Why to Retain Membership of the International Criminal Court? Victim-oriented Considerations

Juan-Pablo Perez-Leon-Acevedo*

Abstract
Among international criminal tribunals (ICTs), the International Criminal Court (ICC) for the first time introduced victim participation and reparations for victims. Against potential African withdrawals from the ICC-Statute, this article seeks to demonstrate the need to retain membership of the ICC under victim-oriented considerations. Despite its deficits and limitations, the ICC is arguably an important judicial forum for victims of mass atrocities committed in Africa for three arguments. First, human rights are invoked as a standard to examine the legitimacy of the decisions of the ICC, African Union (AU), and African states. Second, international and African regional human rights law on victim rights binds African states. Third, since AU regional criminal justice initiatives present important deficits and limitations in terms of victim rights, they are unfit to replace the ICC.

Key words
International Criminal Court; African Union; African states; Victims; Withdrawals.

1. Introduction
The ICC has faced a challenging relationship with the AU and African states. Potential African withdrawals from the ICC-Statute1 illustrate this. As AU practice,2 African state practice,3 and academic literature4 evidence, certain factors invoked and/or considered

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* Post-Doctoral Researcher, Pluri-Courts/University of Oslo. Article funded by: Research Council of Norway-Project-223274.
by African states and/or the AU may explain the said withdrawals and other ‘hostile’ African measures towards the ICC. Although these allegations may be a valid explanation of why African states want to leave the ICC, the validity of these claims may be debunked. These allegations are critically discussed as follows.

First, there are neo-colonialism allegations: the ICC as a western-power tool unfairly focused on Africa and unwilling and/or unable to proceed outside Africa, especially when big powers are involved.\(^5\) This also relates to political decisions of the Security Council (SC) when it under ICC-Statute Article 13(b) decides (not) to refer situations to the ICC and/or under ICC-Statute Article 16 decides not to defer ICC investigations/prosecutions which may threaten peace and security in Africa. However, these allegations are inaccurate. The ICC no longer exclusively focuses on Africa as the Georgia situation and prospective non-African situations evidence.\(^6\) Additionally, Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic as States Parties to the ICC-Statute and in full exercise of their state sovereignty were the first states to trigger the ICC’s jurisdiction via self-referrals of situations to the ICC concerning ICC-jurisdiction crimes committed by their respective nationals in their respective territories.\(^7\) Moreover, African states that are non-permanent SC members did not oppose the SC referrals of the Darfur and Libya situations to the ICC.\(^8\) Furthermore, the ICC-Prosecutor *motu proprio* opened an investigation into Kenya following African fact-finding mechanisms.\(^9\) Finally, since the ICC lacks judicial review powers over SC decisions, the former should not be (primarily) blamed for the latter.

Second, by ordering the implementation of arrest warrants against sitting senior officials, particularly Sudanese President Omar Al-Bashir, the ICC has allegedly pushed

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\(^5\) Ssenyonjo, above n 4, 758, 770-771; SA-withdrawal notification, above n 3, 2; AU-Withdrawal Strategy, above n 2, [2]-[4].
\(^7\) Ibid.
states to violate international obligations on immunities of senior state officials.\textsuperscript{10} Nevertheless, besides the respective ICC-Statute obligations, the International Court of Justice (ICJ) by \textit{inter alia} invoking ICC-Statute Article 27(2) had found those immunities to be inadmissible at ICTs.\textsuperscript{11}

Third, the effectiveness, efficiency, costs, and performance of the ICC have been criticised.\textsuperscript{12} Although this claim carries some weight, international institutions face enforcement and/or funding problems. The obstructionist and/or uncooperative position of African states and certain major powers indeed increase the deficits of the ICC.

Fourth, actions of (some) African states that oppose the ICC seemingly indicate attempts of African leaders to avoid accountability.\textsuperscript{13} The initial good relationship between African states and the ICC dramatically changed when Al-Bashir and Kenyan senior leaders (Uhuru Kenyatta and William Ruto) were indicted. As later examined, the reasons behind the (attempted) withdrawals from the ICC-Statute further evidence this claim.

Discussions concerning African withdrawals from the ICC-Statute have not paid much attention to victims who are arguably the most important addressees of international criminal justice. Despite its flaws and limitations, the ICC by introducing a system of victim participation and reparations for victims for the first time among ICTs established a landmark in international criminal justice. This innovative feature has influenced the incorporation of victim participation and/or reparation systems at later (prospective) ICTs, including the International Criminal Law Section within the envisioned African Court of Justice on Human and Peoples’ Rights (ICLS-ACJHPR),\textsuperscript{14} and the AU-backed Extraordinary African Chambers (EAC) which convicted ex-Chadian dictator Hissène Habré.\textsuperscript{15}

In this scenario, this article argues that African states should stay within the ICC based on victim-oriented arguments. The first section examines the current situation of the African withdrawals from the ICC-Statute, including an analysis of applicable ICC-
Statute provisions as interpreted by the ICC concerning the Burundian withdrawal from the ICC-Statute. The following sections discuss three victim-oriented arguments to stay within the ICC. First, human rights, particularly victim rights, are fundamental standards against which to assess the legitimacy of the decisions of the AU, ICC, and African states (Section III). Second, victims hold some procedural rights in criminal proceedings under international and African human rights law, including sources binding on African states; however, the African withdrawals from the ICC Statute are arguably inconsistent with these standards (Section IV). Third, inter alia the normative foundations of the ICLS-ACJHPR make the ICLS-ACJHPR unfit to replace the ICC system of victim participation and reparations (Section V).

