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Guest Editor / Rédacteur invité

Ato Kwamena Onoma

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Contents/Sommaire

Africa Development, Volume XL, No. 2, 2015, pp. 1-5

(ISSN 0850-3907)

Editorial

International Criminal Justice, Peace and Reconciliation in Africa: The ICC and Beyond

Ato Kwamena Onoma*

The articles in this volume are revised versions of papers presented at a conference in July 2014 on the theme 'International Criminal Justice, Reconciliation and Peace in Africa: The ICC and Beyond' in Dakar, Senegal. The conference was organized by the Council for the Development of Social Science Research in Africa (CODESRIA),the Social Science Research Council's (SSRC), and African Peacebuilding Network (APN) with support from CDD-West Africa and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The conference was part of a broader programme that also eventually included smaller meetings in Kinshasa and Nairobi. It was instigated by the increasingly prominent role that the International Criminal Court (ICC) had come to occupy in discussions concerning politics and human rights at various levels of governance in Africa. While some have portrayed the court as the epitome of many of the things that are wrong with the international justice system others see it as a key instrument in the punishment and prevention of gross human rights violations in Africa and the insurance of justice for its victims.

The July 2014 conference was a hugely engaging affair, which was characterized by heated debate between about 100 scholars and practitioners gathered. These included representatives of some of the leading institutions working on the issue of international criminal justice. Present were a representative of the Office of the Prosecutor of the ICC, a judge representing the President of the African Court on Human and Peoples Rights, the Prosecutor of the International Criminal Tribunal for Rwanda, the President of the East African Court of Justice, the Deputy Prosecutor of the African Extraordinary Chambers for the trial of Hissène Habré and a representative of the special court trying alleged perpetrators of abuses in Cambodia. The conference was opened by the Senegalese Minister of

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Justice, who has sincebeen elected President of the Assembly of State Parties of the Rome Statute. Voices ranged from acerbic criticisms of the ICC and its robust defence to suggestions for an improved international criminal justice regime and calls for the exploration of non-retributive systems of transitional justice. The conference was followed by smaller meetings in Kinshasa and Nairobi as well as a mission to Addis Ababa to engage with leading officials at the African Union Commission on some of the key issues raised during these meetings.

The papers in this collection vigorously debate many of the key issues that featured in discussions at the July 2014 Dakar meeting and in broader conversations concerning gross human rights abuses, international criminal justice and peace and reconciliation in Africa. One of these concerns which comes out in the contributions of Mensa-Bonsu, Murithi and others centers on perceptions of the ICC in Africa. How is the ICC perceived by African states that are signatories to the Rome Statute as opposed to the African Union, which represents all states on the continent? What is the extent of the homogeneity or heterogeneity of such perceptions, and how can we explain such perceptions and their changing dynamics over time? How can the challenge of coherence between the ICC and African justice, human rights and reconciliation institutions be best addressed in the interest of the African people?

The relationship between justice, peace and reconciliation is also one that occupies various contributions to this volume including the pieces by Murithi and Odinkalu. Does the ICC's insistence on indicting leaders in conflict-affected or post-conflict African countries privilege justice and the subversion of impunity over the pursuit of peace or is it in fact integral to long-term peacebuilding? Are there ways of sequencing prosecutions and other peace-making efforts that ensure long-term peace and guarantee justice without encouraging abusive leaders to continue to hold on to power?

Grovogui, Fofe, Mangu, Okafor and Mensa-Bonsu all reflect on the much debated issue of the selectivity that is perceived to characterize the decisions of the Office of the Prosecutor in investigating and trying cases. Does the ICC's exclusive indictment of Africans and seemingly partisan indictments in situation countries demonstrate the Court's non-adherence to the basic principle of equality before the law in judicial processes and jeopardize long-term peacebuilding and reconciliation? Is the court's exclusive indictment of Africans another demonstration of the West's historical paternalism towards Africa that was once widely referred to as the 'White man's burden'?

This question of selectivity is linked to that of the perceived partisanship that characterizes patterns of indictment in the situations in which the Court

intervenes, and is addressed by Grovogui, Mangu and Fofe. Has the ICC become an instrument used by winners in conflict situations to impose versions of justice and peace that fit their interests and ideas? Will such use of the ICC still be consistent with a view of the Court as making valuable contributions towards ending impunity and bringing justice to victims of war crimes, crimes against humanity and genocide?

Related to the issues of selectivity and partisanship raised above, Grovogui and others broach the question of the extent to which the perceived problems of partisanship and selectivity of the ICC simply represent new incarnations of the pathology of global inequality. To what extent are the actions of the ICC in Africa the result of its manipulation by powerful countries, and a reflection of global inequalities, which have historically resulted in the instrumentalization of many other international institutions like the WTO, World Bank and IMF by powerful actors?

The significance of the politics and of history is invoked by Odinkalu who broaches the question of history and memory in questions of gross human rights abuses and how they are tackled. These questions are related to the extent to which international criminal justice systems, as incarnated in the form of the ICC, de-politicize and de-historicize the complex situations in which they intervene. Does the ICC in its approach to justice deliberately de-historicize and de-politicize conflicts and abuses in Africa and is this detrimental to the achievement of long-term peace and reconciliation in troubled countries in Africa? What is the ICC's perception of Africa? Can this be changed and under what conditions?

Given all of these concerns over the ICC, it is unsurprising that alternative conceptions of international criminal justice occupy some of the articles including those by Okafor, Jallow and Jalloh. What does a reflection on alternatives, including ad hoc tribunals tell us about the possibilities and pitfalls of the ICC? Has the focus on, and investment in, the ICC starved alternative justice institutions and paradigms of much needed support and attention? What other alternative justice mechanisms and political institutions exist? In what ways, and at what levels, can such institutions represent viable alternatives to the ICC as a modality for ending impunity and ensuring justice for victims of gross human rights violations?

Discussions about alternatives to the ICC at the 2014 conference came just a month after the African Union decided to give institutional form to its concerns over the conduct and form of the ICC by creating a criminal chamber in the African Court of Justice and Human Rights. The chamber is empowered to deal with the three crimes that currently pre-occupy the ICC – genocide, war crimes and crimes against humanity – as well as a

few others including trafficking in persons and money laundering. As Jalloh (2015) points out, innovations in the form of the types of crimes over which the African Court would be competent and its ability to try corporate entities have been overshadowed by concerns over what many see as an impunity provision (Jalloh 2015:5-6). The court is not allowed to try 'sitting AU heads of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials during their tenure of office'. Suggestions that leaders can always be tried once they leave office tend to overlook the potential for this possibility to dissuade leaders from leaving power at the end of their constitutional mandates. This is already a problem that is threatening the stability of countries including Burundi and the Democratic Republic of Congo.

One thing that is clear from these contributions, and that is evident from wider conversations about the ICC and international criminal justice, is that discussions about international criminal justice almost always end up becoming conversations about power and its deployment at international, regional, national and local levels. The idea of a court that will banish political and 'partisan' considerations from the act of holding those responsible for gross human rights abuses that was advocated by many a legal internationalist going back decades (Parker 1952:642; Pella 1950: 44-5) has not been realized and may well be unrealizable.

Maybe, this should lead us to go beyond decrying the 'politicized' nature of the ICC and international criminal justice to pose a more fundamental question that requires further work in this literature. What is the real nature of the difference that Mamdani (2013) and Mbeki and Mamdani (2014) try to identify when they distinguish between judicial schemes versus political processes for dealing with gross human rights abuses? We can point out that the dichotomy is false in that justice, regardless of its particular hue (retributive, reparative, redistributive), is inherently political in being part of the processes of sharing the burdens and benefits that human co-existence continually requires us to undertake. But this reaction, while being a good one may also be a lazy one. Work needs to go beyond this to investigate what seems to be a rather perceptive and useful but not clearly specified distinction between what these authors call retributive justice systems and 'political processes'.

In a sense the process of clarifying this difference between international criminal justice, and its current incarnation in the form of the ICC, and 'political processes' is part of the much needed task of properly locating international criminal justice and the ICC in a broader social scientific discourse that goes beyond the severely restricted legalistic garb in which they

are too often robed. Properly understood as an institution, interdisciplinary work aimed at inserting the study of the ICC into the very broad literature on institutions, including

its historical, sociological and rational choice variants (Thelen 1999), will be useful. In this respect scholars working on the political economy of Africa have a lot to offer. The continent is the site of various efforts at 'institutional reform' that have ranged from structural adjustment programmes and the construction of 'market-enhancing institutions' to democratization processes and security sector reforms. What lessons can we draw from these efforts at institution making and reform in an effort to make sense of what a permanent international criminal tribunal for trying perpetrators of gross abuses is, what it can be, what it can do and what we can reasonably expect from it.

Such an examination of the ICC, far from being a backward looking exercise in an age when some on the continent are already beginning to look beyond the Hague Court, is in fact a vital step towards the future and towards making sense of alternatives. We have to understand the ICC well enough to be able to fashion alternatives that help us overcome many of the problems for which it is usually critiqued. Without this there is a great chance that new institutions like the African Court may end up displaying the same problems that the ICC is accused of. In this stead I end this brief introduction with a question: to what extent does the African Court as conceived represent an alternative that can avoid many of the critiques posed against the ICC?

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The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview

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Abstract

The year 2013 marked the fiftieth anniversary of the Organisation of African Unity that was replaced with the African Union (AU). It coincided with a great deal of criticism against the International Criminal Court (ICC) by AU member states that were yet instrumental in its creation and referred most of its cases. Using a combined international law and a political science approach, this article aims to contribute to the debate that has been raging on the ICC since it indicted some African leaders. It holds that although much of the criticism is unfounded, the ICC should gain in terms of legitimacy by improving its operations as an impartial court not subjected to the superpowers within the UN Security Council. Instead of withdrawing from the Rome Statute, African States should also comply with their obligations and cooperate with the ICC from which the majority of their people still expect so much. Based on its human rights record, this article argues that the AU's attempt to bypass the ICC by establishing an international criminal law section mandated to deal with international crimes within the African Court on Human and Peoples' Rights is unlikely to end impunity and promote peace on the continent.

Résumé

L'année 2013 marquait le cinquantième anniversaire de l'Organisation de l'Unité Africaine qui fut remplacée par l'Union Africaine (UA). Cette année était aussi celle de nombreuses critiques contre la Cour pénale internationale (CPI) par les Etats-membres de l'UA qui avaient pourtant joué un important rôle dans sa création et lui avaient soumis la plupart des cas. Sur base d'une approche combinée de droit international et de sciences politiques, cet article se veut une contribution au débat qui fait rage sur la CPI depuis la mise en accusation de certains dirigeants africains. Il soutient que bien ces critiques soient généralement non-fondées, la CPI devrait gagner en légitimité en améliorant ses méthodes de travail pour devenir une juridiction impartiale qui ne soit pas

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soumise aux superpuissances qui siègent au sein du Conseil de Sécurité des Nations-Unies. Plutôt que de se retirer du Statut de Rome, les Etats africains devraient respecter leurs obligations et coopérer avec la CPI dont la majorité de leurs peuples attendent encore beaucoup. Partant de ses réalisations en matière des droits de l'Homme, cet article soutient que la tentative de l'UA de contourner la CPI en mettant en place une section de droit international pour juger les crimes internationaux au sein de la Cour Africaine des Droits de l'Homme et des Peuples ne peut pas contribuer à la fin de l'impunité ni promouvoir la paix sur le continent.

Introduction

The twentieth century was characterized by some of the most serious human rights violations. These human rights violations that qualified as international crimes were committed in the aftermath of two armed conflicts that threatened international peace and security as never before in human history.

The First World War (WWI) took place from 1914 to 1918 while the Second World War (WWII) was waged almost two decades later, between 1940 and 1945. Several million people were left dead or injured. However, individuals who were responsible for international crimes during WWII could no longer go unpunished, as did Guillaume II of Hohenzollern, the German Emperor responsible for the death of 22,000,000 civilians during WWI, and those responsible for the Turkish genocide of the Armenians in 1915 (Nyabirungu 2013: 8–13). The United Nations (UN) was established in 1945 to ensure that this never happens again to mankind, to reaffirm the faith of the world nations in human rights, and to promote peace and reconciliation. Accordingly, the Nuremberg and the Tokyo Tribunals were created.

War crimes, genocide and crimes against humanity, which usually come with armed conflicts, continued unabated in several parts of the world. As the twentieth century was drawing to an end, Yugoslavia collapsed and disintegrated due to ethnic conflicts which resulted into genocide. The international community reacted in almost the same way as it did after WWII when the Nuremberg and Tokyo Tribunals were established. In 1993, the UN Security Council (UNSC) adopted a resolution (Res) establishing the International Criminal Tribunal for former Yugoslavia (ICTY) (UNSC 1993:Res 827). A few years after Yugoslavia, genocide was also committed in Rwanda.

