

# Consultative Conference on International Criminal Justice

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## CONSULTATIVE CONFERENCE ON INTERNATIONAL CRIMINAL JUSTICE:

### SESSION 5: REGIONAL COURTS AND COMMISSIONS; 9 -11 SEPTEMBER 2009.

#### Reflections and Perspectives of the African Commission on Human and Peoples' Rights

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#### Introduction

I wish to thank the Steering Committee for the invitation to participate in this very important conference on International Criminal Justice. I am greatly honoured to be part of this panel of very eminent academicians and judges, who are involved in one way or the other in addressing problems of impunity across the world.

#### Reflections on Prof Mendez's paper; Regional Courts and Commissions

My presentation will start by addressing certain issues raised in Professor Juan Mendez's paper, on Regional Courts and Commissions. I note that the paper highlights the areas of similarity in all the regional human rights systems, such as their judicial and quasi judicial procedures in the protection of human rights and the development of jurisprudence by each regional system. In this context the main goals and objectives of the regional bodies contribute too the fight against impunity.

The paper notes that one of the key characteristics of regional bodies is their jurisdictional limitation to cases of human rights violations by States, while international criminal tribunals address individual criminal liability for gross violations of human rights. It is important to add that international criminal tribunals complement the broader human rights agenda pursued by, what Prof Mendez calls, the state responsibility organs, namely the regional courts and commissions.

The paper states further that regional bodies coordinate and cooperate with one another, albeit informally. I can confirm that the African Commission, (and the African Court,) have benefited from the regular consultations with their counterparts in the Inter American Human Rights system, and the European Court. A form of cooperation among the regional bodies involves cross referencing of each others jurisprudence, which can only enhance the development of universal human rights standards and justice.

It is common currency that the African Commission has over the years been inspired by the jurisprudence of the Inter American Court, and Commission, and the European Court of Human Rights. Article 60 and 61 of the African Charter mandates the African Commission to refer to such decisions as subsidiary sources of law.

The *Velasquez Rodriguez* decision<sup>1</sup> on the principles of availability, adequacy and effectiveness of domestic remedies has been cited by the African Commission's admissibility decisions. The African Commission recently cited a landmark advisory opinion of the Inter American Court, against Costa Rica, on the right to freedom of expression, relative to the right of journalists to voluntary registration.

From the European Court, the African Commission has cited various decisions, including decisions against Turkey concerning property demolitions, and evictions.<sup>2</sup>

The African Commission is a strong advocate of strengthening national courts, their independence and role in the administration of justice, as guarantors of human rights. Article 26 of the African Charter enjoins African States to guarantee the independence of courts and other national bodies for the promotion and protection of human rights. Ensuring that national courts play their role in the protection of fundamental rights and the fight against impunity is a critical challenge in Africa. The independence of judiciaries in many African countries is compromised through political interference, or outright intimidation, in some cases, and the allocation of inadequate resources, factors which affect their operational capacity. The recent expulsion of judges of the Constitutional Court in Niger, after they declared unconstitutional, the abolition of term limit before a national referendum changed the constitution, is a case in point.

Professor Mendez observes also that specific common values, geographical and cultural homogeneity, and historical heritage of the regional human rights bodies are likely to jeopardise their role in setting universal norms and standards. Notwithstanding such a possibility, I do not agree entirely with this observation. Indeed political, social and cultural factors have been cited as reasons for the establishment of regional bodies, as was the case of the African Commission, when the African Charter was adopted in 1980. However, let me add that regional bodies are guided by judicial and legal principles, rather than political consideration in their standard setting processes. The regional bodies make reference to jurisprudence of other regional bodies in their decision making, hence increasing the scope for harmonization of principles. I submit that the likelihood of major divergence is minimal. If such a situation arises, it is likely to constitute a minority of cases rather than the norm.

### **Perspectives of the African Commission**

In sharing the perspectives of the African Commission in the context of international criminal justice, it is pertinent to state that the African Commission and its sister institutions tasked with the mandate to promote and protect human rights in Africa,

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<sup>1</sup> 1998 Int. Am. Ct.H.R.(Ser.C.)No 4.