2. (Attempted) African Withdrawals from the ICC-Statute
Potential African withdrawals from the ICC-Statute come alongside the lack of African state cooperation with the ICC and the projected establishment of the ICLS-ACJHPR. As of 20 March 2018, only the withdrawal of Burundi from the ICC-Statute became effective. South Africa and Gambia withdrew their respective withdrawals from the ICC-Statute before these became effective. In its 2017 ‘ICC Withdrawal Strategy’, the AU welcomed those (attempted) withdrawals. However, this strategy focuses not on an effective ‘collective’ withdrawal but primarily on non-legally binding reform proposals. Although the AU Assembly of Heads of State and Governments (AU-Assembly) in January 2018 noted the Burundian decision to withdraw from the ICC-Statute effective on 27 October 2017 and condemned the ongoing ICC investigation into alleged crimes committed into Burundi, there were no longer references to a ‘collective’ withdrawal from the ICC-Statute.

African (attempted) withdrawals from the ICC-Statute are largely connected to political decisions of some African political leaders when ICC (preliminary) investigations may involve them as the Burundian and Gambian situations evidence. The Burundi’s withdrawal from the ICC-Statute is closely related to the ICC’s investigation into crimes committed allegedly by state actors led by Burundian

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16 Decision on the ICC-2017, above n 2; AU-Withdrawal Strategy, above n 2, [22]-[26].
17 Ssenyonjo, above n 4, 793.
18 Decision on the ICC-2018, above n 2, [4].
The current Gambian administration withdrew the Gambian withdrawal from the ICC-Statute filed during the term of former President Yahya Jammeh, who was allegedly involved in atrocities. South Africa justified its withdrawal by criticizing the ICC’s focus on Africa at the expense of peace, security, stability and immunity *ratione personae* of Heads of States not parties to the ICC-Statute (Al-Bashir). However, South African courts found the lack of arrest of President Al-Bashir in South Africa to be inconsistent with South Africa’s ICC-Statute obligations, and revoked the withdrawal filed during the now former President Jacob Zuma’s term for unconstitutional grounds (lack of parliamentarian approval).

Any state party to the ICC-Statute may without justification withdraw from it. Withdrawals from treaties are basically unilateral acts, are normally effectuated via notice to the other parties, and approval or consent of other states is not required. As the AU recognises, ‘collective withdrawal […] has not yet been recognised by international law’. Under Article 42(2) of the Vienna Convention on the Law of Treaties (VCLT), withdrawals ‘may take place only as a result of the application of the provisions of the treaty’ (namely, the ICC-Statute in this case) ‘or of the [Vienna] Convention’. Article 127 of the ICC-Statute recognises this discretionary and sovereign power. Nevertheless, this withdrawal is subject to proceedings and effects. Under Article 127(1), the withdrawal must be given by written notification to the UN-Secretary-General and, unless a later date is specified, the withdrawal ‘shall take effect one year after the date of receipt of the notification’.

Burundi filed its written notification of withdrawal from the ICC-Statute with the UN-Secretary General (ICC-Statute depositary) on 27 October 2016. The withdrawal became effective on 27 October 2017. Under Article 127(2), the withdrawing state is not discharged from ICC-Statute obligations accrued while it was a party to the ICC-Statute; the withdrawal does not affect binding cooperation with the ICC concerning investigation/proceedings that started before the date when the withdrawal took effect.

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19 Ssenyonjo, above n 4, 754-756
20 ibid., 756-758.
21 SA-withdrawal notification, above n 3.
22 *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZAZCA 17 (Supreme Court of Appeal).
23 *Democratic Alliance v. Minister of International Relations and Cooperation and Others* (83145/2016) [2017] ZAGPPHC 53 (High Court of South Africa).
25 *AU-Withdrawal Strategy*, above n 2, [21].
withdrawal became effective; and the withdrawal does not affect the continued consideration of matters already considered by the ICC before the date when the withdrawal became effective.

On 25 October 2017, when authorising the opening of an investigation into the situation in Burundi, ICC-Pre-Trial Chamber-III (ICC-PTC-III) based on ICC-Statute Articles 12(1)-(2) (exercise of the ICC’s jurisdiction) and 127(1) found that the ICC retains jurisdiction over crimes committed during the time when Burundi was party to the ICC-Statute. This means between the date when the ICC-Statute entered into force for Burundi (1 December 2004) and the date when its withdrawal became effective (27 October 2017), and the ICC may exercise this jurisdiction over those crimes even after the withdrawal became effective. ICC-PTC-III found that Article 127(2) gives effect to the VCLT Article 70(1)(b) principle: the termination of a treaty ‘does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination’. It concluded that subsequent to the entry into force of its withdrawal, Burundi’s obligation to cooperate with the ICC related to the investigation into alleged crimes committed in Burundi remains in effect as long as this investigation lasts and includes any proceedings stemming from the investigation. This could involve a potential case against President Nkurunziza.

African and non-African states like The Philippines, which faces an ICC’s preliminary investigation and withdrew from the ICC-Statute on 18 March 2018, should consider these findings and norms to think over about using exiting strategies as political tools because certain legal obligations continue after a withdrawal.

3. **Human Rights of Victims and Legitimacy**

Victim-oriented considerations are intrinsically connected to the realisation of victim rights. This section examines victim rights as a standard to assess the legitimacy of the actions of member states of the AU/African states parties to the ICC Statute, the AU and the ICC. Two legitimacy aspects are considered. While normative legitimacy

27 Ibid.
28 Ibid., [25]
29 Ibid., [26].
concerns whether an institution is entitled to rule under objective standards, sociological legitimacy examines whether the institution is perceived or believed to be legitimate. Although these legitimacy types are conceptually distinct, they cannot be entirely separated from each other.