UNSC set up the International Criminal Tribunal for Rwanda (ICTR) (UNSC 1994: Res 955), which that was modelled on the ICTY and mandated to prosecute and judge the authors of genocide and other serious violations of international humanitarian law committed in Rwanda and neighbouring states between 1 January and 31 December 1994. Serious

violations of both international humanitarian law and Sierra Leonean law also required the Security Council to establish the Special Court for Sierra Leone (SCSL) to prosecute and judge the authors of these crimes (UNSC 2000: Res 1315; Tejan-Cole 2001:107–26). The ICTY and the ICTR were *ad hoc* international tribunals with limited temporal, material, personal and territorial jurisdiction. Even more limited was the jurisdiction of the SCSL, which is partly an international tribunal and partly a domestic one. A universal and permanent court was needed to deal with the most serious violations of international law occurring in the world and not just in some individual countries or under some particular circumstances.

On 17 July 1998, 120 UN member states' representatives met at the headquarters of the Food and Agriculture Organisation (FAO) in Rome and adopted the Statute establishing the International Criminal Court (ICC 2011), which came into force on 1 July 2002 after sixty signatory states had deposited their instruments of ratification with the UN Secretary General. African states were instrumental in bringing the Rome Statute into force as they constituted the majority of those that ratified it. After decades of impunity and massive human rights violations that followed independence, the Rome Statute was expected to usher into a new era of respect for human rights, peace, justice and reconciliation. It was amended in 2010 *inter alia* to deal with the crime of aggression which was not defined in the original document (ICC 2011).

The year 2013 marked the fiftieth anniversary of the Organisation of African Unity (OAU), which was replaced with the African Union (AU) whose Constitutive Act was adopted in Lomé, Togo, on 11 July 2000, and came into force on 26 May 2001. It also coincided with a great deal of criticism against the ICC especially among African leaders who enthusiastically welcomed its creation and referred to it the overwhelming majority of its cases.

A lot has already been written and said about the ICC, its achievements, its failures and its relationships with Africa. There is an ongoing debate between the pros and the cons, the advocates of the ICC and its opponents (Kimenyi 2014:35; Nouwen 2014:23; Hayner 2014:93; Kersten 2014:36; Petrasek 2014:39; Kambale 2014:22; Mue 2014:23).

This article intends to further contribute to the debate on the ICC. It adopts a legal approach when dealing with the mandate, the jurisdiction of the ICC, and States Parties' obligations. It then moves to a political science approach when reflecting on the relationship between the ICC and Africa and African perceptions of the ICC. There is no perfect human institution. The article concurs with the view that the ICC is to date the best instrument to prosecute and punish the most serious violations of international law, namely

war crimes, genocide and crimes against humanity, and to deliver justice and fight impunity at the international level. The ICC can also contribute to peace and reconciliation although the first mandate of a court, whether international or national, is to administer justice, prosecute and punish criminals. The article holds that much of the criticism levelled against the ICC by African leaders individually or collectively within the AU is unfounded from an international law perspective. On the other hand, even though Africa does not speak with one voice about the ICC, the majority of African people, their leaders, intellectuals and civil society organisations (CSOs) are still favourable to the ICC. Admittedly, the ICC should improve its workings as an independent judicial institution. However, any attempt to avoid or bypass the ICC by establishing an International Criminal Law Section within the African Court on Human and Peoples' Rights with competence to prosecute and judge the authors of the most serious violations of international law such as war crimes, genocide and crimes against humanity is unlikely to produce better results. A brief presentation of the ICC will serve as an entry point into this important debate and as background to this reflection on the ICC.

Mandate, Jurisdiction, Organisation and Functioning of the ICC

According to the Rome Statute (ICC 2011), the ICC has the 'power to exercise its jurisdiction over persons responsible for the most serious crimes of international concern'. This jurisdiction is 'complementary to national criminal jurisdictions' in the sense that a case would be admissible before the ICC only when a State Party to the Statute is not willing or able to independently and effectively prosecute and judge the authors of these crimes (Rome Statute: Article 1).

The jurisdiction of the ICC is material, personal and temporal. The material or *ratione materiae* jurisdiction of the ICC covers 'the most serious crimes of concern to the international community as a whole'. These crimes are the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Rome Statute: Articles 4–10). As far as its personal or *ratione personae* jurisdiction is concerned, the ICC is competent to prosecute and judge the suspected authors or co-authors of these crimes and their accomplices or those persons who individually encouraged or assisted them and contributed in one way or another to their commission.

The jurisdiction of the ICC is limited to natural law and excludes juristic or legal persons and minors or persons under eighteen years. Criminal responsibility is individual and not collective. The jurisdiction of the ICC is also limited *ratione temporis*. The Court has jurisdiction only with respect to crimes committed after the entry in force of the Statute (as of 1 July 2002)

or after a state has become a party to the Statute unless it made a declaration whereby it accepted the competence of the Court after the coming into force of its Statute (Rome Statute: Articles 11–12).

The exercise of the jurisdiction of the ICC is subject to some conditions. The state which refers a case to the ICC, the state in which an investigation has to be conducted by the ICC or the state of which a national is to be prosecuted and judged by the ICC should be a party to the Rome Statute or should have accepted the jurisdiction of the ICC with respect to the crimes referred to in Article 5 of the Statute (Rome Statute: Article 12).

The ICC only deals with the cases that have been referred before it by a State Party to the Rome Statute, by the UN Security Council acting under Chapter VII of the UN Charter, or by the Prosecutor acting *proprio motu* with the authorization of the Court or one of its pre-trial chambers or on the basis of information ('communications') received from individuals or organisations (Rome Statute: Articles 13–15).

The Security Council may also, by a resolution adopted under Chapter VII of the UN Charter, request a deferral of an investigation or a prosecution by the ICC for a period of twelve months. Such a request may be renewed (Rome Statute: Article 16). One of the problems with the Rome Statute is the authority granted to the UN Security Council to refer cases before the ICC or request a deferral of an investigation or an execution, while Permanent Members of the Security Council, notably the US, China and Russia, have so far declined to ratify the Statute.

The ICC first deals with the admissibility (Rome Statute: Articles 17, 18) of the cases before moving to the trial stage. The suspects or accused persons enjoy all the rights related to fair trial (Rome Statute: Articles 55, 67). The jurisdiction of the ICC may also be challenged by an accused or a State Party (Rome Statute: Article 19).

An important principle governing ICC's investigations and prosecutions is *ne bis in idem*. No one can be tried before the Court or any other court with respect to a conduct which formed the basis of crimes for which the person has already been convicted or acquitted by the ICC. A person who has been tried by another court may only be tried by the ICC if the proceedings were for the purpose of shielding that person from criminal responsibility for crimes within the jurisdiction of the ICC or if the proceedings were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring that person to justice (Rome Statute: Article 20). Other general principles of law that apply before the ICC are *nullum crimen sine lege* (Rome Statute: Article

22), *nulla poena sine lege* (Rome Statute: Article 23) and non-retroactivity *ratione personae* (Rome Statute: Article 24). *Nullum crimen sine lege* entails that no one can be held criminally responsible under the Statute unless their conduct constitutes a crime within the jurisdiction of the Court at the time it takes place. According to the *nulla poena sine lege* principle, the ICC cannot sentence anyone to a penalty which is not provided for by the Rome Statute.

The ICC has no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime. On the other hand, the Rome Statute does not apply retroactively.

An official capacity as Head of State or Government, a member of a government or parliament, an elected representative or a government official cannot exempt a person from criminal responsibility before the ICC. Nor does it constitute grounds for reduction of sentence. Immunities or special procedural rules which may be attached to the official capacity of a person, whether under national or international law, cannot bar the Court from exercising its jurisdiction over such a person (Rome Statute: Article 27). Furthermore, a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with its Statute (Rome Statute: Article 25.2).

Military or civilian commanders and other superiors are responsible for crimes committed by their subordinates as a result of their failure to exercise control properly over them or to take all necessary and reasonable measures when they either knew, or owing to the circumstances at the time, should have known that they were committing or about to commit such crimes (Rome Statute: Article 28).

The ICC consists of a Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, the Office of the Prosecutor, and the Registrar (Rome Statute: Article 34). No two judges may be nationals of the same state (Rome Statute: Article 36(7)). The judges and the prosecutor are nominated by the States Parties and elected for nine years by the Assembly of States Parties. The ICC consists of eighteen independent judges but their number may be increased by States Parties (Rome Statute: Article 36, 1 and 2). They are not eligible for re-election. The Deputy Prosecutors are elected in the same way from a list of candidates submitted by the Prosecutor. The President, the First and the Second Vice-Presidents and the Registrar are elected by an absolute majority of the judges. The Registrar and the Deputy Registrar are elected for five years (Rome Statute: Articles 35–43).

The ICC has an international staff of around 800 individuals appointed by the Prosecutor and the Registrar (Rome Statute: Article 44). They operate from the ICC headquarters in The Hague in the Netherlands, and from the

field offices that are currently established in Abidjan (Côte d'Ivoire), Bangui (CAR), Kampala (Uganda), Nairobi (Kenya), Kinshasa and Bunia (DRC).

The work of the ICC is divided into Appeals, Trial and Pre-Trial Divisions, which are each divided into Chambers. Five judges, including the President, constitute the Appeals Division or chamber. The pre-trial chambers deal with preliminary cases or investigations as well as the confirmation of the charges. They may authorize the Prosecutor to undertake an investigation and issue warrants of arrest. Once the suspect has been identified and the charges presented, the pre-trial chamber must confirm or infirm them totally or partially. If there is not enough evidence and the charges are not confirmed, the suspect may be released conditionally or not. Otherwise, the case is submitted to the trial chamber, which is composed of three judges. The accused may be released or convicted if there is not or if there is sufficient evidence of the commission of the crime. A convicted person may appeal against the sentence before the Appeals Division or chamber. If the Appeals Chamber finds in favour of the accused, the judgement is reviewed and the convicted person released. Otherwise, the first judgement is confirmed and the person maintained in prison. The sentence is to be served in a State Party to the ICC that gives its consent to receive the prisoner.

The Rome Statute provides for the Assembly of States Parties, which is the management oversight and legislative body of the ICC. It decides on the budget and the number of the judges. It elects the judges and prosecutors. It adopts the Statute and other regulations and rules of the Court and is also competent to amend them (Rome Statute: Articles 112–23).

The Rome Statute is a treaty under international law and therefore subject to the 1969 Vienna Convention on the Law of Treaties. As such, only states can become parties to the Statute by signing and ratifying it and by depositing their instruments of ratification with the UN Secretary General. The constitutions of many countries provide that a treaty that has been regularly signed and ratified prevails over any other law, except for the constitution. It is also directly enforceable in the domestic law of countries that adopted the monist system and were inspired by Roman-Dutch law. On the other hand, Anglophone countries or those that were inspired by Anglo-American law adopted a dualist system. In terms of the dualist theory, international law and domestic law are different laws. Accordingly, as a primary source of international law, a treaty that has been signed and ratified is not directly enforceable in domestic law. It needs to be incorporated into domestic law by an Act of Parliament. Even in this case, it has the same status as an ordinary piece of legislation.

States Parties' obligations are governed by the principle of *pacta sunt servanda*. Accordingly, States Parties should comply with the Rome Statute in good faith

(Rome Statute: Article 26). They should cooperate with the ICC and cannot invoke the provisions of their domestic law to defeat or not abide by the relevant provisions of the Statute (Rome Statute: Article 27).

Finally, States Parties may always withdraw from the Rome Statute by notification to the UN Secretary General. The withdrawal will be effective a year after notification and meantime, they will be bound to cooperate (Rome Statute: Article 127). The Rome Statute expands on international cooperation and judicial assistance in prosecuting international crimes, delivering justice and fighting impunity (Rome Statute: Articles 86–102).

The ICC and the Promotion of Justice, Peace and Reconciliation: The Fight Against Impunity in Africa

International law experts working on the ICC, ICTY, ICTR and even the SCSL have reflected on justice, peace and reconciliation (Cassese 2007–2008: 8; Fofe 2006a: 13–14; Gaparay 2001: 99–106; Mutabazi 2014: 152–9, 171–5, 183, 194–7; Nyabirungu 2013: 34). The key question has been what these notions mean, and whether they have been or could be achieved by a court like the ICC.

Relationship Among Justice, Peace and National Reconciliation

The work of international criminal tribunals focuses on justice 'in its legal sense'. Justice is equated with retribution that is the punishment of wrongdoers in direct proportion to the harm inflicted. However, justice should also be understood in its substantive sense to refer to reparation and restitution (Mutabazi 2014: 152).

Classical criminal law stresses prevention, deterrence, retribution, protection of the public interest, rehabilitation, and social reconstruction in a large sense (Gaparay 2001: 99–100). Traditional objectives of criminal prosecution include crime deterrence, fight against impunity, retribution and incapacitation (Mutabazi 2014: 159). Prosecuting international crimes can serve to deter the commission of future atrocities or as a means for their prevention (Wippman 1999–2000: 473–88; Mutabazi 2014: 161). Deterrence is also the main argument invoked for the establishment of *ad hoc* international tribunals and the ICC.