<sup>2</sup> *Akdivar and Others vs Turkey*, No 2189393. 1996-IV no 15, *Dogan and Others vs Turkey*, Appls. No 8803-8811/2 et al; 29 June 2004.

operate within the broad African Union framework, whose objectives include *inter alia*; respect for human rights, good governance, and the fight against impunity on the continent. The African Union has established other bodies with specific human rights mandates. These include, The African Committee of Experts on the Rights and Welfare of the Child in Africa established in 2002, and the African Court on Human and Peoples' Rights established in June 2006. These organs face formidable challenges in their task. Foremost among these is the challenge of resource constraints.

The African Commission has in the past 22 years operated on a shoe string budget. It was not until fiscal year 2008 that its budget was increased by almost 400%, from USD 1.6million, to USD 6million. The amount was however slashed further by the African Union Executive Council during the Fiscal Year 2009, by almost 50% due to lack of absorption capacity by the African Commission. This was due to inadequacies and high turnover of staff at its Secretariat, factors which constrain the functional capacity of the Commission. The African Committee on the Rights and Welfare of the Child, which is mandated to protect the rights of children on the continent, does not have a separate budget, or a Secretariat of its own. The Committee is serviced by one official from the Social Affairs Department in the African Union Commission. The protection mandate of these organs, including the African Court, covers violations of individual rights as well as serious and massive violations and atrocities.

Notwithstanding the budgetary constraints, the African Commission has highlighted violations of human rights in Africa, through the communication procedure, and its special mechanisms. It has carried out fact finding missions to a number of countries, namely Mauritania, 1996, Zimbabwe, 2002, Cote D' Ivoire, 2003, Darfur , Sudan 2004, and Togo in 2005 to investigate cases of serious and massive violations.<sup>3</sup> Recommendations have been submitted to the respective States' authorities and the African Union. Investigations are pending for situations in Kenya (2007/8 post election violence) and South Africa (migrants' rights.)

The failure by some African States to fully respect human rights and the inability of the protection mechanisms to offer timely and adequate protection when rights are violated, are a matter of grave concern to the African Commission. It is in this context that the indictment and prosecution of various African individuals by the international criminal justice system complements the regional human rights system to ensure accountability, the fight against impunity and the establishment of human rights culture on the continent. Notwithstanding their jurisdictional distinction, the broad objectives of the international criminal tribunals and the regional human rights organs remain and continue to be the same, namely the protection of human rights for all.

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<sup>3</sup> Article 58 establishes a procedure whereby the Commission shall draw the attention the Assembly about cases of serious or massive violations, where one or more communications reveal so, and the Assembly may request the Commission to undertake an in depth study, make a factual report, findings and recommendations, or in case of emergence the Commission shall submit to the Chairperson of the Assembly who may request it to undertake an in depth study. However in the above cited cases the Commission undertook investigations under Article 46 of the African Charter which allows it to resort to any appropriate method of investigation.

The African Commission's promotional mandate is yet another complement to the role of the international criminal justice system in fighting impunity. The Commission's outreach is critical for awareness creation about human rights generally and its work in particular, and the work of other regional and international institutions which impact human rights on the continent. The Commission has campaigned for the ratification of the Rome Statute and other regional and international human rights instruments by African States.

The aforementioned institutional framework and resource constraints facing African human rights organs inform the scope of their responses to violations of human rights. It is with this background that the African Court on Human and Peoples' Rights was established in 2006. While the Court enjoys considerable resource allocation than its sister organs,<sup>4</sup> it has been constrained by the limitations to its jurisdiction. Only 26 out of the 53 African Union member states have ratified the Protocol establishing the African Court. Of the 26 only two states, namely Burkina Faso and Malawi, have made the declaration conferring competence on the African Court to receive cases from individuals and NGOs under Article 34(6) of the Protocol establishing the Court.<sup>5</sup>

The African Commission and the African Human Rights Court are currently engaged in harmonising their respective rules of procedure to concretize their complementary relationship. Yet the Court is in transition awaiting the eventual merger with the African Court of Justice, which was established under Article 5 of the Constitutive Act of the African Union. The two courts were merged by a Protocol following a decision of the Assembly arising from concerns of resource constraints. The African Human Rights Court is faced with a situation of partial paralysis, because of the scarcity of cases. The failure by States parties to the Protocol to confer the Court with compulsory jurisdiction indicates their reluctance to submit to adjudication for human rights violation.