Normative legitimacy may relate to authority justifications based on legal norms. Legality is part of the legitimization process. Subjects of international law that comply with international rules would then be (more) legitimate. Although normative legitimacy is not confined to legality, the former cannot be detached from the latter. This is particularly relevant when there are possible violations of human rights. The need to curb state abuses actually underlies legality.

Three approaches to normative legitimacy are considered here. Under international/global constitutionalism analyses at the intersection of law and politics, states evidence clear urgencies to demonstrate that their actions are legitimate under fundamental norms such as human rights. The increased focus on international and regional human rights protection is part of an emerging constitutional order. Although international organizations are not generally parties to human rights treaties, their increased exercise of power over individuals demand that they are subject to human

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30 Daniel Bodansky, ‘Legitimacy in International Law and International Relations’ in Jeffrey Dunoff, and Mark Pollack (eds), Interdisciplinary Perspectives on International Law and International Relations (CUP, 2012) 326-327; Ian Clark, Legitimacy in International Society (OUP, 2005) 18–19; Silje Langvatn and Theresa Squatrito, ‘Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals’ in Nobuo Hayashi and Cecilia Bailliet (eds), The Legitimacy of International Criminal Tribunals (CUP, 2017) 43.
31 Ibid 43-44.
33 Alain Pellet, ‘Legitimacy of Legislative and Executive Actions of International Institutions’ in Rüdiger Wolfrum and Volker Röben (eds), Legitimacy in International Law (Springer, 2008) 67.
38 Ibid 3.
rights standards.\textsuperscript{40} Human rights protection, which is a key feature of the constitutionalization of international law,\textsuperscript{41} also applies to the international judiciary.\textsuperscript{42} Human rights are interconnected with the international rule of law and the latter also constitutes a fundamental norm in global constitutionalism.\textsuperscript{43} Legal literature\textsuperscript{44} and international practice\textsuperscript{45} have recognized human rights as an important legitimacy standard connected to and/or constitutive of the international rule of law.

The legal strategies of the AU concerning the ICC have been qualified as ‘schizophrenic’ oscillations between following and attempting to subvert global constitutional rules.\textsuperscript{46} While the international community has welcomed the aims of the AU of African solutions to African problems, the AU has also disregarded universally accepted rules and challenged an emerging global constitution.\textsuperscript{47} The AU has endeavoured to remove African issues from the purview of global institutions by granting authority upon national and/or regional institutions.\textsuperscript{48} African withdrawals from the ICC-Statute and the replacement of the ICC with the ICLS-ACJHPR, both arguably at the expense of victim rights, illustrate this.

Second, the performance and effectiveness of international institutions (including international courts) are under goal-based approaches determined by to what extent the goals prescribed to an institution and its mandate can be achieved within a period.\textsuperscript{49} Effectiveness and legitimacy are interrelated. An effective institution is more legitimate than an ineffective institution, and a legitimate institution is in a better situation to become effective than an illegitimate institution.\textsuperscript{50} An important goal of international crime justice and related institutions such as the ICC, the ICLS-ACJHPR,

\textsuperscript{40} Ibid 80.
\textsuperscript{41} Anne Peters, ‘Membership in the Global Constitutional Community’ in Klabbers et al., above n 37, 167; Geir Ulfstein, ‘The International Judiciary’ in Klabbers et al., above n 37, 127.
\textsuperscript{43} Wienner et al., above n 37, 3.
\textsuperscript{45} Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (23 August 2004); Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies UN Doc S/2011/634 (12 October 2011); UN-General Assembly, The Rule of Law at the National and International Levels UN Doc A/RES/68/116 (18 December 2013).
\textsuperscript{46} Reinold, above n 4, 1097.
\textsuperscript{47} Ibid 1100.
\textsuperscript{48} Ibid 1097.
\textsuperscript{49} Yuval Shany, Assessing the Effectiveness of International Courts (OUP, 2014) 29.
\textsuperscript{50} Ibid 158.
and the AU is to render justice for victims, which is closely related to victim rights to protection, participation and reparations.\textsuperscript{51} As ICC-Chief-Prosecutor Bensouda claimed, ‘This Court is defending victims and will continue to do so’.\textsuperscript{52} International criminal law may be considered as a tool for more effective human rights enforcement (fight against impunity); however, this victim-centred approach must be reconciled with other interests and goals such as the protection of defendant rights.\textsuperscript{53} These considerations arguably apply to institutions such as the AU and the ICC which are involved in international criminal justice and victim rights.

Third, under global governance and related global administrative approaches, i.e., accountability principles, mechanisms, and practices applied to international organizations and state agencies, the protection of individual rights constitutes a normative goal pursued by international law actors and seeks to ensure the legality of decisions.\textsuperscript{54} In normative legitimacy assessments of institutions involved in global governance, equal regard for fundamental rights/interests of all persons should be considered.\textsuperscript{55} Despite the pushes for and challenges to recalibration of global separation of powers brought by the AU and its member states, the ICC via investigation/prosecution of atrocities is arguably dedicated to promote human rights and is imbedded in the broader framework of global governance institutions whose interrelationships are regulated via the UN Charter, ICC-Statute, the VCLT, etc.\textsuperscript{56} The ICC arguably needs to become more politically sensitive; however, international (human rights) law cannot be dismissed, and international justice should as long as possible satisfy global legitimacy concerns.\textsuperscript{57}


\textsuperscript{52} Fatou Bensouda, \textit{Does the ICC Target Africa—Is the ICC Selectively Prosecuting Cases?}, Speech hosted by German Foreign Office and the Wayamo Communication Centre, Botswana, 6 July 2011.


\textsuperscript{54} Benedict Kingsbury et al., ‘The Emergence of Global Administrative Law’ (2005) 68(3) \textit{Law and Contemporary Problems} 15, 17, 44-45.


\textsuperscript{56} Reinold, above n 4, 1099.