Retributive justice entails the proportional punishment of criminals according to the seriousness and gravity of their crimes. Justice entails that everyone receives what they deserve (Mutabazi 2014: 167). Criminal punishment must neutralize dangerous deviant individuals and also incapacitate them as a means of social protection by not only punishing the

wrongdoer but also removing or confining the offender. Punishment is one of the purposes of incapacitation.

A number of arguments have been advanced to justify the prosecution of those responsible for the most serious human rights violations. First, it is often argued that authors of these violations must be prosecuted in order to bring them to justice. There is clearly a delicate balance between seeking vengeance and desiring suitable punishment. However, some argue that punishment of some sort is a component of justice. Second, prosecutions are considered to be supporting the rule of law. This view asserts that failure to prosecute past human rights violations will not provide a firm basis for building the rule of law in future. The rule of law requires that all persons and institutions are equal before and under the law. No one is above the law. Therefore, when grave crimes are not prosecuted, the rule of law will be disregarded. Third, support for prosecutions is based on the need to protect society. As long as perpetrators remain at large, they continue to be a threat to the society in which they live. This argument may not be very strong if one considers that once the perpetrators of human rights are no longer in power, their capacity to perpetuate the violations with impunity is greatly curtailed. Fourth, the perpetrators of human rights abuses must be prosecuted to deter further abuses (Kindiki 2001: 71).

International courts were expected to bring about peace and security. According to the Rome Statute, 'grave crimes threaten the peace, security and well-being of the world' (Rome Statute: Preamble). Gaparay holds that 'the ultimate goal of justice should be building or rebuilding a peaceful society' (Gaparay 2001: 106). Peace and security are the opposites of war and hostilities. However, they mean more than the absence of war or armed conflicts and rather entail a state of harmony between people or groups within a society or between several groups which were previously in conflict. International criminal tribunals were expected to contribute to peace and security at the domestic level in the states where the most serious crimes of concern to the international community had been committed.

Even though 'reconciliation' does not feature among the objectives of the ICC, international criminal justice was expected to contribute to national reconciliation. Reconciliation relates to the process of re-establishing peaceful relationships between parties after they were disrupted by quarrels, misunderstanding, insults, injuries and other negative situations. The belief that international justice serves national reconciliation is replete in the constitutive documents of the *ad hoc* tribunals (Mutabazi 2014: 183).

Justice, peace and reconciliation are reconcilable. One strong view contends that there cannot be peace without justice and *vice versa*. The

attainment of justice or the acknowledgement of the truth helps the process of reconciliation (Gaparay 2001: 106). Put otherwise, justice, peace and national reconciliation are closely interrelated despite the tensions which exists among them. The question is, however, what should precede what. Criminal lawyers and advocates of international criminal justice argue that justice should come first. The authors of serious human rights violations should be prosecuted, judged and sentenced according to the harm they inflicted to the society. This would bring about peace and national reconciliation.

The opposite view is that peace and reconciliation should be preferred in countries that just emerged from wars or armed conflicts. Those who share this view argue that African societies in conflict need peace and national reconciliation first and not justice or revenge. According to this view, international justice may jeopardise peace and national reconciliation (Nyabirungu 2013: 34). However, whether international criminal tribunals are well-suited and can deliver in terms of justice, peace and reconciliation is a more complex question that has received different answers from both the proponents and the critics of international justice. The former are of the view that international criminal courts are the best way to administer justice in countries where the most serious crimes took place. Schabas (2002:101) and Mutabazi (2014:155) cite the case of the ICTY, which did not take sides between the Muslims, Croats and Serbs and was therefore impartial. However, the same cannot be said about the ICTR.

Mutabazi and Eltringham hold that the ICTR delivered a partial justice because it failed to investigate and prosecute the crimes committed by the Rwandan Patriotic Front (RPF) despite admission by the Rwandan government that their soldiers also committed serious human rights abuses in 1994 (Mutabazi 2014:155; Eltringham 2004:144).

Amnesty International also expressed concern that no crimes committed by the members of the RPF in 1994 had been adequately investigated and prosecuted and therefore demanded justice for all parties (Amnesty International 2007). Amnesty International observed that for any justice system to operate effectively, it has to be impartial, independent and investigate crimes promptly (Amnesty International 2007). Failure to do so made the ICTR ineffective in delivering justice (Mutabazi 2014:159). Zolo argues that 'international criminal justice has not yet proven to be capable of remedying widespread impunity, except to a minor degree and with normative ambiguities' (Zolo 2004:730). This is a more balanced view as compared to Mutabazi's assertion that *ad hoc* tribunals have been at odds with combatting impunity in their areas of jurisdiction. Territorially, materially, personally and temporarily, the tribunals have failed (Mutabazi

2014: 144, 166). According to Mutabazi, the design and practice of *ad hoc* tribunals are imperfectly suited to retributive ends (Mutabazi 2014: 169).

According to Haque, 'international criminal prosecution seems too selective to satisfy the demands of retributive justice. Too many wrongdoers go unpunished; too many victims are forgotten or simply ignored' (Haque 2005–2006: 275). The ICTY and the ICTR did not totally succeed in deterring criminals, fighting against impunity, delivering retributive justice and incapacitating the criminals. However, this does not imply that they were useless and did not contribute to the retribution or incapacitation of the criminals.

As far as the restoration and maintenance of peace and security is concerned, Fofe and Mutabazi argue that the ICTY and ICTR did not succeed in this regard (Fofe 2006a:13–14; Mutabazi 2014:171–5). What brought peace and security to former Yugoslavia and Rwanda and ended the genocide was less the actions of the ICTY and ICTR than the use of force in these countries.

The question whether international tribunals contribute to national reconciliation or whether the model of international tribunals is the best way to achieve peace and national reconciliation can be answered with respect to the context of each country. In any case, the primary objective of a court or a tribunal, whether domestic or international, is not and has never been to achieve national reconciliation, but justice or retribution. Mutabazi argues that this can only happen if the tribunal responds to challenges of impartiality and judicial consistency and when everyone finds their place in the tribunal's process (Mutabazi 2014:196). Unfortunately, this is not what he identified with the ICTY and ICTR.

Tribunals' officials and criminal law experts tend to argue, sometimes unconvincingly, that international justice contributes to national reconciliation. The prosecution's position is that targeting people to arrest and prosecute may contribute to national reconciliation. According to Kingsley, an ICTR official, 'the judgments of the ICTR have contributed to the individualization of guilt, a necessary element in reconciliation processes as opposed to collective guilt that blocks avenues for reconciling fractured societies' (Kingsley 2002). Yet, at an international symposium held in July 2009, Bernard Muna, a former Deputy Prosecutor at the ICTR, was actually doubtful about the ICTR achieving national reconciliation (Mutabazi 2014:196).

Reconciliation is not a function of a criminal tribunal, whether domestic or international. It is a political and not a judicial objective that therefore improperly befalls the criminal courts (Mutabazi 2014:194–7). As a transitional process that brings together former antagonists, it better fits with the work of truth-telling commissions. These commissions help people

share the blame of the past and offer them the opportunity to design the future together (Mutabazi 2014:196–7).

Justice, Peace and National Reconciliation and the Fight Against Impunity under the ICC: An Appraisal

The ICC has attracted a lot of criticism in relation to the justice, peace and national reconciliation that it was expected to achieve on the African continent. This criticism has mainly emanated from policy makers, heads of state and government, intellectuals and some elements of the civil society movement who have argued that like the ICTR and the SCSL, the ICC had failed to deliver on its mandate. In general, there is an acknowledgement of failure not only by African leaders, but also by some academics like Mwangi Kimenyi who consider the ICC a 'failed experiment' (Kimenyi 2014: 35).

With regard to the administration of justice and the fight against impunity in the DRC, which was the first world country involved with the ICC, Pascal Kambale argues that 'Periods of popular support for a more assertive ICC have been overtaken by the widespread view that the Court is either incapable or unwilling to respond adequately to the people's search for justice' (Kambale 2014: 23).

According to Kambale, the ICC's record in the DRC shows that justice has been denied to the people because of the ICC prosecutorial strategy targeting the 'small fish' and letting those most responsible for the worst international crimes off the hook in contradiction with the Rome Statute (Article 1) (Kambale 2014: 22). Germain Katanga, Matthieu Ngudjolo, Thomas Lubanga and Bosco Ntangana, who were indicted and arrested, were 'small fish' as compared to Congolese and Ugandan political and military leaders who supplied them with military support to commit crimes in the north-eastern DRC under Ugandan occupation.

The ICTR was also blamed for justice denial by prosecuting and sentencing Hutus and elements of the former Rwandan government only, whilst closing its eyes to genocide committed by some Tutsis and elements of the RPF (Haskell and Waldorf 2011: 78; Mutabazi 2014: 194–5). In this regard, the ICTY performed better than the ICTR and the ICC by prosecuting and sentencing the 'big fish', the former head of state and high ranking military officers who were involved in the commission of genocide, war crimes and crimes against humanity in former Yugoslavia.

Since justice in its substantive sense also refers to deterrence, the fight against impunity, reparation and restitution (Mutabazi 2014: 152, 159, 161, 167; Kindiki 2001: 71; Wippman 1999–2000: 473–88), the ICC may also

be said to have failed in providing reparations for the victims despite the fact that the Rome Statute (Article 79) established a 'Trust Fund' to this effect. The ICC has not ended impunity. The prosecution of some perpetrators of international crimes has not totally deterred further abuses. On the other hand, this prosecution has not contributed to peace and security that remain fragile with the continuation of armed conflicts. Nor has national reconciliation been achieved. Like the ICTR, the ICC cannot be blamed for that. It may contribute to peace and national reconciliation, but this is not the primary concern of the court, which is established to prosecute, punish and sentence those who are convicted of crimes. Its first mission is not to make peace or reconcile people.

However, the impact of the ICC cannot be denied. In the process of ratification of the Rome Statute and its domestication, many states have been required to rewrite their criminal laws to ensure clear definitions of international crimes and duties to prosecute those responsible and punish them with the appropriate sentences (Petrasek 2014: 39). The ICC has made an impact, even in non-States Parties.

For instance, Ramanathan has demonstrated the surprising impact of the Rome Statute in a country like India which has refused to join the ICC but where the Rome Statute has been useful in pushing for law reform to fight impunity for state complicity in violence (Ramanathan 2014: 24). During its first decade of existence, the ICC has conducted only twenty-one investigations and convicted one suspect, namely Thomas Lubanga. This is too few. Nevertheless, one should admit not forget that with an annual budget of around $US100,000,000 and 800 staff members, the ICC is unable to do what is expected of it. It cannot open investigations all over the world. Nor can it prosecute and judge all those responsible for the most serious international crimes around the world or in a single conflict situation. Expectations of the ICC seem to have been too high.

It would be wrong to conclude that there has been either a total failure or a total success of the ICC. According to Article 1 of the Rome Statute, the ICC complements national criminal jurisdictions of State Parties to the Rome Statute. Moreover, to hold that the ICC is unhelpful or irrelevant to Africa because it might be manipulated by the big powers to target Africa while closing its eyes to the most serious crimes of international concern committed in other parts of the world would be a political argument of little value. There is no reason why people should be more critical of the ICC than their domestic criminal courts that should be the main actors in combating crimes.

Relationship Between the ICC and Africa

According to Bakum, two realties gave impetus to Africa's strong support for the establishment of the ICC, namely the Rwandan genocide, which must not be repeated, and its authors who had to be prosecuted and judged on the one hand, and the need to prevent powerful countries from preying aggressively on the weaker ones on the other hand (Bakum 2014: 9). The 1994 genocide in Rwanda and recurrent armed conflicts that have the potential of resulting in genocide, war crimes and crimes against humanity are some of the factors that contributed to the establishment of the ICC. Africa therefore strongly supported the ICC.

Africa and the ICC

The contribution of African states to the ICC can be demonstrated by their participation in the conference during which the Rome Statute was adopted. On 1 May 2013, 122 states were parties to the Statute. Forty-three of them were African states.

More than a decade after the ICC was established, African states are still the ones that keep it working as almost all its investigations and prosecutions have been conducted on the continent. All the cases brought before the ICC and arrest warrants that have been issued have targeted Africans (Wanjiru Gichuki 2014: 108–14). All the persons in custody or at large have been Africans. All the suspects tried and sentenced as well as those who were summonsed and voluntarily appeared are African citizens. Four African states have referred cases before the ICC, namely the Central African Republic (CAR), Mali, Uganda and the DRC.

