify that it was withdrawing its declaration made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. The court held on 3 June 2016, that Rwanda's

[55] References below
[56] The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights
[57] Ingabire Victoire Umuhoza v. The Republic of Rwanda, App. No. 003/2014, Judgment of 24 November 2017,

withdrawal would not affect the pending case and that it would only take effect one year after the notice.[58]

The final judgment on the merits was particularly courageous because it was rendered against Rwanda in November 2017 at a time when it was public knowledge that Rwanda would soon assume the Presidency of the African Union as announced on July 4, 2017.[59]

Rwanda has not respected the court order rendered on 24 November 2017. We understand that procedures are underway to require Rwanda to respect the order. The Taylor Report on 27 November 2017 had a good interview on this judgment with Mr. Justin Bahunga, legal critic from M Ingabire's party, United Democratic Forces of Rwanda.[60]

A second important judgment was rendered by the Court on 28 September 2017 in the case of Leon Mugesera vs the Republic of Rwanda.[61] Mr. Mugesera had been deported from Canada in 2012 to undergo trial in Rwanda. In his application filed on 28 February 2017, Mr. Mugesera claimed violations of:

- right to a fair trial provided for under Article 7 of the African Charter
- victim of cruel, inhuman and degrading treatment, in violation of Articles 4 and 5 of the Charter including being deprived of contact with his lawyer and his family and of medical care and a special diet which was needed.

The Court ruled in favour of Mr. Mugesera ordering Rwanda to allow him access to lawyers, communications with his family without impediment, requiring Rwanda to provide medical care and abstain from treating him in a manner which may affect his physical and mental integrity and his health. Rwanda, now President of the African Union, did not respond to the Court order raising some serious questions about the respect for the Rule of Law. There is a good interview on the Taylor Report with Philippe Larochelle, counsel for Mr. Mugesera.[62]

The Committee Against Torture (CAT) of the United Nations in a decision not yet public rendered a decision on 11 May 2017 against Canada for deporting Mr. Mugesera to Rwanda

[58] Para 45 of the judgment
[59] http://www.newtimes.co.rw/section/read/215531
[60] (In French: Forces Democratiques Unifiées, FDU-INKINGI. http://www.radio4all.net/index.php/program/94986
[61] IN THE MATTER OF LEON MUGESERA V. REPUBLIC OF RWANDA APPLICATION NO. 012/2017 ORDER FOR PROVISIONAL MEASURES 28 September 2017
[62] http://www.radio4all.net/index.php/program/94469, 16 October 2017

when the committee asked Canada to stay the deportation pending the instruction of the Mugesera complaint filed in 2012.[63] The allegation of torture seems founded given the treatment of Mr. Mugesera described in his motion described above.

African Criminal Court and the Malabo Protocol

A promising development is the adoption of The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights **(**Malabo Protocol) by the African Union on 27 June 2014.[64] Under this protocol, there will be a merger of the African Court on Human and Peoples' Rights and the Court of justice of the African Union and the creation of the African Court of Justice and Human and Peoples' Rights. This new court will have an original and appellate jurisdiction, including an international criminal jurisdiction. The Protocol and Statute will enter into force 30 days after the ratification by 15 member states.[65]

The Preamble stresses the Member States' respect for democratic principles, human and people's rights, the rule of law and good governance**, t**heir respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression, and the commitment to fighting impunity. The Preamble acknowledges the future role of the African Court of Justice and Human and Peoples' Rights stating the role as:

> "strengthening the commitment of the African Union to promote sustained peace, security and stability on the Continent and to promote justice and human and peoples' rights as *an* aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa"

The international criminal jurisdiction reflects the preamble. This jurisdiction goes far beyond the narrow jurisdictions of the ICC, the ICTR, and the ICTY limited to violations of international humanitarian law. We have seen the distortions and bias of the ICTR and the ICC in their prosecutorial polices and structural weaknesses.

[63] http://www.lapresse.ca/actualites/politique/politique-canadienne/201806/07/01-5184787-ottawa-blame-par-lonu-pour-le-renvoi-au-rwanda-de-leon-mugesera.php
[64] https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, Adopted by the Twentythird Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27th June 2014
[65] Article 11, Malabo Protocol

The added crimes set norms for the conduct of national and international governance for the future of Africa eventually as the United States of Africa. We list the crimes in the draft statute going beyond international humanitarian law:

4. The Crime of Unconstitutional Change of Government
5. Piracy
6. Terrorism
7. Mercenarism
8. Corruption
9. Money Laundering
10. Trafficking in Persons
11. Trafficking in Drugs
12. Trafficking in Hazardous Wastes
13. Illicit Exploitation of Natural Resources
14. The Crime of Aggression

The jurisdiction of the Court can apply even to individuals who are not nationals of a signatory state according to Article 46E bis paragraph 2 which defines the broad non-restrictive and alternative conditions for acquiring jurisdiction when the State is bound by the Court:

> 2. The Court may exercise its jurisdiction if one or more of the following conditions apply:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
> (b) The State of which the person accused of the crime is a national.
> (c) When the victim of the crime is a national of that State.
> (d) Extraterritorial acts by non-nationals which threaten a vital interest of that State.

Extraterritorial acts by non-nationals can be the subject of charges if the criminal conduct affects a vital interest of the State. It appears that this provision can apply to most or all the crimes in the statute committed in or against the state by anyone in the world- aggression, pollution, corruption, unconstitutional change of Government, terrorism and other crimes.

As of 8 February 2018, 11 countries had signed the Protocol. None have ratified yet or deposited

their instruments of ratification with the Court.[66]

There is an important provision in the positive law adopted by the Organisation for African Unity. The 1969 OAU Convention Governing The Specific Aspects of Refugee Problems in Africa (Art III par 2.) requires Signatory states :

> "to undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio."

Art II par. 1 provides that refugees

> "shall also abstain from any subversive activity against any Member State of the OAU" [67]

Countries and individuals violating these provisions might well be guilty in this new African Criminal Court as parties to mercenarism, the crime of aggression, or attempts at the Unconstitutional Change of Government. Modern international relations in Africa and elsewhere show us that this type of provision in international law is important.

Conclusion

Recent experience after 1990 shows us that western inspired or imposed international courts are not models which future African and non-Western leaders should favor. There is no need for Western human rights courts which have no lessons to deliver to Africa or the rest of the world. The human rights treaties adopted from 1948 to 1981 during the period of decolonization will be useful. The Columbian epoch is drawing to a close after 500 years of slavery and colonial domination.

The African experience described in this paper is a source of optimism, especially if the consensus in support of the Malabo Declaration becomes law with the deposit of ratification documents by 15 member states. African human rights law inspired by African values and the

66 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

67 OAU Convention Governing The Specific Aspects of Refugee Problems in Africa. Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September, 1969. It entered into force on 20 June 1974.

exercise of democratic sovereignty can complement the important political and economic development now underway.

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