\textsuperscript{57} Charles-Chernor Jalloh and Ilias Bantekas, ‘Conclusion’ in Jalloh and Bantekas, above n 4, 373.
Concerning sociological legitimacy, the perceptions of the ICC, especially among victims and communities in regions under ICC investigations, largely differ from counter-ICC approaches adopted by several African leaders. For example, most Kenyans, victims included, have largely endorsed the ICC. Many ordinary African citizens no longer accept neo-colonialist arguments against the ICC, civil society organizations support the ICC, and even African political leaders are not completely unified in an anti-ICC front. Indeed, several African leaders have recently shown support for the ICC and reluctance and/or opposition to withdrawals from the ICC-Statute: African states leaders are divided about the AU’s Withdrawal Strategy.

In the last years, studies conducted among victim participants at the ICC reveal general victim support for the ICC to realise certain victim rights. In Uganda, most victim participants appreciated that they had a voice in the cases and could tell their stories; they found the ICC to be a better institution than national judicial alternatives despite the ICC’s failures; victims felt respected by and built trust in the ICC staff; victims felt safe applying to the ICC, especially after the security situation in Northern Uganda improved; and victims considered reparations to be the main reason for their participation and the need for pairing convictions with reparations. In the DRC, most victims applied for participation at the ICC to receive support or reparations. Despite their safety concerns, victims expect convictions and reparations. In Kenya, virtually all victims rejected that domestic Kenyan courts could handle cases concerning Kenyatta or Ruto and were sceptical of an AU’s regional criminal court. According to them, even if the ICC is slow or susceptible to political pressure, it is still better than other judicial alternatives. Victims expressed safety concerns due to potential government reprisals, and considered that reparations and convictions are equally important. Concerning Ivorian victim participants at the ICC, they strongly prefer the

58 Sosteness-Francis Materu, ‘A Strained Relationship-Reflections on the African Union’s Stand Towards the International Criminal Court from the Kenyan Experience’ in Werle et al. (eds), above n 4, 221-222.
59 Reinfeld, above n 4, 1103, 1105.
60 Ssenyonjo, above n 4, 793.
63 Ibid.
64 Ibid 59.
65 Ibid.
66 Ibid.
ICC to national courts as the former is perceived to be unbiased and able to render justice. Their ultimate satisfaction depends on judicial outcomes: conviction and compensation.

These findings among ICC victim participants confirm previous surveys conducted in communities located in regions under ICC investigations. For example, in Northern Uganda, most interviewees considered that the ICC contributed to peace and justice efforts. In Kenya, the majority preferred the ICC to national courts. In the DRC, although most of those polled considered national courts over the ICC as the first option, the overwhelming majority wanted international cooperation with national prosecution. In Darfur, a very large majority desired that state actors be tried by the international community/the ICC and found the ICC to be impartial. In the Central African Republic, the overwhelming majority considered the ICC to be neutral and just.

The previous normative and sociological legitimacy considerations gain more weight when the principle of complementarity is considered. This principle leads the relationship between the ICC and domestic jurisdictions but the ACJHPR Protocol (Malabo Protocol) neglected it. Under Article 17 of the ICC-Statute, the ICC exercises its jurisdiction if ‘the state is unwilling or unable genuinely to carry out investigation or prosecution’. The ICC has benefited many African victims of international crimes when their states were unwilling and/or unable to deliver justice. Withdrawals from the ICC-Statute would mean to deprive victims of mass atrocities from a crucial judicial forum,

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67 Ibid. 70.
68 Ibid.
69 Phuong Pham et al., Forgotten Voices-A Population-based Survey on Attitudes About Peace and Justice in Northern Uganda (ICTJ/Berkeley Human Rights Center, January 2005) 4-5; Phuong Pham et al., When the War ends-Peace, Justice, and Serious Reconstruction in Northern Uganda (ICTJ/Berkeley Human Rights Center/Payson Center, December 2007) 2-5.
72 Darfurian Voices (24 Hours for Darfur, July 2010).
which may additionally affect peace, security and stability in Africa.\textsuperscript{75} Withdrawals from the ICC-Statute would also expose victims to the lack of proper justice in scenarios of (future) mass atrocities. Moreover, there is an increasing need for reparative/restorative complementarity approaches,\textsuperscript{76} namely, to consider whether victims received reparations and/or other remedies as part of the ICC admissibility criteria.

Therefore, there are factors that explain the African withdrawals from the ICC-Statute. Certain African initiatives and/or wishes to withdraw from the ICC-Statute may carry some normative and/or sociological legitimacy. Nevertheless, when crucial victim-oriented considerations, including victim rights, are considered, the normative and sociological legitimacy of African withdrawals from the ICC-Statute overall is severely weakened. It is thus strongly advisable not to proceed with the said withdrawals. Precisely, the following section examines international and African human rights standards on victim rights.

4. **International and African Regional Human Rights Law on Victims**

AU member states are obligated to respect and protect the rights of those under their jurisdiction in accordance with treaties ratified by them, resolutions of international organizations adopted with votes of African states, and decisions of international/regional human rights bodies against African states.\textsuperscript{77} Thus, identification of victim rights in criminal proceedings under international and African regional human rights law is crucial. This also shows that potential withdrawals from the ICC-Statute are inconsistent with human rights law sources binding on African states or sources in which development African states were involved. In the context of unwilling/unable states to deliver justice for victims, the said inconsistency corresponds to the deprivation of victims from an important international judicial platform (the ICC) at which victims

\textsuperscript{75} Ssenyonjo, above n 4, 794.


\textsuperscript{77} E.g., *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Articles 2-5; *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), Articles 1-3. For further references, see this section.
of international crimes may realise their rights related to (international) criminal proceedings.