CAR referred the case of Jean-Pierre Bemba Gombo, a DRC Senator and a former Vice-President who was accused of crimes against humanity and war crimes committed by the troops he sent to CAR to support President Ange Patasse against the rebellion which was then led by François Bozize (*The Prosecutor v Jean-Pierre Bemba*). An arrest warrant was issued against Bemba who was arrested in Belgium and handed over to the ICC. On 20 November 2013, another warrant of arrest was issued against Jean-Pierre Bemba Gombo and his lawyers Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido for offences against the administration of justice (subornation of witnesses) allegedly committed in connection with *The Prosecutor v. Jean-Pierre Bemba Gombo*. Aimé Kilolo Musamba, Fidèle Babala Wandu, Jean-Jacques Mangenda Kabongo and Narcisse Arido were arrested and transferred to the ICC. They were released on bail in 2014 but Jean-Pierre Bemba remained in custody

for the main charges brought against him. The submission of evidence is now closed and the judgement was still pending at the time of writing.

On 16 January 2013, the Office of the Prosecutor opened an investigation into alleged crimes committed on Mali territory since January 2012. The situation in Mali was referred to the Court by the Mali government on 13 July 2012.

The Uganda government referred five top members of the Lord's Resistance Army (LRA), namely to the ICC, namely Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya for war crimes and crimes against humanity committed in northern Uganda (*The Prosecutor v. Joseph Kony et al.*). The proceedings against Raska Lukwiya were terminated following the confirmation of his death. The four remaining suspects are still at large.

The cases of Callixte Mbarushimana (released) (*The Prosecutor v. Callixte Mbarushimana*) and Silvestre Mudacumura (at large) (*The Prosecutor v. Silvestre Mudacumura*) also relate to the situation that the Ugandan government referred to the ICC.

The DRC referred Thomas Lubanga Dyilo (sentenced) (*The Prosecutor v. Thomas Lubanga Dylo*), Mathieu Ngudiolo Chui (released) (*The Prosecutor v. Mathieu Ngudiolo*), Germain Katanga (sentenced but appealed) (*The Prosecutor v. Germain Katanga*) and Bosco Ntaganda (on trial) (*The Prosecutor v. Bosco Ntangana*), accused of war crimes and crimes against humanity committed in northeastern DRC (Ituri).

The cases referred by the Prosecutor to the ICC also ensue from African countries, namely Kenya and Côte d'Ivoire. The Kenyan cases concerned Kenyan citizens suspected of having committed crimes against humanity during the 2007 general elections (*The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Hussein Ali; The Prosecutor v. William Samoei Ruto, Joshua Arap Sang and Henry Kosgey*). These cases were referred to the ICC by the Prosecutor who opened an investigation *proprio motu* with the authorization of Pre-Trial Chamber II on 11 March 2010. At the time of writing the trial was still on but no one had been arrested. In December 2014, ICC Prosecutor withdrew charges for crimes against humanity against President Uhuru Kenyatta.

Côte d'Ivoire was not at the time a State Party to the Rome Statute, but accepted the jurisdiction of the ICC on 18 April 2003. The presidency of Côte d'Ivoire reconfirmed the country's acceptance of this jurisdiction on 14 December 2010 and 3 May 2011 respectively. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute. On 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorization to open an investigation *proprio motu* into the situation in Côte d'Ivoire with respect to crimes within the jurisdiction of the Court, which had allegedly been

committed since 28 November 2010. On 22 February 2012, Pre-Trial Chamber III decided to expand its authorization for the investigation to include crimes allegedly committed between 19 September 2002 and 28 November 2010. Mr Laurent Gbagbo, former president of Côte d'Ivoire, was arrested for crimes against humanity and transferred to the ICC detention centre at The Hague where he has been under trial (*The Prosecutor v. Laurent Gbagbo*).

Other warrants of arrest were issued for the same charges against Simone Gbagbo, former First Lady of Côte d'Ivoire (*The Prosecutor v. Simone Gbagbo*), and against the former minister Charles Blé Goudé (*The Prosecutor v. Blé Goudé*). On 22 March 2014, Charles Blé Goudé was surrendered by the Ivorian authorities to the ICC. However, they refused to surrender Simone Gbagbo who is instead judged in the country and sentenced on 10 March 2015 to 20 years in jail for her role in the violence that followed the 2010 elections..

The two cases referred to the ICC by the Security Council also related to situations in two African countries, namely Sudan and Libya. The situation in Darfur (Sudan) concerned crimes against humanity (murder, extermination, rape, torture and forcible transfer), war crimes (intentionally directing attacks against the civilian population or individual civilians and pillages) and genocide allegedly committed in Darfur from August 2003 to March 2004 (*The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb); The Prosecutor v. Omar Hassan Ahmad Al Bashir; The Prosecutor v. Bashr Idriss Abu Garda)*. Bashr Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I on 18 May 2009 and is not in custody. The other suspects are at large. On 26 February 2011, the Security Council referred the situation in Libya. On 27 June 2011, Pre-Trial Chamber I issued warrants for arrest against three suspects for crimes against humanity (murders and persecution) committed by the Libyan security forces in Libya from 15 to 28 February 2011 (*The Prosecutor v. Muammar Mohammed Abu Minyar Gaddhafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*). The case against Muammar Gaddhafi was closed on 22 November 2011 following his death. The remaining two suspects are currently in custody in Libya where the government has so far refused to surrender them to the ICC, alleging that the Libyan judicial system had the ability to independently judge them, which the ICC has contested.

The ICC's record as summarized above has led to a great deal of criticism on the African continent. The enthusiasm that followed its establishment has been overtaken by pessimism and even indifference. However, as

Nyabirungu (2013: 34–6) rightly pointed out, Africa does not speak with one voice about the ICC. There is an 'institutional' voice and a 'popular' voice about the ICC and these voices are not unanimous.

AU, Individual African Leaders and the ICC

As stressed earlier, African states were instrumental in bringing the Rome Statute into force and warmly welcomed its creation. However, the love story between the ICC and Africa did not last for more than a decade. The recent declaration by President Robert Mugabe who was elected AU chair in January 2015 and called for non-cooperation or withdrawal of AU member states from the ICC is evidence that relations between the ICC and the AU remain strained, at least between the ICC and some African leaders who earlier supported it (Bakum 2014 : 9).

At a meeting held in July 2009, the AU endorsed a decision of its members which are States Parties to the Rome Statute to no longer cooperate with the ICC on the basis of Article 98 of the Statute. At the Review Conference of the ICC held in Kampala from 31 May to 11 June 2010, speaking in her capacity as the chair of the AU, the President of Malawi argued that the indictment of sitting heads of states and governments could jeopardise the relationship between the ICC and Africa (Van der Vywer 2011: 684).

The tension increased with the arrest and transfer of the former president of Côte d'Ivoire Laurent Gbagbo to the ICC detention centre at The Hague. The last straw was the indictment of Uhuru Kenyatta and William Ruto before their election as President and Deputy President of Kenya respectively. The ICC appeared to be manifestly against Africa and following the agenda of the big powers in the Security Council, despite some of them not being States Parties to the Rome Statute and Africa being continually denied any permanent membership of the Council.

President Kenyatta earlier confirmed that he would appear before the Court but worked hard to get his colleagues in the AU to request that the UN Security Council and the Prosecutor defer the case or withdraw the charges to preserve peace and national reconciliation in Kenya. The AU and some African leaders accused the ICC of being manipulated by the big powers and of being biased against Africa. The AU also requested its members implement a policy of non-compliance and non-cooperation with the ICC, and even withdrawal from the ICC (Bakum 2014: 9). President Omar al-Bashir, President Uhuru Kenyatta and Vice-President William Ruto were therefore able to travel safely to several other African countries that were States Parties to the Rome Statute without being arrested.

The Security Council and the ICC Prosecutor declined the request from the AU to delay investigations or withdraw the charges against President Bashir, President Kenyatta and Vice-President William Ruto. The AU request not to cooperate with the ICC and even withdraw from the Rome Statute was not followed unanimously by its member states. Uganda, Botswana, Malawi and South Africa announced that they would not comply with the AU request. Malawi was were even denied the hosting of an AU summit because Malawian President Joyce Banda had declared that her government would arrest President Omar al-Bashir if he ever travelled to Malawi to attend the summit.

In any case, the relationships between the ICC and individual African States Parties were not identical, as international justice and the fight against impunity were taking the backstage as compared to peace and national reconciliation. For instance, Uganda which referred some cases before the ICC later requested the Court to defer the prosecution in order to preserve peace and national reconciliation. For the same reason, the DRC government refused to cooperate in the case of General Bosco Ntangana who had been served an arrest warrant but had signed a deal with President Kabila. There was a double-standard as the same government that refused to arrest and surrender Bosco Ntangana but promoted him in the ranks as a general was quick to arrest and surrender its opponents like Thomas Lubanga, Mathieu Ngudiolo and Fidele Babala. The DRC also refused to arrest President Bashir during his visit and the Prosecutor travelled to the DRC to seek clarity for non-compliance with the Rome Statute. The government hid behind the Rome Statute and its other international obligations in order not to arrest President Bashir. The South African government did the same by refusing to arrest him during the AU summit held in Pretoria in June 2015. Mbata Mangu rightly complained about what he referred to as a case of 'backpedalling on human rights and the rule of law in post-Mandela South Africa' (Mbata Mangu 2015: 179-200).

Arguably, the accusation by the AU and some African leaders that the ICC was biased against Africa and Africans was not totally wrong considering the fact that the work of the ICC had focused on Africa and Africans. This was also corroborated by the fact that African situations were the only ones selected and referred to the ICC, the Security Council and the Prosecutor while the same situations occurred in other parts of the world. It is also true that the ICC has a complementary jurisdiction and most cases before it were referred by African governments because of their own unwillingness or inability to prosecute and judge the perpetrators of the crimes under the ICC's jurisdiction.

However, the AU decision or call requesting its member states to stop their cooperation with the ICC and even withdraw from the Rome Statute

is not founded in international law and cannot therefore be upheld. First, although the withdrawal from a treaty is permitted, only states are parties to the Rome Statute, not international organisations like the AU, and no single African state had requested the authorization of the AU before signing, ratifying or aceding to the Rome Statute. Second, in terms of the *pacta sunt servanda* principle, States Parties are bound to cooperate with the ICC, and the AU as a responsible organization cannot incite its member states to violate their obligations under the Rome Statute. This explains why some African leaders did not follow the AU and are unlikely to follow the recent request by AU Chair President Robert Mugabe. Even President Kenyatta, whom the AU wanted to protect, accepted to travel to The Hague and voluntarily appeared before the ICC in 2014. On the other hand, no AU member state has withdrawn from the Rome Statute.

African Citizens, CSOs and the ICC

African citizens and Civil Society Organisations (CSOs) entertain their own relationships with the ICC. African CSOs put considerable pressure on their governments that signed and ratified the Rome Statute. Many African citizens and CSOs do not support their governments in their refusal to cooperate with the ICC and withdraw from the Rome Statute. Some even paid for it. In Kenya, for instance, Mue reveals that during the two years that followed the election of President Kenyatta and Vice-President Ruto, 'their supporters attacked CSOs that supported the ICC process, nick-naming them "the evil society" and depicting them as agents of foreign powers'. The ruling coalition vowed to push through legislation to curtail their activities by limiting the amount of funding that they are allowed to receive from foreign donors (Mue 2014: 33).

However, despite the continuing support for the ICC, there is definitely some disenchantment as compared with earlier enthusiasm. CSOs complain about a tardy and less effective ICC. The first ICC judgement in the *Thomas Lubanga Dyilo case* was handed down in 2012, almost a decade after the Rome Statute came into force. To date, the ICC has delivered two sentences only. If the ICC was to deliver one judgement per decade or every five years, it would take up to fifty years to judge ten suspects. On the other hand, African citizens and CSOs complain about a court which focuses on 'the small fish' and lets the big ones off the hook.

The victims are also critical of a court that cannot provide fair compensation or reparation for the damages suffered. Moreover, African citizens and CSOs complain about the 'victors' justice' rendered by the ICC since African governments have only cooperated with the ICC in cases involving their opponents.

International and human rights law experts have also criticized the ICC but their criticism has generally been constructive and aimed at improving its work. During a recent debate on the ICC, Sarah Nouewen argued that it has made little impact on the politics of impunity (Nouwen 2014: 23). Examining the ICC's record in the DRC, Pascal Kambale spoke about justice that would have been denied (Kambale 2014: 22). Mwangi Kimenyi has wondered whether the ICC in Africa was not 'a failed experiment' (Kimenyi 2014: 35). But no single scholar or commentator has suggested that the ICC is irrelevant and should be disbanded. According to Petrasek, 'if this Court fails, there will not be another (at least not for a very long time). If one believes in international criminal justice, surely the task must be – through patient effort – to make this Court succeed' (Petrasek 2014: 39). In the case of Kenya, Mue even argued that 'The ICC mustn't give up in Kenya'. The victims should not be allowed to feel lost and forgotten (Mue 2014: 23). The ICC must ensure that despite the challenges, the Kenyan cases are pursued to their logical and lawful conclusion (Mue 2014: 23). Many human rights and humanitarian law scholars or experts may therefore be critical about the ICC, its functioning and its *modus operandi,* but they still support it and their criticism aims at improving its record.