### **Extension of African Court Jurisdiction**

Following concerns arising from the perceived abuse of the principle of universal jurisdiction, the Assembly of the African Union requested the African Union Commission, the African Court and the African Commission to study and report on the implications of conferring the African Court of Justice and Human Rights of international criminal jurisdiction. This study is underway and a report should be submitted to the Assembly by January 2010.<sup>6</sup>

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<sup>4</sup> The approved budget for Fiscal Year 2009, for the African Commission on Human and Peoples' Rights is USD 3.6million, while the Africa Court was allocated USD 7.6million. See **Assembly /AU/Dec. 208(VII)** Feb 2009.

<sup>5</sup> Article 34(6) of the Court Protocol reads as follows; "[a]t the time of ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive petitions under Article 5(3) of the Protocol. The Court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration." Article 5(3) states to the following; "The Court may entitle relevant non governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol."

<sup>6</sup> Paragraph 9, **Assembly/AU/Dec.213 (XII)**, AU Assembly Session 1-3 Feb 2009. Para 9 reads as follows; "Requests the Commission (ie AU), in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court

In that respect what I shall state hereunder are my personal views and do not represent the African Commission, which is likely to adopt its views on this issue during its session in November 2009.

Should the African Union extend the African Court's jurisdiction to include international criminal jurisdiction, it is my contention that the Court is not likely to effectively exercise the said jurisdiction to fight impunity, due to various reasons not of its making. Such reasons are not insurmountable. The indictment and prosecution of persons with the ultimate command responsibility for crimes of international concern, in most cases involve top political and military leaders. The cases are politically sensitive matters in any country or under any circumstances, whether it be in Liberia, Sierra Leone, Argentina, Chile, Cambodia, or Sudan, to mention but a few.

The history of war crimes tribunals and transitional justice accountability mechanisms shows that the mechanisms have invariably been conducted by successor regimes or by the international community *ex post facto* the demise of the perpetrator regimes. It is not surprising that the successful prosecution of perpetrators of grave crimes, through international, hybrid or national tribunals has been done when the perpetrators are no longer in power. This was the case of the Nuremburg and Tokyo Tribunals after WW2, the ICTY and ICTR ad hoc tribunals in the mid 1990s, the Argentinian prosecution of the military junta generals, the stripping of General Pinochet immunity while he was on his deathbed, Peru Fujimori, Cambodia, East Timor etc, etc.

The indictment of the Sudanese President Omar el Bashir is unprecedented because it is the first time in history that a sitting head of state has been indicted. The ICC created in 2002, is the first permanent international tribunal, which is mandated to investigate and prosecute persons responsible for mass atrocities in real time.

The African Union's decision to consider the implications of conferring the African Court's jurisdiction with international criminal jurisdiction, and its stand on non cooperation with the ICC, pursuant to President Bashir's indictment, are in my view a political backlash to what African Union considers as a "selective" indictment and prosecution of African individuals or leaders by the ICC, or by some European judges and courts exercising universal jurisdiction.

While the conferment of international criminal jurisdiction to the African Court is feasible, and is a welcome development in the long term, it is in my view constrained in the short term for a number of reasons, the main one being the apparent lack of political will required to make such institutions of accountability effective. The African Union expressed concern about the ICC indictment of President Bashir, while underscoring its commitment to fight impunity and condemnation of violations of human rights in Darfur.

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being empowered to try international crimes such as genocide, crimes against humanity, and war crimes and report thereon to the Assembly in 2010."

The AU responded to the indictment by setting up a Panel to undertake an in depth study and make recommendations on how to address impunity reconciliation and healing.<sup>7</sup>

It would appear that very few African states, if any, would be prepared to engage in “throwing stones from a glass house.” A Swahili proverb goes, “Which mouse will tie the bell around the cat’s neck!!” Which African state would be prepared to support the indictment of an African leader, in an African Court while similar situations might occur in its own backyard, any time in future, due to the fragility of political systems on the continent, and the trend towards suppression of dissent? Further to that it is unlikely that an African state will enforce the arrest warrant against a sitting head of state, for political or diplomatic reasons.