Pivotal international developments on victim rights occurred at the UN General Assembly (UNGA) which adopted the 1985 Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (UN-Victim Declaration), the first international instrument that explicitly recognised victim rights to access to justice and receive reparations. Under UN-Victim Declaration Article 1, victims are those who ‘suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws’. States are recommended to improve victim access to justice and fair treatment, allow restitution from the offender and state compensation, treat victims with dignity and respect, inform victims of their rights, provide overall assistance, criminalize abuse of power-related violations, and provide remedies and social services. The UN-Victim Declaration establishes no specific procedural right; however, it arguably requires states to provide victims with mechanisms to review judicial and administrative decisions. The UN-Victim Declaration is broad enough to enable states to adapt their systems to implement the UN-Victim Declaration general aims.

In 2005, the UNGA Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN-Principles) were adopted. The UN-Principles follow victim-based perspectives to provide ‘mechanisms, modalities, procedures and methods’ for implementing existing international human rights law and international humanitarian law obligations. The UN-Principles victim definition (Principle 8) follows the UN-Victim Declaration. Victim participation in criminal proceedings is not explicitly mentioned; however, the UN-Principles recognise three broad victim rights: equal and effective access to justice; adequate, effective and

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79 UN-Declaration, Articles 1-19.
81 UN Doc A/RES/60/147 (2005).
82 UN-Principles, Preamble, [7].
prompt reparation for harm suffered; and right to the truth. As Bassiouni noted, access to justice is the ‘right to be heard and the right to an effective remedy’. Notwithstanding their soft-law nature, the UN-Victim Declaration and UN-Principles constitute the Bill of Rights of victims of (international) crimes. They influenced the victim definition under Rule 85(a) of the ICC-Rules of Procedure and Evidence. Inter alia the ICC, the AU-backed EAC in Habré, and the African Court on Human and Peoples’ Rights (ACtHPR) have invoked the UN-Victim Declaration and/or UN-Principles when interpreting and applying their legal framework provisions on victims and/or deciding on victim matters. Additionally, these UNGA resolutions have influenced and have been influenced by international and regional human rights case-law and treaties. And, they overall built on general legal principles common to civil-law and common-law jurisdictions.

Progressively, victim rights have been explicitly included in UN human rights treaties binding on African states. The 1966 International Covenant on Civil and Political Rights (ICCPR) lacks references to victim rights. However, the situation has changed in later international human rights treaties concerning rights of victims, including the immediate relatives or dependants of direct victims and others who suffered harm as a result of the harm inflicted on direct victims. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Articles 13-14), and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED) (Articles 12(1), 24) explicitly include victim rights. Victims are entitled to: complain; have one’s case promptly and impartially examined by competent authorities; be protected as victims/witnesses

84 Ibid 263.
86 E.g., Prosecutor v. Lubanga (Decision on Victims’ Participation) (ICC, Trial Chamber-I, ICC-01/04-01/06-1119, 18 January 2008) [5].
87 E.g., Prosecutor v Habré (Arrêt) (EAC, Appeals Chamber, 27 April 2017) [611].
88 E.g., Beneficiaries of Late Norbert Zongo and Burkinabé Movement on Human and Peoples’ Rights v Burkina Faso (Judgment on Reparations) (ACtHPR, Application No 013/2011, 5 June 2015) [47].
90 Ibid; UNODCCP, above n 80.
91 UN-Principle 8.
against intimidation or ill-treatment connected to their complaints and evidence; and redress, including compensation and rehabilitation. Moreover, CED Article 24(2) recognises the right to the truth. Thus, there is an increasing inclusion of explicit victim rights in major international human rights instruments which traditionally were mainly or exclusively focused on defendant rights. These developments exemplify the ‘humanization’ of international law.\textsuperscript{92}

As for individual cases, unless human rights violations are systematic, which correspond to international crimes, the Human Rights Committee (HRC) generally does not seem to consider victim access to and participation in criminal proceedings as part of fair hearing under ICCPR Article 14(1).\textsuperscript{93} Nevertheless, the Committee against Torture (CmAT) has under CAT Articles 13-14 considered victim rights to: complain, have their case impartially and promptly examined by competent authorities, and be redressed/adequately compensated.\textsuperscript{94} Under CED Articles 12(1) and 24(1)-(3), the Committee on Enforced Disappearances (CmED) has determined that victims should be allowed to actively participate in the investigation, be compensated and rehabilitated.\textsuperscript{95}

Concerning HRC and CAT case-law on serious human rights violations such as torture, extrajudicial killing, and forced disappearance, rendered against African states, these victim rights may be identified: effective and enforceable remedies to violations, including thorough and diligent investigation, prosecution, trial and punishment of perpetrators,\textsuperscript{96} redress, including, compensation, restitution, satisfaction, rehabilitation, and guarantees of non-repetition,\textsuperscript{97} information about investigations;\textsuperscript{98} protection

\textsuperscript{92} Theodor Meron, \textit{The Humanization of International Law} (Martinus Nijhoff, 2006); Antonio-Augusto Cançado-Trindade, \textit{International Law for Humankind} (Brill/Nijhoff, 2010).
\textsuperscript{95} CmED, \textit{Views: Communication No. 1/2013}, UN Doc CED/C/10/D/1/2013 (12 April 2016) [10(9), 12] (‘Estela-Deolinda Yrusta/Alejandra del-Valle-Yrusta v. Argentina’).
against ill-treatments or intimidations resulting from the complaint made or evidence given; and equality before courts. The African Charter on Human and Peoples’ Rights (ACHPR) contains no explicit provision on the right of victims to an effective remedy. Nevertheless, the African Commission on Human and Peoples’ Rights (ACmHPR) has implied this right under ACHR Article 7 which provides for the right to a fair hearing, and considered that investigation, prosecution, and punishment of serious human rights violations are effective remedies owed to victims. The ACmHPR found that the right to a fair hearing includes the victim right to access to criminal proceedings. In the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa and the Principles and Guidelines on the Right to Fair Trial and Legal Assistance, the ACmHPR established that anyone (not only defendants) holds the right to a fair hearing in criminal proceedings. Under the African Charter on the Rights and Welfare of the Child (Article 4), children who can voice their opinions should be heard and considered during legal proceedings.