Assessing the AU's Response to the ICC and the African Court of Human and Peoples' Rights as an Alternative

While criticizing the ICC and accusing it of bias and political manipulation by the big powers, African leaders have also been criticized for favouring the impunity of some of their colleagues despite their condemnation and rejection of impunity in the AU Constitutive Act (Article 4 (0)).

To counter this criticism, African Heads of State and Government within the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights in Sharm El-Sheikh, Egypt on 1 July 2008. This Protocol has as yet not come into operation, but this did not prevent African leaders from going ahead in adopting the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights during their summit held in Malabo, Equatorial Guinea, on 27 June 2014. This Protocol added international criminal justice to the competence of the Court (Article 3). The Statute of the African Court of Justice and Human and Peoples' Rights, which is annexed to the Protocol, establishes an International Criminal Law Section among the Sections of the Court (Article 9). This Section deals with international crimes (Article 14). The Protocol and its Annex have not come into operation.

Nevertheless, the International Criminal Law Section, as the AU alternative to the ICC, poses several problems and cannot constitute a better instrument to prosecute and judge the authors of the most serious international crimes. First, the African Court cannot receive cases from African individuals or African NGOs against a State Party that has not made a declaration recognizing the competence of the Court to directly receive such cases. This is almost the same as under the Rome Statute which does not grant individuals and NGOs *locus standi* before the ICC. However, they can approach the ICC through the office of the Prosecutor. Second, unlike the Rome Statute that does not consider immunities, the Statute provides that the African Court will not receive any charge against any serving AU Head of State and Government or anybody acting or entitled to act in such capacity or any other senior state officials during their tenure of office (Article 22). This gives some credence to the argument that AU leaders want to protect themselves. Moreover, the fact that the draft Protocols and Statutes of the African Court have taken so long to be signed and will take even longer to get the required fifteen ratifications to come into operation signals that African leaders are not serious about fighting impunity and international crimes.

With the AU acting as a 'Club of Heads of State and Government' supporting one another, as in the case of President Bashir of Sudan, or President Kenyatta of Kenya, it is doubtful that even if the Protocol could come into operation, the African Court of Justice and Human and Peoples' Rights would be independent enough to prosecute and judge any African Head of State and Government accused of genocide, war crimes and crimes against humanity.

Conclusion

The ICC was established to prosecute and judge all those responsible for genocide, war crimes, crimes against humanity and crimes of aggression after the Rome Statute came into operation. In addition to rendering justice and fighting impunity, the ICC was expected to contribute to peace and national reconciliation.

The ICC has been in existence for more than a decade. Unfortunately, the ICC has not achieved its objectives or delivered on its mandate. International crimes and impunity continue unabated in several parts of the world. On the other hand, the ICC has concentrated its work on Africa and Africans, as if international crimes were not committed elsewhere. Hence a great deal of the criticism levelled against it.

Some African leaders have labelled the ICC a neocolonial tool in the hands of the big powers, manipulated and biased against Africa and its

people. Following the indictments of Presidents Bashir and Kenyatta, the AU requested its member States Parties to the Rome Statute to no longer cooperate with the ICC and even withdraw from the Rome Statute. However, Africa has never spoken with one voice about the ICC. While some leaders criticized the work of the ICC, others went on to support it by changing their domestic legislation to comply with the Rome Statute.

As any human institution, the ICC cannot be immune from criticism. Therefore, it would be wrong to deny some politicization or manipulation of the ICC through the UN Security Council and the Prosecutor. The UN Security Council, which has no single permanent member from Africa, has so far referred only African situations to the ICC despite the commission of war crimes, genocide and crimes against humanity outside the continent. The Prosecutor has also done the same. This has given the impression that the ICC was established to prosecute and judge Africans only. As Bakum stressed, to remain a credible institution of international justice in the eyes of Africans, the ICC should be reformed (Bakum 2014: 9). The UN Security Council and the Prosecutor should change their ways of dealing with Africa under the Rome Statute. The ICC should also strive to administer speedy justice and provide adequate reparations for the victims of crimes while punishing the authors or givers of orders, and not just the subordinates.

However, the AU's call to its member states to no longer cooperate with the ICC and withdrawal from the Rome Statute is unfounded from an international law and even from a moral perspective. According to Nyabirungu, the ICC has contributed to promoting peace, security, good governance and human rights (Nyabirungu 2013: 36). Many leaders also felt the need to change their governance by fear of prosecution before the ICC where immunities are irrelevant. On the other hand, the politicization or manipulation of the judicial system by those in power is not specific to the international system. It also takes place at the domestic level. Most cases before the ICC were referred by African governments.

African states that freely became parties to the Rome Statute should comply with their obligations under this treaty and fully cooperate with the ICC. On the other hand, instead of complaining about the ICC when African Heads of State and Government are investigated, indicted or issued warrants of arrest to appear before the ICC, African leaders should understand that the jurisdiction of the ICC is complementary to national jurisdictions. They therefore need to put their own houses in order and strengthen their judicial systems to avoid the intervention of the ICC (Bakum 2014: 9). They would then not need to refer cases to the ICC or later blame the Court for their inability or unwillingness to independently

and effectively judge the persons responsible for the crimes punished under the Rome Statute. The best way to avoid the ICC is to embark on the promotion of constitutionalism, the rule of law, democracy and human rights that will create an environment which leaves little room for genocide, war crimes and crimes against humanity.

At the domestic and regional levels, efforts should be undertaken and sustained to establish judicial systems that are genuinely independent and can effectively combat impunity and international crimes while contributing to promoting peace and national reconciliation.

An International Criminal Justice Section of the African Court of Justice and Human and Peoples' Rights is also a good development in fighting impunity in Africa. However, the fact that two Protocols on the African Court have already taken so long to get the fifteen ratifications required to come into operation, and because the Court would not receive charges against persons covered by immunities and against states which did not make the declaration required to receive direct complaints from individuals and CSOs, demonstrates that the AU and African leaders are still to take the fight against impunity and international crimes seriously.

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The ICC, International Criminal Justice and International Politics

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Abstract

The International Criminal Court (ICC) came into being as a result of a desire by the international community to establish a permanent body to deliver criminal justice instead of the formula of ad hoc tribunals that had become the norm. The coming into force of the Rome Statute in 2002 was greeted with euphoria as it signified to many that a new era had dawned when the international community would, with one voice, say no to impunity and create a deterrent effect to crimes of genocide, crimes against humanity, war crimes and crimes of aggression. The slowness with which the court has moved in concluding cases, as well as its perceived lack of even-handedness in selecting what cases to pursue, have resulted in widespread disappointment and disaffection, even to the extent of generating hostility in some of its former supporters. Has the ICC indeed failed to live up to expectations, or were those of its proponents unrealistic, and the criticism of its detractors unfair? Are the ICC's weaknesses a function of its very nature or externally-imposed by the machinations of international politics? Is there a need for the world in general, and Africans in particular, to look beyond the ICC for protection from their own people, and for ending impunity in a decisive manner? In short, does it have a future, and how shall it remain relevant in the future? This article is a think piece on the ICC, its failings, perceived or real, and its prospects for achieving what it was originally conceived to be and to become in the world of international criminal justice.

Résumé

Le Tribunal Pénal International (TPI) est né comme résultat d'un désir de la communauté internationale à mettre en place un organe permanent pour administre la justice pénale à la place des tribunaux ad-hoc qui étaient devenus la norme. L'entrée en vigueur du Statut de Rome en 2002 fut saluée avec euphorie, puisqu'elle signifiait pour beaucoup la naissance d'une nouvelle

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ère dans laquelle la communauté internationale, à l'unisson, dirait non à l'impunité et créerait un effet dissuasif sur les crimes de génocide, les crimes contre l'humanité, les crimes de guerre et les crimes d'agression. La lenteur avec laquelle la Cour a évolué à rendre des décisions sur des dossiers, ainsi que son manque perçu d'équité à choisir quel dossier poursuivre, ont résulté en une large déception et désaffection, au point même de générer de l'hostilité chez certains de ses anciens partisans. Le TPI a-t-il effectivement échoué à être à la hauteur des attentes, ou furent ces adeptes irréalistes et les critiques de ces détracteurs injustes ? Les faiblesses du TPI sont-elles fonctions de sa nature intrinsèque ou extérieurement imposées par les machinations de la politique internationale ? Y-a-t-il besoin pour le monde en général, et les africains en particulier, de chercher au-delà du TPI pour la protection de leurs propres populations et pour mettre fin à l'impunité de manière décisive ? En résumé, le tribunal a-t-il un avenir et de quelle manière restera-t-il pertinent dans le futur? Cet article est un document de réflexion sur le TPI, ses échecs, perçus ou réels, et ses perspectives pour réaliser ce pourquoi il a été initialement conçu pour être et devenir dans le monde de la justice pénale internationale.

Introduction

The International Criminal Court (ICC) which came into being as a result of a desire by the international community to establish a permanent body rather than the ad hoc tribunals that had become the norm since the Nuremburg and Tokyo tribunals launched the world on the path of international criminal justice. The coming into force of the Rome Statute in 2002 signified to many an end to impunity and the advent of a culture of accountability because, it was believed, the ICC was going to create a deterrent effect on crimes of genocide, crimes against humanity, war crimes and crimes of aggression. The euphoria that greeted the establishment of the International Criminal Court (ICC) has been dampened somewhat by experience of its first twelve years, into measured optimism regarding its impact on international criminal justice.[1]

The slowness with which the court has moved in concluding cases has diminished its 'bogeyman effect', for it was only on the tenth anniversary of its existence that the ICC passed its first judgement,[2] and its second, two years later.[3] With a track record of two convictions in twelve years and a lack of cooperation on the part of states to arrest and surrender indictees, the ICC appears to be a giant with clay feet. As if it did not have enough on its plate, it has borne criticism for its apparent lack of even-handedness in its operations. Critics maintain that its focus seems to be restricted to Africa, and this has created a feeling among many Africans and African leaders that it has deliberately targeted African leaders, considering the fact that it appears not to show as much interest in abuses going on elsewhere, as in Africa.

Clearly, for all of the reasons mentioned above as well as others discussed below, the need to end impunity by developing mechanisms of accountability at the international level has not been fulfilled by establishing the ICC. Many Africans still appear to live lives that are 'nasty, brutish and short' at the hands of their governments, and increasingly at the hands of non-state actors when the state's inability to protect its citizens leaves them at their mercy. Buffeted in its operations by international politics, are the ICC's weaknesses a function of its very nature or externally-imposed? Does it have a future? Is there a need for Africans to look beyond the ICC for protection from their own people, and for ending impunity in a decisive manner?

This article is a think piece on the problem of protecting Africans and the processes or institutions that would best serve the purpose beyond the ICC. The article is in four parts. Part I sets the background of the court and the current issues its operations. Part II discusses the impact of international politics on its operations. Part III discusses its future in view of its current problems. Part IV is the conclusion.

A Brief on International Criminal Justice

The commission of egregious human rights abuses during WWI on account of strategies adopted by the German Kaiser in an attempt to secure victory over the Allied Powers, as well as during the 1915 Turkish campaigns against the Armenians, exposed a need for action to be taken against war crimes, and led to proposals for the establishment of international criminal processes.[4] Subsequently, the Leipzig War Crimes Trials (1921) set the precedent for trying war criminals. However, it was the Nuremberg (1945-46) and Tokyo (1946-48)[5] trials that laid the foundation for contemporary international criminal justice. The Nuremberg tribunals were established to prosecute individuals responsible for war crimes during World War II. Twenty-four high ranking Nazi officials were put before the tribunal, charged with crimes ranging from warmongering, through war crimes to other crimes against humanity.

The principles enunciated at Nuremburg, now commonly called 'Nuremburg Principles', have become a beacon in international criminal justice. The Nuremburg Principles established that there could be criminal responsibility under international law for the commission of listed crimes even if the domestic law of a particular state does not impose such liability. Further, that there could be personal responsibility even if the person acted in an official capacity, as president or head of state, or acted under orders of a government or political authority, especially if the circumstances made it possible for a moral choice to be made. The Nuremburg Principles listed what crimes were punishable under international law and affirmed the right

of anyone accused of those crimes to a fair trial.[6] Ultimately, the Principles established that intrusion of international law into the domestic legal terrain, i.e. the subordination of national sovereignty to higher principles of ensuring sustainable peace and respect for human rights in every corner of the globe, was a necessary evil if humankind was to 'be saved from the scourge of war'.

These Nuremburg Principles, have set the world on a trajectory which, beginning with the establishment of first the ad hoc tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY),7 culminated in the establishment of a permanent criminal court as the means by which international criminal justice as a vehicle for promoting political accountability on the international plane, was institutionalized.