Perhaps the only possibility is a Charles Taylor scenario, of indicting an ex leaders and trying him or her outside the continent. The trial of Charles Taylor had to be moved to The Hague instead of Freetown, due to security concerns in the two neighbouring countries. The trial of Hissene Habre remains a hostage of lack of resources,<sup>8</sup> notwithstanding the waiting by Chadian victims for justice, in spite of a decision by the African Union that Senegal prosecutes him instead of extraditing him to Belgium.<sup>9</sup>

Resource constraints affecting regional human rights organs, is a major impediment, which is likely to hamper the viability and operations of the African Court exercising international criminal jurisdiction. The sophisticated infrastructure and procedures required for and by such a court, such as investigators, holding detention facilities, prosecution and defence teams, witness protection programmes, which are not part of the African Court as currently established. The importance of the political will necessary to ensure that the court effectively exercises international criminal jurisdiction, cannot be over emphasized. This is a prerequisite for such a decision to be implemented. Anything less than that would be tantamount to a masquerade of international criminal jurisdiction.

African states’ commitment to fight impunity must be seen to be a reality and not merely rhetoric. In order for the extension of international criminal jurisdiction to succeed the prevalence of a culture disrespecting human rights, intolerance and bad governance must cease. Democratic institutions must be respected, elections and political succession must be conducted transparently and democratically, economic, social and cultural rights must be realised.

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<sup>7</sup> **Assembly/AU/Dec.221(XII)** states the following; “[c]ondemns the gross violation of human rights in Darfur, and URGES that the perpetrators be apprehended and brought to justice, and supports the decision of the PSC(Peace and Security Council) to establish a High Level Panel of Eminent Personalities under the chairmanship of former President of the Republic of South Africa, H.E Thabo Mbeki, to examine the situation in depth and to submit recommendations on how best the issue of accountability and combating impunity, on the one hand, and reconciliation and healing on the other, could effectively, and comprehensively addressed.”

<sup>8</sup> In February 2009, the AU Assembly adopted, **Decision on the Hissene Habre case**, ref **Assembly/AU/Dec. 240(XII)** which *inter alia*, “[c]alls on all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission.”

<sup>9</sup> Decision of the African Union, ref. **Assembly/Dec.127(VII)** of July 2006 adopted in Banjul the Gambia

The extension of international criminal jurisdiction to the African Court must be a genuine framework for addressing impunity, fostering political accountability, and providing a different layer of a regional complement to the international criminal justice system. It should not be a ruse for shielding perpetrators of grave crimes against international criminal justice.

### **Conclusion**

It is my submission that the infrastructure for a regional court exercising international criminal jurisdiction, such as the registry, the prosecutor's office, the training of judges and lawyers, requires a lot of resources. African states when considering the decision must take this fact into account. Since July 2006, the African Union has requested Senegal to prosecute Hissene Habre, former Chadian President. To date Senegal is not able to do so due to resource constraints. From the victims stand point, this is a typical case of either unwillingness or inability to prosecute. The handling of this case will show the extent to which the African Union is prepared to ensure that international crimes of concern are tried on the continent as envisaged.

The Rome Statute framework provides for situations of inability and unwillingness to prosecute, which would enable the ICC to intervene. Until such time that a decision is made, it is not yet clear whether the African Union will confer jurisdiction on the African Court in lieu of the ICC, or as a regional complement to the national jurisdiction under the Rome Statute. The later situation is not provided for under the Rome Statute. Yet if the African Court and the ICC are to operate in parallel, the African Court must be seen as competent complement to the fight against impunity.

An important analogy must be the sub-regional Courts in ECOWAS, SADC, and the East African region in their complementary role to the African Commission and the African Court. Their jurisdiction includes, *inter alia*, the application and interpretation of the African Charter, and other regional, sub regional and international human rights instruments.

Finally, while appreciating the limitations of the ICC in relation to Somalia, and the criminal responsibility of non state actors, this conference must take a minute to reflect on the precarious human rights situation in Somalia. The international community must bear collective responsibility for the inadequate support given to the African Union regional efforts to stabilise Somalia. The civilian population in Somalia continues to experience daily violations of their rights. Women and children have suffered the most, and war lords thrive in impunity.

It is my sincere hope that we shall summon the deepest of our consciousness to figure out a solution to this crisis in Somalia which has witnessed grave crimes over the past 20 years, and ensure that those responsible for the grave crimes are held accountable.

I thank you for your attention.

New York  
11 September 2009.