The ACtHPR correctly determined that although the AU-Assembly formally adopts treaties, signature and ratification thereof are exclusive state prerogatives under ACHPR Article 63(1) and Article 34(1) of the Protocol to the ACHPR. Since the AU is not a party to the said Protocol, it cannot be sued before the ACtHPR. The ACtHPR invoked the Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion of the ICJ to conclude that the AU cannot be sued as a corporate community on behalf of its member states since the AU ‘has a legal personality separate from the legal personality of its Member States’. As the ACtHPR appropriately recognized, this is consistent with Article 34 of the Vienna Convention on the Law of

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98 Djebrouni v Algeria, above n 96, [10].
99 Asfari v. Morocco, above n 97, [13.5].
100 Olo-Bahamonde v. Equatorial Guinea, above n 93, [9.4].
101 Res. 41(XXVI)99, 15 November 1999 [7].
103 Ibid, [213]. See also Ochoa, above n 93, 133.
105 DOC/OS(XXX)247, Section A(1).
106 Ochoa, above n 93, 133-134.
107 Femi Falana v. African Union (Judgment) (ACtHPR, Application No. 001/2011, 26 June 2012) [67].
109 Falana v. African Union, above n 107, [68].
Treaties between States and International Organizations or between International Organizations: ‘A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization’.

ACtHPR case-law has discussed fair trial rights, especially concerning the defendant. Additionally, the ACtHPR in Zongo and Burkinabè v. Burkina Faso specifically examined rights of victims of crimes in criminal proceedings. Under this ACtHPR jurisprudence, which interpreted and applied ACHPR Article 7 and ICCPR Article 14, victim procedural rights may be identified. These are the rights to: one’s case heard by a competent and independent court; timely proceedings and effective remedies; be involved in proceedings, including be heard as witnesses or civil parties, adversarial proceedings between witnesses and the defendant, and adversarial proceedings between civil parties and the defendant if this is necessary and useful; diligent state efforts to search, prosecute, and try perpetrators; equality before the law and equal protection of the law; legal representation, including free legal assistance if needed; and reparations to redress harms inflicted. Although this last right concerned ACtHPR reparation orders against states, ‘harm’, ‘violation-harm causal link’, ‘compensation’, etc. constitute general legal concepts: they also mutatis mutandis apply in victims’ reparations claims against perpetrators. When construing its jurisprudence, the ACtHPR has relied on inter alia case-law of the European and Inter-American Courts of Human Rights, which have developed robust practices on (procedural) rights of victims in criminal proceedings. Concerning victims’ broad rights to access to justice, the truth, and


111 Beneficiaries of Late Norbert Zongo and Burkinabè Movement on Human and Peoples’ Rights v. Burkina Faso (Judgment) (ACtHPR, Application No 013/2011, 28 March 2014) [114]-[170]; [200]-[202].


113 E.g., ibid, [48], [60]-[61], [66].

114 See Ochoa, above 93, 111-131, 142-145.
reparations, these human rights regional practices may help to prove (emerging) customary international law and/or international law principles.\textsuperscript{115}

5. **ICC vis-à-vis AU Criminal Justice, Particularly the ICLS-ACJHPR**

Despite its flaws, the ICC is arguably important to realise certain victim rights. Also, victim rights at the ICC are consistent with human rights-based legitimacy assessments and international/African regional human rights law. This section argues that AU justice initiatives, particularly the ICLS-ACJHPR, are unfit to replace the ICC.

Unlike the ICC, the envisioned ICLS-ACJHPR lacks a general victim participation system.\textsuperscript{116} Under ICC-Statute Article 68(3), when victims’ personal interests are affected, the ICC ‘shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’. Article 68(3) acknowledges victims’ right to voice their concerns and views when their personal interests are affected, but subject to other competing legitimate interests and rights, particularly defence rights. Article 68(3) has been replicated or has influenced victim participation regimes at ICTs. The Statute of the Special Tribunal for Lebanon (Article 17) illustrates this trend. Additionally, the AU-backed EAC-Statute (Article 14(1)) provides for civil party participation. Among other ICTs, this court actually invoked ICC-Statute Article 68(3) and related ICC victim participation case-law.\textsuperscript{117}

Conversely, the ACJHPR-Statute departs from these international criminal justice trends. The ACJHPR-Statute lacks a general victim participation regime. Victims will be unable to be participants at the ICLS-ACJHPR. This sends victims back to the situation at ICTs prior to the ICC: mere witnesses during pre-conviction proceedings. This is inconsistent with victim-oriented and restorative-oriented justice developments.

ACJHPR-Statute Article 46G(3), which copied ICC-Statute Article 15(3), contains the only ICLS-ACJHPR victim participation instance. ‘Victims may make

\textsuperscript{115}Bassiouni, above n 83, 251; UN-Principles, Preamble, [7].
\textsuperscript{116}See also Juan-Pablo Perez-Leon-Acevedo, ‘Victims at the Prospective International Criminal Law Section of the African Court of Justice and Human and Peoples’ Rights’ (2017) 17(3) ICLR 453, 466-476.
\textsuperscript{117}Habré, above n 87, [642]-[644].
representations to the Pre-Trial Chamber’ when it decides on authorising an investigation. However, this is only accessory to general victim participation at the ICC under Article 68(3).