This permanent court, at its setting, appeared to address the negative perceptions under which ad hoc special tribunals laboured, such as issues of 'victor's justice' and targeted retribution by political opponents, thereby appearing to detract from the essence and quality of justice that they dispensed. For the 'accountability lobby' not only was there a sense of personal victory as the values they had championed for a long time came to fruition, but also a sense of achievement that the processes preceding the establishment of the court was a manifestation of world-wide consensus that impunity had had its day, and that an era of accountability, when the powerful was no longer going to repress and abuse the weak without consequences, had begun.

The hopes and aspirations that fuelled the sense of achievement have long since evaporated, and a decade and a half later, the court is struggling to fend off strident and somewhat justifiable criticism from its detractors, whilst needing to demonstrate its continued relevance to observers, and is even struggling to retain the support of its once fondest supporters. What then is the ICC and why does it seem to have played into the hands of its sworn enemies and disappointed its friends in such a big way?

The ICC

The ICC is 'the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community'.[8] The need for such a court was evident when it had become clear that to enforce universal human rights standards and demand accountability from those who breached same, setting up judicial bodies that operated under a perception of victor's justice, with all the attendant animosity that this projected, was to do a disservice to humanity. Again, it had become clear that in instances when egregious offences had been committed by a state, or public officials of high standing, its national courts were unwilling or unable to act to punish such perpetrators.

Thus, when the International Law Commission (ILC) was constituted under the auspices of the United Nations (UN) to prepare a Draft Code of Crimes Against the Peace and Security of Mankind as well as the draft Statute for an international criminal court, the global community's enthusiasm to establish an international court to try genocide, crimes against humanity, and war crimes had been fully expressed.[9] The eventual adoption of the Rome Statute made the ICC the first tribunal to be established under an international treaty with equal participation of all states, and to operate as a separate and independent entity within the international system.[10] All of the special tribunals, howsoever called, created between 1993 and 2005, have helped to contribute to the jurisprudence of international criminal justice.[11]

Jurisdiction

The jurisdiction of the ICC is activated in three broad contexts. First, *ratione materiae* (crimes that can be tried by the court): the main crimes that can be tried by the Court as stated in Article 5 of the Rome Statute of the ICC, i.e. the crime of genocide, crimes against humanity, war crimes, the crime of aggression and latterly rape as an instrument of war. Second *ratione personae* (persons who can be tried by the court): i.e. persons over eighteen years of age at the time of commission of the crime; and third *ratione temporis* (the 'timeframe' within which the crime was committed).

The ICC does not have universal jurisdiction,[12] though it has been set up with the capacity to exercise jurisdiction over international crimes.[13] Article 12 (1) provides that, 'A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5'.

Since no state can be forced to subscribe to a treaty, this provision puts the court under a number of serious limitations: first, not every state is subject to its jurisdiction. By implication then, any state that is not a signatory to, or has not ratified the Rome Statute is at liberty to commit international crimes within its territory without fear of prosecution. Second, it thus limits the jurisdiction of the ICC to the territory within which the crime occurred and the nationality of the perpetrator. The citizen or leader of any state that is not a signatory to, or has not ratified, the Rome Statute is at liberty to commit international crimes within its territory without fear of prosecution in that court. Thus the US, which is not a member of ICC, cannot be bound by the jurisdiction of the court. Consequently its citizens cannot be subject to the exercise of that court's jurisdiction. A number of persons have announced their intention to get the ICC to investigate and try George W. Bush, the former President of United States, for war crimes, but these efforts have

achieved no traction. Again, although states are expected to honour their treaty obligations, they may fail to do so without any consequences, although the Security Council, of which the US is a leading member, has called on all states to co-operate with the ICC. A case in point is that of Sudan and its President Omar al-Bashir: in spite of the fact that Sudan is a signatory, Omar al-Bashir, who has been indicted under the processes of the court, continues to enjoy the protection of the Sudanese government, and has failed to report to the ICC despite the two warrants issued against him. This appearance of helplessness has not been helped by the fact that the US, the most powerful country on earth, has stayed out of the ambit of the court's jurisdiction. Thus, although the Security Council has urged member states to cooperate with the court, the fact that the US, a leading permanent member of that body, has not signed up to it is a fact whose significance has not been lost on detractors of the court. 'If it is such a good idea', they contend, '...why has the United States refused to subscribe to it?' Thus, the very nature of its instruments of birth have created difficulties that will continue to dog its steps. These instances illustrate the difficulties of a court that depends upon the cooperation of States Parties in order to be effective, for without the active cooperation of the States Parties, the ICC has little but its moral authority to compel submission to its jurisdiction.

The ICC and International Politics

The very mode and nature of the court makes it a political animal that can never escape its genetic make-up. The range of its jurisdiction as well as its subject matter puts it squarely in the arena of international politics, so how can it escape such external factors? At the same time, it has to limit the effect of such factors if it is to remain credible. Indeed the determination of who can be tried by the court, as well as for what crimes, is a political question and can only be determined by the influence of international politics.

The Court has, so far, concluded the trial of two persons and has a number of others yet to be brought to trial. Its facilities have been put to use by some of the earlier ad hoc tribunals and these trials have erroneously been attributed to the ICC. Indeed many people who accuse the ICC of anti-African bias often cite the case of Charles Taylor, the former president of Liberia, as one of the instances. Yet Charles Taylor was tried by the Special Court of Sierra Leone, which borrowed the ICC's facilities so as to prevent destabilization of the sub-region by the trial of a former president of a neighbouring country. The supposed failings of the ICC have their roots as much in the structures that gave birth to it as in the functioning of the international system. These external factors, such as issues of sovereignty, the politics of funding, etc.

have played a devastating role in holding the ICC hostage and diminishing its stature in the eyes of the uninitiated. These are by no means the only culprits, however. For there are internal factors pertaining to its operations, such as perceptions of selective justice and the overtly political grandstanding of some of its lead officials, which have done the image of the institution no good. These factors, discussed *seriatim* below would explain why, deservedly or undeservedly, the court has courted such opprobrium even in the bosom of its erstwhile supporters and friends.

Sovereignty

The impact of 'sovereignty' on the proper functioning of the ICC cannot be overlooked or glossed over. Viewed by a school of thought as the enemy of international law, 'sovereignty' constitutes an integral part of the ICC's founding treaty, and cannot be wished away. First, the fact that the ICC is made up of State Parties means that respect for sovereignty is the very basis of its existence; second, its principle of complementarity is a recognition of the state's dominion when it comes to asserting and exercising criminal jurisdiction; and third, in terms of how it may acquire jurisdiction depends on the willingness of State Parties to refer cases to it, and assist it in gathering evidence. Therefore, its inability to proceed without doing obeisance to 'sovereignty' makes the Court hostage to its demands, and is responsible for some of its difficulties. It is conceded that the whole idea of the ICC runs somewhat contrary to Westphalian norm as it presents itself as a 'superior'. But the establishment of special international tribunals in earlier times was no less of an intrusion by the international community, yet no harm was done to the stature of 'sovereignty' as recognized under international law. The real problem, then, is not how much its existence undermines notions of sovereignty, but how much its operations may be shaped by it, i.e. how it determines whether international criminal justice can operate in a particular territory or not. The states are free to subscribe or not to membership with consequences exemplified by the failure of the United States, Russia and China to accept the jurisdiction of the ICC, at no cost to them. Indeed, as P5s (permanent members) of the Security Council, they have engaged in referrals to a Court to which they do not subscribe, and yet do not feel it a moral incongruity to do so.[14]

Politics of Funding

'He who pays the piper calls the tune' is an aphorism whose truth is demonstrated on a daily basis in the arena of international criminal justice. Criminal Justice is expensive to run, and international criminal justice even

more so. Therefore those who provide the funding shape the operations of the ICC, as its funding situation determines what, and how much, it can do. It is acknowledged that setting up a permanent court was to avoid the perception that rich countries would fund the court to deal with persons they desired to punish. Yet the reality of a permanent court that is no longer the product of a decision by a rich country to fund a court to deal with those it considers responsible for a particular crisis has not undermined this perception to any degree. Again, the fact that the ICC lacks the capacity to exercise jurisdiction over all crimes within its remit committed within the territory of all of its member states, with the exception of what the international community is willing to fund, cannot be denied. Coupled with the fact that its staff capacity is small, and it does not have its own police force or correctional facilities, the ICC has, of necessity, to rely on States' Parties to arrest and surrender suspects, thus hobbling its effectiveness in the exercise of its mandate. Worse, since most governments would be averse to surrendering their own public officials, or persons aligned with the government, or who remain powerful in the state,[15] the creation of a perception of lopsided justice has been inevitable.

The range of persons liable to be tried by the ICC excepts no one but minors. This means that neither social stature nor political standing in a particular country is material in determining jurisdiction. All persons over eighteen years old in a particular territory, however powerful – and this could range from heads of states, presidents and prime ministers through to powerful warlords – are triable by the ICC, as the Kenyan case exemplifies. This can create tremendous difficulties when it involves a sitting head of state or other powerful individual. What calculation is more likely to invite international politics than efforts to hold accountable the most important individual in a particular state?

Again, the (accused) national's state must be willing to accept the ICC's jurisdiction even in a situation where the person's crimes were committed after the Statute came into force on 1 July 2002, but before that person's state joined the ICC; that state, though only subject to the court's jurisdiction in respect of prospective crimes, may agree to the court exercising jurisdiction with retrospective effect.[16] This is in fact a situation calculated to draw the court into politics of attrition in a particular state, or of victors' justice, and consequently mire it in international politics. Here is the reason why: it is unlikely that a government would hand over one of its own members, and cooperate with the ICC to see the trial through. It stands to reason that it would be only those who had fallen out of favour with their governments who would be given up in this manner – thereby becoming an instrument of the powerful for settling scores with political opponents and other enemies.

Further, the categories of who can make a referral to the court puts its operations squarely in the lap of international politics – particularly as regards Security Council referrals (with support from the P5) and through the exercise of *proprio motu* powers of the Prosecution. Clearly who gets referred by the Security Council would be subject to the political power play that the Council is often embroiled in, ensuring that only the 'friendless' would end up being referred to the ICC for action. In a similar manner, a decision by the court itself to initiate prosecution is bound to be influenced by states who are powerful enough, particularly through funding arrangements, to influence the decision.

Another reason why the Court's own nature makes it both a creature and victim of international politics is to be found in the operation of the principle of complementarity[17] which holds that the ICC's duty is to complement national courts in prosecuting international crimes. Therefore it is only when national institutions are unwilling or unable to properly investigate and prosecute crimes of the nature set down in Article 5 that the ICC can intervene as a last resort. This certainly, makes the Court an arena for international power play, for the issue of when this determination or inability gets assessed is itself productive of power play. Thus, depending upon how a case lands in the lap of the ICC, it may be indicative of a powerful nation's belief that the national authorities are unwilling or unable to take action, or of national authorities who find it a convenient means to deal with political opponents.

Apart from these political issues that inhere in the very nature of a judicial tribunal of an international nature, there are other factors that have impinged on the work of the ICC, and that have, on occasion, threatened to swallow it up completely.

Perceptions of Selective Justice

A perception of selective justice has dogged the work of the ICC, and undermined its image as a fair and impartial forum for the administration of international criminal justice. This perception has been the product of both events external to the ICC, and events within its own operations. First, the failure of the majority of the Security Council's P5 members to sign up for the Court and to be subject to its jurisdiction is its Achilles heel. Why have those who are providing funding for the Court, and who have the power to refer cases to the Court, not signed up and subjected themselves to its jurisdiction? Is it only poor and weak states whose conduct can invoke international criminal justice? The undeniable conclusion is that by limiting the ability of the court to operate in the arena of the powerful – an undeniable result of its nature as a treaty-based institution – a perception of its helplessness in

the face of powerful nations has been sown. The events that unfolded within the Security Council, where Russia and China vetoed a Resolution on 22 May 2014 to refer both sides of the Syrian crisis – the Assad regime and opposition elements – to the Court,[18] only reinforces the perception. This is underlined by the fact that earlier that same month, Russia was threatening the interim administration of Ukraine with just such a referral for moving against pro-Russian separatists in eastern Ukraine, leading to the deaths of a few insurgents. How can atrocities committed in Ukraine be considered grave enough for the attention of the ICC when a Resolution based on reports of the UN on the situation in Syria be considered worthy of a veto? There is thus the inescapable conclusion that it is international politics that determines who gets referred by the Council to the ICC, rather than the gravity of one's legal responsibility for infractions of human rights.. There is also the slightest hint that where a person is vulnerable by reason of being from a state that is geo-strategically unimportant (and therefore being without a friend among the P5 powers) there is greater certainty that one could face the music for one's acts and inactions. These currents again reinforce the view that it is not only egregious conduct that amounts to crimes as provided under Article 5 that can secure a referral by the Security Council, but other less worthy considerations as well. No wonder every continent wants a permanent seat on the Council!