Article 68(3) is important because victims can upon judicial determination be granted victim participant status which, subject to progressive judicial evaluations, can be meaningfully exercised throughout procedural stages. Article 68(3) general victim participation regime has led to broad victim participation in investigation, pre-trial, trial, sentencing, and (interlocutory) appeals. Victim procedural rights include: be notified, file evidence and challenge evidence admissibility, question witnesses and the accused, participate in oral proceedings, file written motions, access to case-file documents/material, attend hearings, receive judicial protective measures, and be dual victim participants/witnesses.118

However, ICC practice on Article 68(3) victim participation has not been flawless. Certain ICC practice that excessively expanded victim participation may be criticized as this has been problematic with defence rights,119 and efficient proceedings.120 Inconsistency in some victim participation practices across ICC-Chambers,121 and non-realisation of certain victim participation goals122 have also prompted criticism.

Nevertheless, these deficits do not justify the absence of ICLS-ACIJHPR victim participation. Additionally, ICC-Chambers have re-visited and refined their victim participation practices to address the above-mentioned problems. First, broad victim participation during investigation was replaced with a more balanced approach that allows victim participation during investigation but limited to judicial proceedings.123 Second, to better handle the increasing numbers of victim participants, ICC-Chambers

118 E.g., Lubanga, above n 86; Katanga/Ngudjolo-Chui (Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case) (ICC, Pre-Trial Chamber-I, ICC-01/047-01/07-474, 13 May 2008).
122 Brouwer and Heikkilä, above n 51, 1346-1347.
123 Situation in the DRC (Decision on Victims’ Participation in Proceedings Relating to the Situation in the Democratic Republic of Congo) (ICC, PTC-I, ICC-01/04-593, 11 April 2011).
have designed mechanisms, including collective victim participation applications, simplified individual applications, or registration plus simplified victim participation. Participation has been generally conducted via common legal representatives for efficiency. Third, anonymous victim participants are allowed but their procedural rights have been more limited, and been subject to requirements, including inadmissible anonymous testimonies by victim participants during trials. Fourth, the ICC jurisprudentially construed the victim’s procedural right to file evidence on the accused’s guilt; however, the ICC has clarified that this right is not unfettered because its admissibility depends on its contribution to the ICC’s mandate to judicially determine the truth. Fifth, the ICC no longer requires victim participants to re-apply for participation in interlocutory appeals if victims already participated in related pre-trial/trial proceedings.

The drafting history of the ACJHPR Statute provides no clue on the absence of general victim participation. The 2012 and 2014 Draft Protocols contained no provision. No official record concerning this normative gap is found. In June 2014, upon the AU-Executive Council’s recommendation, the AU-Assembly adopted the Draft Protocol, calling on member states to sign and ratify the so-called Malabo Protocol.

The secretive drafting history of the ACJHPR-Statute sharply contrasts with the much more transparent process of drafting/negotiation of the ICC-Statute which involved states and civil society organizations. Limited communication and consultation with civil society representatives and legal experts based in AU states illustrate this.

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125 Katanga/Ngudjolo-Chui (Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140) (ICC, Trial Chamber-II, ICC-01/04-01/07-1665, 20 November 2009) [22].
126 Lubanga, above n 86, [108]-[109].
128 AU Doc. Exp/Min/vi/Rev. 7 (15 May 2012); STC/Legal/Min/7(I) Rev.1 (15 May 2014).
The lack of participation of victims, victim associations and/or human rights NGOs in this process underlies normative deficits.

Concerning reparations for victims of ICLS-ACJHPR-jurisdiction crimes to be claimed against the convicted, ACJHPR-Statute Article 45 largely extrapolates ICC-Statute Article 75. By substantially reproducing ICC-Statute Article 79, Article 46M of the ACJHPR-Statute provides for the establishment of a Trust Fund for victims and their families. As ICC practice shows, a Trust Fund is necessary to manage funds for reparation award implementation, and design reparation implementation plans, especially concerning collective awards against indigent offenders.

Unlike general victim participation, the ACJHPR-Statute provides grounds for a reparation system. This is achieved by reproducing ICC-Statute provisions. However, the ACJHPR-Statute did not incorporate key ICC-Statute provisions. First, the right of victims as reparation claimants to appeal via their lawyers reparation orders (ICC-Statute Article 82(4)) is omitted. As the ICC-Appeals Chamber determined, this right corresponds to the role of victims as proper parties (not mere participants) to post-conviction reparation proceedings. Second, norms such as ICC-Statute Articles 75(4) and75(5), under which the ICC may upon conviction seek cooperation measures to give effect to reparation orders, and States Parties to the ICC-Statute shall give effect to ICC awards, are absent. These omissions may affect the implementation/enforcement of ICLS-ACJHPR awards. As the ICC experience evidences, judicially-ordered protective measures are key to secure funds for reparations, and state cooperation is fundamental to implement awards.