Perception of Victor's Justice

The era of ad hoc tribunals produced a perception that such tribunals were an exercise in victor's justice rather than real justice; and the notion of a permanent tribunal was to address just such a perception. However, the ICC, by dint of some of its own decisions, has done nothing to rid itself of this historical baggage. For instance, in deciding to summon Uhuru Kenyatta, then an opposition leader, but not Raila Odinga, in the Kenya post-election crisis, and in bringing an indictment of Laurent Gbagbo, a defeated leader in the Côte d'Ivoire crisis, but not his rival Alassane Ouatara, now sitting president, what conclusion is any observer to draw? Such perceptions, when nourished, have a tendency to undermine the raison d'être of a permanent court, as well as the brand of justice it dispenses.

ICC: Insensitive to National and Cultural Realities?

The Sudan and Kenya cases brought into sharp relief the issue of whether there can be peace without justice, and reignited the debate as to whether justice can be obtained even at the expense of peace or whether peace must be maintained as a priority, even if it means postponing justice. When an arrest warrant was issued against Omar al-Bashir, President of Sudan, after

he was indicted by the ICC, the AU, horrified by the fact that a sitting president had been indicted, sought to intervene by asking for a deferral, citing the need to sustain the peace in Sudan. It further argued that in view of Omar al-Bashir's potential role as an interlocutor in the reconciliation process in Darfur, prosecuting him would be subversive of peace.[19]

In the Kenya case, the situation was not that different. Following the election of Kenyatta and William Ruto as President and Deputy President respectively, the prospect of seeing a sitting president and deputy president on trial before the ICC for crimes committed before their election looked positively unattractive. The parties themselves, having submitted to the ICC, began to press for a deferral until after they had served their term of office. Following their own unsuccessful attempt, they roped in others, first the Kenya parliament, then the East African states, which called on the AU to take a stand on the matter. The AU then passed a Resolution supporting the request by the East African states for the cases against the President and Deputy President to be dropped in favour of a 'national mechanism to investigate and prosecute the cases under a reformed judiciary provided for in the new constitutional dispensation'.

As in the Sudan case, the AU based its request on the need to 'prevent the resumption of conflict and violence in Kenya'; and by suspending efforts to demand accountability, to thereby support ongoing peace-building and national reconciliation processes. The AU Resolution went on to express concern that the indictment of the president and deputy president posed a threat 'to on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also in the Region'. The AU also went further to endorse the request of the East Africa Region for the ICC to yield up jurisdiction in favour of a national mechanism on grounds of the principle of complementarity.

Surely this was a strange argument, for those two positions advocated were in themselves contradictory: if a trial could not go on in an international forum for fear of disrupting peace-building efforts, then how could a national court proceed in like manner without similar effect? Again, the position appeared to overlook the sequence of events, because the ICC took charge of the case only after national processes had failed to do so. Was this request by the East African states and the AU grounded in good faith? This event has not only undermined the ICC, but has also called into question the AU's avowed aim of dealing with impunity.

Other questions go beyond this position, into states' treaty obligations under international law. Was the attempt by the East African states to motivate AU member states to pull out of the ICC *en bloc* not tantamount

to using 'street-tactics', to thereby wiggle out of an inconvenient treaty obligation? Was this not international politics at its best, when states, which had signed up to the ICC individually and had thereby pledged their cooperation, were seeking, in violation of their treaty obligations, to block the work of the ICC by ganging up against it? If the effort to coerce the ICC into acceding to their demands by making its position politically untenable was not international politics at play, then nothing else could be. African states had voluntarily agreed to subject themselves to the jurisdiction of the Court and must use dialogue to press home their concerns, not acts that would be in violation of their individual treaty obligations.

Exercise of Prosecutorial Discretion and Perception of Anti-African bias

The Office of the Prosecutor's (OTP) concentration on economically and politically weak African states is also perceived as bias against Africa. It is an incontrovertible fact that since the establishment of the Court, all the investigations pursued by the OTP are in Africa: Sudan, Democratic Republic of Congo (DRC), Côte d'Ivoire, Guinea, Kenya, Uganda, Central African Republic (CAR), Mali and Libya. The former chief prosecutor of the ICC, Moreno Ocampo was perceived as exhibiting an anti-African bias because of his persistence in issuing arrest warrants only to Africans during his time in office, the first nine years of the Court's existence. It is said that on account of the fact that six of the thirty prosecutions he launched have either been withdrawn, dismissed or led to an acquittal, he had an agenda against Africans, as the withdrawn, the dismissed and perhaps the acquitted warrants may have lacked merit. To be fair, such a record in criminal jurisdiction is not unusual, for even the best-prepared case can be lost on technical or procedural grounds, but it is the fact that no one else outside Africa has attracted his attention that has fuelled the perception of a witch-hunt against Africans. Perhaps because Ocampo was anxious for the court to start work and justify its existence and the huge expense of its operations, he was less than careful in his choice of cases. Perhaps he was playing to the gallery in drawing attention to himself and was in thrall to sensationalism in the choice of cases. Whatever the explanation, the perception of an anti-African bias in its operations has become a major obstacle to the image and operation of the Court.

Perhaps African leaders have also sought to play politics with the court, and the effort having been resisted, has been viewed as an indication of anti-African bias. Had no events happened elsewhere which should have triggered an attempt at investigation, perhaps Africans and their leaders would have had no reason to accuse the ICC of bias, but this has not been the case.

Therefore those with an axe to grind have not been slow in arriving at the conclusion that the Court is indulging in politics and pandering to the whims of powerful states, becoming an instrument to deal with leaders who have become unpopular with those powerful interests. This situation has been damaging as it has rendered some of the once-supportive African states who constitute the largest grouping within the Assembly of States Parties (ASP), hostile to it, leading to the adoption of an unhelpful stance of non-cooperation towards the ICC.[20] Regardless of the fact that the Court was not established to prosecute only Africans, one cannot overlook the fact that focusing on Africa served the political interests of both local and international parties. But at least the bogeyman threat of a referral to the ICC seems to have an effect on some African leaders' intent on pursuing their own interests at the expense of their civilian populations.

The Perceived Ineffectiveness of the Pre-Trial Chamber

An examination of the issue of Ocampo's predilection, in retrospect, also raises questions about the role of the Pre-Trial Chamber. Where was it when all those 'faulty' indictments were being issued? Did it fail in the discharge of its duties or did Ocampo ignore the standards of procedure for judicial proceedings in the Court?[21] Now that a case against British soldiers has found its way to the Court,[22] the mode of handling will determine how the issue of anti-African bias will be addressed (or reinforced).

Apparent Inadequacy of the Witness Protection Programme

Every prosecution lives or dies by the quality of its evidence. Thus witnesses are critical to any successful prosecution, hence the need to establish witness-protection programmes to safeguard those who would be willing to testify, particularly for the prosecution. However, it would appear that its witness protection programme is not effective in addressing the challenges a Court such as the ICC must surmount in-country to encourage potential witnesses to step up and testify. For instance, in the Kenyan case, the Victims and Witnesses Unit of the ICC appears to be asleep at the wheel. There have been clear violations of Articles 68 and 70 in the processing of charges levelled against William Ruto – Deputy President of Kenya, Uhuru Kenyatta – President of Kenya, and Joshua Arap Sang – a journalist. The three were invited before the Court for their critical roles in the 2007 Kenyan post-election violence. Human Rights Watch reported: 'Seven potential witnesses have been killed and others have apparently recanted their testimony.'[23] Walter Barrasa's indictment was on account of 'corruptly influencing a witness', contrary to Article 70 of the Statute, as he is reported to have offered bribes to two witnesses, and

had made efforts to bribe a third witness in exchange for withdrawing from testifying. The arrest warrant issued by the ICC recited that Barasa's arrest was necessitated by the need to ensure that he did not continue to disrupt the Court's investigations by 'influencing' witnesses. Apart from this clear instance of interference with the work of the Court through attempts to influence the witnesses, it is alleged that the current Chief Prosecutor, Fatou Bensouda has in her possession the tape recording of a telephone conversation incriminating an associate of Kenyatta's who was attempting to bribe witnesses to withdraw their testimonies. If this is true, this is a serious setback for the Court, for it is a fact that witnesses who can be reached for purposes of bribery can also be reached for purposes of conveying threats of harm. In an adversarial proceeding, such as a criminal trial, which depends upon witness-testimony to build a case against an accused, any feeling of vulnerability induced in witnesses can have serious repercussions on the successful conduct of a case. It is also acknowledged that if one witness is harmed, ten others would take counsel and withdraw their cooperation for their own safety and protection – hence the need for witness protection programmes. Therefore, such rumours of recorded conversations in the public domain can only enhance the feeling of the vulnerability of witnesses, and whether or not these allegations are true is not the point.

What is material is that if there are observed effects, such as when witnesses begin to pull out or refuse to cooperate with the Court, then action must be taken that would both end the perceived threats and reassure the potential witnesses of their safety. Unfortunately, even though this phenomenon has been observed in this case, as witness after witness has inexplicably withdrawn cooperation or been found dead in unexplained circumstances, not much firm action has been taken. What other conclusion can one draw but that the allegations of interference and intimidation are credible, thereby reinforcing the vulnerability of those who had previously signalled a wish to assist the work of the Court as witnesses? At this rate, there will be no witnesses left by the time Kenyatta is put before the Court.[24]

Judging by the issues arising from the Kenyan example, however, there clearly are other practical challenges the Court faces, such as: when does witness protection begin? Does it begin when investigations are underway or after an arrest warrant has been issued? Or should it be limited to the period just before or during the trial? When it comes to witness protection in communal societies such as Africa with its extended family system there may be issues as to whom the witness protection programme can cover, and whom it cannot. Is the concept being implemented by the ICC sufficiently sensitive to communal societies or is it only devised and understood as in Western culture, with its emphasis on individualism? Whatever the practical problems are for the ICC, the failure to mount an adequate witness protection

programme victimizes the victims once again, and makes the Court complicit in needlessly reopening old wounds, or worse, leaving the victim at the mercy of the powerful and often ruthless perpetrator(s).

International politics is not a one-way street, and so the attempt to make use of the Court to the advantage of a state or politician is also unavoidable. It has become apparent that African leaders comply with the directives of the Court or assist in investigations only when it suits them. There is enough reason to suppose that sometimes assistance is provided by parties in exchange for exemption of their political allies, or to save themselves from future prosecution. Such is the experience with the DRC, Uganda and even Côte d'Ivoire. For instance, in the first ever self-referral in 2003, President Yoweri Museveni of Uganda was all too willing to cooperate with the ICC to find Joseph Kony, the infamous leader of the Lord's Resistance Army. The ICC's investigations in northern Uganda that began in January 2005 were bound to implicate both the LRA and the Ugandan People's Defence Force (UPDF). Yet, when in 2005 arrest warrants were issued, five LRA leaders were indicted, but no member of the Ugandan People's Defence Force (UPDF) was listed, thereby leading to the inference that in twenty-five years of fighting the insurgency, that has involved many serious human rights abuses on both sides, no member of the UPDF was answerable for those atrocities. Could it be that assistance provided to the Court had made Museveni's government beholden to it? Bearing in mind that Uganda's referral to the Court was conspicuously marked by Museveni and Ocampo appearance at a joint conference in London, sharing a solidarity handshake, there was little surprise that right seemed to be all on their side and all wrong on the LRA's. Museveni's current hostile posture against the ICC is perhaps born out of the Court's failure to yield to his demands and out of a fear of future prosecution.

The Future of the ICC

Much of the ICC's future prospects depend on the full and reliable support of States Parties. Nurturing and retaining such support depends in turn on whether or not the ICC is perceived as being able to demand the same accountability and justice from the West as it does from Africa.[25] Despite its political realities, the ICC should strive to establish itself as an independent Court concerned with prosecuting all international crimes by whomsoever committed and not just one that has its eye fixed only on those committed by Africans. The future of international criminal justice will depend upon the willingness of the powerful states to continue to provide funding, and be seen to be willing to subject themselves to the court for whose operations they provide substantial sums of money.

Maintaining a Dialogue with the AU and Africans

With recent calls by the AU to member states not to cooperate with the ICC, the concern is that the ICC may suffer a similar fate as the League of Nations, and should therefore engage in focused dialogue with the AU to address the concerns of Africans and their leaders. The swiftness with which the Extraordinary Chambers, inaugurated in February 2013, moved to charge and place Hissène Habré in pre-trial detention promises an attitude of Africa's willingness to deal with impunity, years after dilly-dallying and shilly-shallying by Senegal. The ICC faces grave opposition from AU member states, and this has produced the decision to expand the jurisdiction of the African Court of Human and Peoples' Rights to give it criminal jurisdiction in a bid to develop 'African mechanisms to deal with African challenges and problems'.[26] However, the expanded jurisdiction needs not be seen as undermining the operations of the ICC. The two bodies need not be mutually exclusive, and Africa has put itself under a heavy burden to show that establishing their own court is not just a means to evade accountability. In any case the AU is so donor-dependent that it would do well to dialogue with the ICC and to remain on cordial terms with that body, as it is unlikely that those whose funds support both institutions would provide funding whose purport would be to undermine either institution. The non-availability of funding might render the idea still-born, though its value in upholding Africa's determination to improve the accountability of leaders for abuses that occur under their authority is immeasurable.