Also, the financing of the ACJHPR and implementation of ICLS-ACJHPR reparation awards will be challenging. Many resources will be needed for an effective ICLS-ACJHPR. Like other ICTs, the ICLS-ACJHPR can under ACJHPR-Statute Article 45(2) issue reparations orders against the convicted but not states. However,

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133 See also Perez-Leon-Acevedo, above n 116, 476-484.
134 Prosecutor v. Lubanga (Decision on the Admissibility of the Appeals against Trial Chamber I’s “Decision Establishing the Principles and Procedures to be Applied to Reparations” and Directions on the Further Conduct of Proceedings) (ICC, Appeals Chamber, ICC-01/04-01/06-2953, 14 December 2012) [67].
136 Katanga, above n 132.
convicted persons are often indigents at ICTs. The ICC and its Trust Fund for Victims have largely relied on donations for reparation funding.\(^{137}\) Donations also constitute most of the AU budget.\(^ {138}\) AU Member States contributed USD 205.1 million out of the 782.1 million AU budget for 2017.\(^ {139}\) Indeed, out of the USD 10.386 million ACtHPR budget (2016), partner funds meant USD 2.451 million.\(^ {140}\) Nevertheless, important donors may be reluctant to fund the ICLS-ACJHPR, including reparation implementation. There have been critical voices about the AU’s hostile attitudes towards the ICC, including the ICLS-ACJHPR as a political tool to circumvent the ICC. Some representatives of international organizations have manifested reservations to support the ICLS-ACJHPR mainly because of the provision on immunities of senior officials.\(^ {141}\)

That the AU-backed EAC is unlikely to gather enough cooperation to implement the whole compensatory awards for civil parties in Habré, i.e., West African Francs 82.29 billion (approximately USD 147.5 million), raises questions about the planned ICLS-ACJHPR reparation system. This may result in largely symbolic reparation awards and related re-victimization.

Three additional factors may increase funding challenges for reparations. First, since Article 46Abis controversially grants immunities to senior officials, cases against offenders who may be wealthy will decrease. Second, reparation claimants may likely be more numerous at the ICLS-ACJHPR than at the ICC. International crimes, several transnational crimes, and some serious domestic offences fall under the ICLS-ACJHPR’s jurisdiction. This will demand more financial resources to efficiently and effectively implement awards. Third, whether the AU will timely set up the ACJHPR-Trust Fund for Victims may be questioned. The AU has yet to make the EAC-Trust Fund operational to implement reparation orders for victims against Habré although the EAC rendered awards on 30 May 2016 (confirmed on 27 April 2017). Conversely, when the ICC delivered its first award in Lubanga (7 August 2012), the ICC-Trust Fund had been operational since 2005.

\(^{137}\) ICC-ASP/15/14, 16 August 2016, [10].


\(^{140}\) AU-Executive Council, Report on the Activities of the ACtHPR, (EX.CL/999(XXX)), 22-27 January 2017, [34].

\(^{141}\) EU Statement at the African Judicial Dialogue, 6 November 2015, Arusha, Tanzania, 3.
6. Conclusion

In the debate about whether African states should retain membership of the ICC, considerations on the rights of victims of mass atrocities in Africa should be more considered. At a general level, this also corresponds to the importance of victim rights to protection, participation and reparations at the ICC and other international courts such as hybrid criminal tribunals and regional human rights courts. Moreover, the exercise of victim rights at international courts and international organizations realises and reflects the status of the individual as a subject of international law.

Notwithstanding the limitations and flaws of the ICC, this article concludes that the best course of action for African states is to retain membership of the ICC rather than exit it. The only effective withdrawal from the ICC-Statute (Burundi), (prospective) attempts of some African states to withdraw from the ICC-Statute, and/or encouragement or suggestions from the AU to proceed with a ‘collective’ withdrawal’ present problems in terms of victims’ interests and rights.

First, the permanence of African states in the ICC rather than their exit from the ICC seems to be currently the more legitimate option. Hostile and/or uncooperative actions towards the ICC, including withdrawals from the ICC-Statute, undertaken by African states and/or the AU, are inconsistent with normative legitimacy standards, particularly human rights. Additionally, under sociological legitimacy analyses, those actions arguably lack support among important sectors of African victims and societies and, indeed, several African leaders do not endorse them.

Second, despite its limitations, the ICC has overall become an important institution to realise certain victim rights. When states are unwilling/unable to provide justice, to deprive victims from the ICC is arguably inconsistent with international/African regional human rights law on victims which bind African states and/or in which African states have contributed. Under these standards, victims of mass atrocities are broadly speaking entitled to access to justice, participation in criminal proceedings, the truth, and reparations.

Third, the envisioned ICLS-ACJHPR as the African criminal justice alternative to the ICC is unfit in terms of victim rights. Unlike the ICC, the ACJHPR-Statute presents serious normative deficits, namely, absence of victim participation and lack of key provisions on reparation implementation/enforcement. Additionally, likely funding
challenges and the ongoing problems faced by the AU-backed EAC cast doubts on the chances of effective justice for victims at the prospective ICLS-ACJHPR.

Therefore, the best scenario for the sake of African victims of international crimes and effective realisation of their rights in (international) criminal proceedings is that African states (AU included) progressively replace antagonistic attitudes towards the ICC with increasingly cooperative approaches to the ICC. State interests and victim interests may differ and even collide. Whereas factors for the African withdrawals from the ICC-Statute include affirmation of state identities in post-decolonisation contexts, victim interests relate to the realisation of their rights. In case of conflict, interests of victims of mass atrocities should in principle be preferred over state interests. By definition, international crimes are perpetrated against individuals (victims) who need to access justice and receive redress for the harm inflicted. Victims are arguably the primary addressees of international criminal justice mechanisms. Unlike other international law areas exclusively or mainly focused on state interests, international criminal law primarily deals with individuals: offenders who commit atrocities against victims. International criminal justice initiatives/mechanisms should reflect this, which illustrates the humanization of international law. Importantly, international level mechanisms constitute the last resource for victims to realise their rights. The exercise of victim rights at international criminal justice mechanisms takes place only when the states failed to deliver justice for victims at the national level.

Under the principle of complementarity, the synergy of international, regional and national criminal justice mechanisms should aim to have the rights and interests of victims of international crimes as a main priority. In the end, all (international) criminal justice initiatives should enhance the situation of victims since these are the main or direct addressees of justice delivered or to be delivered by the ICC, AU, and African states.