Developing Capacity of National and Continental Courts

Primarily, the ICC's role is not to replace national courts but to complement them.[27] Partnering national governments to prosecute will create greater impact in terms of reach, timing and timeliness. It would also put less stress on the limited resources of the Court. Such partnerships would also help develop national capacity and so provide a dividend thereafter to the citizenry in the form of better administration of justice. The issue is, of course, whether the same principles of complementarity would be upheld by the ICC, or are enforceable against it, when it is not a national court but a supranational court, such as a regional and continental court, that is asserting rights against the ICC. The advent of a continental court with criminal jurisdiction has raised the prospect of this conflict beyond the realm of speculation. What would be the philosophical and legal basis for applying the principle of complementarity to a continental court after national institutions have signalled an inability to prosecute a case? Would there be an undignified tussle between the two institutions as the ICC seeks to assert primacy, or would it yield ground to the continental body? We live to see how this plays out.

Increasing Public Outreach

The work of the ICC requires reaching out to the public in all its member states. Therefore its engagement with Civil Society Organizations (CSOs) and Non-Governmental Organizations (NGOs) in Africa is a critical factor of success. Effectiveness of such engagement with the public can be facilitated in no small measure by CSOs. The growing importance of civil society in development and related issues means engaging it is crucial. The collective reach of CSOs is much more extensive than any international institution could hope to achieve, and working with those CSOs such as the Coalition for the International Criminal Court (commonly known as CICC) would create an avenue for many of the misconceptions regarding the ICC to be addressed. To begin with, NGOs played important roles in rallying support for the ratification of the Rome Statute, and so their strengths can be harnessed again. Indeed, Africa's civil society played an immense role in trying to resolve the rift between the AU and the ICC, and this track record means that no one need counsel the Court to maintain a close working relationship with NGOs and CSOs who are known to be credible.

Conclusion

The ICC, established on the crest of a wave of activism appears not to have lived up to the bill. Although it is admissible that international criminal justice has come a long way and has made notable strides, the ICC has not met the expectations of those who invested emotions and resources in pursuing the establishment of a permanent court. It was supposed to end impunity and make an example of those who oppress their fellow human beings by egregious violations of human rights standards. It was, thus, at once a watchdog of standards of accountability and a bogeyman to all potential abusers of human rights: they could run but not hide as the day of accountability would one day dawn when their power and might would be useless in shielding them from the world's wrath. Admittedly, the role of the Court in achieving these desiderata was always more symbolic than real, and the euphoria surrounding the birth of the Court was bound to dissipate after a while (as in all cases), leaving behind a feeling of depression. However, it would seem that for the ICC, the end has come too soon.

The myriad factors that have produced this unfortunate result span the entire gamut of the body's existence: from its genetic make-up as a treaty-based body, through the machinations of international politics, to its own operations and decisions wittingly or unwittingly taken. Much has been said

by both the detractors and erstwhile supporters of the ICC of its failings – perceived or real. What is clear is that as a creature of international politics, the influence of international politics will always hold sway in its affairs. The ideals for which it was born remain valid, and so its essence remains worthwhile despite the challenges that are threatening to undermine it.

Does the ICC have a future? It certainly does, and its continued relevance is also beyond question. At a minimum, it has become a vehicle for denouncing human rights abuse, and for offering the prospect of accountability to those in the throes of suffering. Currently, it is not unusual for leaders of a country to be warned ahead of a major election that their conduct in fomenting violence might be a subject of interest to the Court. This is certainly exploiting the bogeyman image of the institution to prevent conduct that might endanger lives and property in the country concerned. However, this image might be undermined if it does not make an effort to shore up its credibility. Indeed, the future of the ICC depends largely on its ability to exhibit independence and operate in a professional and transparent manner. It must strive to maintain good working relations with all member states by being perceived not to be pandering to the wishes of those who have chosen to stay outside its membership, but wanting to direct its work. This is a serious charge to keep, for unless the ICC works on the perception that it is independent, it will not regain the affection it once had in the bosom of African countries. It must be seen to administer fair and impartial justice, even though the influence of international politics, on account of its reliance on funding by the major donor countries, can never be wished away. As a Court set up to play a complementary role to national courts, it does not have its own law enforcement agencies and will therefore rely on the cooperation from State Parties and on their goodwill. Despite these challenges, the ICC remains relevant to many, for at the base of all expectations of the ICC is the hope that the interests of powerless persons and voiceless victims would be well-served on behalf of the international community. It remains the only credible means by which the benefits of the rule of law, which may have evaded the voiceless on account of the realities of power within their own states, would, at last, be bestowed on them. These are the lofty hopes that still burn in the hearts of many and that the Court dare not disappoint, nor frustrate.

Notes

1. In 2003 the Darfur genocide claimed the lives of at least 350,000 to 400,000 people in twenty-nine months. Currently, the world the world is witnessing escalating violence in the Central African Republic, a situation the Secretary

General, Ban Ki-Moon fears may escalate to a full blown genocide. Between the 14 and 16 January 2014, fifty Muslims were killed in Bangui and an estimated 200,000 are internally displaced. To all intents and purposes, the ICC has not created a chilling effect on the commission of egregious crimes against citizens, and even genocide. *See* Eric Reeves, 2005, 'Genocide in Darfur - how the horror began', 3 September, available at http://www.sudantribune.com/spip.php?article11445, accessed on 24 April 2014; Amnesty International, 2014, 'Central African Republic: more than 50 Muslims killed in two attacks', 24 January, available at http://www.amnesty.org/en/news/car-50-muslims-killed-2014-01-24, accessed 24 April 2014; Walter Kälin, 2011, 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons, at the Fifteenth session, Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development', Agenda Item 3, 18 January. A/HRC/16/43/Add.4.

2. The very first judgement of the ICC was passed on Thomas Lubanga Dyilo, a Congolese warlord, in March 2012.
3. In March 2014, Germain Katanga became the second individual to be convicted for his role in the 24 February 2003 attack of village of Bogoro, in the Ituri district of the Democratic Republic of the Congo (DRC).
4. Stephan Landsman, 2000, 'Those who remember the past may not be condemned to repeat Iit', cited in 'Pluralizing international criminal justice. From Nuremberg to The Hague: the future of international criminal justice', 2005, *Michigan Law Review* 103 (6) in *Survey of Books Relating to the Law*, May 2005, pp. 1295–328, The Michigan Law Review Association.
5. The Nuremberg Tribunal was established to prosecute twenty-four individuals alleged to be responsible for war crimes during WWII, and the International Military Tribunal for the Far East, IMTFE, more commonly known as the Tokyo Tribunal, was also established in 1946 to try twenty-eight major war criminals (seven of whom were sentenced to death) on similar charges as persons tried at the Nuremberg tribunal. The tribunals were established by the USA and its allies of WWII, and the individuals concerned were leaders of Germany and Japan who served as military or political leaders.
6. Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950, Document A/1316, pp. 11–14; Articles 22–33 of the Rome Statute of the International Criminal Court.
7. The International Criminal Tribunal for the former Yugoslavia (ICTY) is an ad hoc tribunal established by the Security Council to investigate and prosecute grave war crimes committed in the territory of the former Yugoslavia during the conflicts in the Balkans since 1991. It was the first war crimes tribunal established after the Nuremberg and Tokyo trials. It was found that civilians were wounded and killed, raped, forced to flee their homes, enslaved and illegally detained – a situation which was in clear contravention to international humanitarian law. The crime of genocide was also reported. The object of this tribunal was therefore

to try individuals responsible for these violations. An estimated 160 persons including heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts. Lower-ranking officials were referred to national courts as part of the Completion Strategy which began in 2003, which is aimed at building the capacities of national courts to try war crimes. The ICTY played a major role in discrediting the notion of collective responsibility by calling individuals to account for atrocities committed. It has also played a pivotal role in the development of international humanitarian law.

8. http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspxc, accessed 24 April 2014.
9. Roy S. K. Lee, 1999, *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results*, Martinus Nijhoff Publishers.
10. The Rome Statute was signed on the 18 of July 1998, and entered into force in July 2002 when the sixtieth state ratified it.
11. Matthew Weed, 2011, International Criminal Court and the Rome Statute: 2010 Review Conference. Congressional Research Service, 10 March; Lansana Gberie, 2014, 'The Special Court for Sierra Leone rests for good', *Africa Renewal***,** April, p. 6, United Nations Department of Public Information.
12. Articles 12 and 13 explain the limits of the jurisdiction of the Court. Article 12(1) details, 'A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5'.
13. Kirsch, Philippe, 2007, 'The role of the nternational Criminal Court in enforcing international criminal law', *American University International Law Review* 22 (4): 539–47.
14. Daniel G. Partan and Pedrag Rogic, 2003, 'Sovereignty and international criminal justice', available at http://www.javeriana.edu.co/juridicas/pub_rev/international_law/revista_1/cap.%203.pdf, accessed on 12 May 2014.
15. Jean-Pierre Bemba constitutes one of the few public officials surrendered to the ICC. His arrest yielded political gains for his opponent, Joseph Kabila.
16. With regard to Ratione Temporis, the ICC has jurisdiction only over crimes committed after 1 July 2002. If a state becomes party to the Rome Statute, the ICC has jurisdiction only over those crimes that were committed thereafter. However, the state can make a declaration accepting the jurisdiction of the Court retroactively.
17. Article17. Article 17(2) determines unwillingness whilst Article 17(3) determines inability of the national court to investigate and prosecute.
18. This was despite the fact that UNSCR 2139 (2014) anticipated the possibility of such referral, and cautioned all parties thereon.
19. Tim Murithi, 'The African Union and the International Criminal Court: an embattled relationship?', The Institute for Justice and Reconciliation, Policy brief, 8 March, 2013.
20. This decision was taken at the 13th Annual Summit of Heads of State and Government in Sirte, Libya.

21. According to Cuno J. Tarfusser, the pre-trial chamber does three main things; filter (only solid and grave cases should go to trial; Article 15), 'safeguard (Of the rights of the suspect, the defense and the victims. Principle of fair trial) and impulse (Confirm (or not) the charges against the accused and thus mark the transition from pre-trial to trial proceedings with all preliminary questions solved)'.
22. A group has brought a case against British soldiers for brutalities committed against civilians in Iraq.
23. Kenneth Roth, Africa attacks the International Criminal Court, available at http://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court, accessed 5 August 2014.
24. Unsurprisingly, the case against Uhuru Kenyatta has had to be discontinued and the charges withdrawn, with much loss of face for the ICC.
25. In Afghanistan, Reuters reports that the United States is said to have been responsible for the killing of civilians and continue to inflict 'death, torture and other atrocities' on Afghans. The United States has failed to cooperate with investigations into these violations. The Guatanamo Bay Detention Camp set up by the United States continues to be the centre of mass human rights violations including enforced disappearance and torture even several years after it was scheduled to close.
26. Resolution Assembly/AU/13(XXI).
27. See Preamble of the Rome Statute of the International Criminal Court.

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Between Tunnel Vision and a Sliding Scale: Power, Normativity and Justice in the Praxis of the International Criminal Court

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Abstract

This article examines the relatively extensive, liberal and increasing deployment of the International Criminal Court (ICC) as the central mechanism for redressing gross human rights abuses in Africa. It shines the spotlight on how global and domestic power matrices affect the character and behaviour of international criminal justice norms and institutions, including our sense of what the model approach to international criminal justice ought to be in Africa and elsewhere. Three inter-related arguments are advanced as follows: first, the deployment of the ICC to help redress gross human rights abuses on the African continent has its pros and cons, but its deployment to play a central role as it currently does is fraught with suspicion as regards the true intention; second, when it comes to redressing the gross human rights abuses that are committed on the African continent, as elsewhere, the ICC is not the only viable and available option – there are a range of other reasonable options in the repertoire of international criminal law and policy; and third, it is largely because of the interplay of domestic and global power matrices (and not in the main because of some immanent sense of morality or logic) that international criminal justice has increasingly tended to take one particular, generally inflexible, ICC-heavy, form in its encounters with gross human rights abuses in Africa.

Résumé

Cet article examine le déploiement relativement large, libéral et croissant de la Cour pénal international (CPI) en tant que mécanisme central pour réparer les violations graves des droits de l'homme en Afrique. Il fait briller les

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projecteurs sur la manière dont les matrices de pouvoir mondiaux et domestiques affectent le caractère et le comportement des normes et institutions de la justice internationale, y compris notre sens de ce que l'approche modèle de la justice pénale internationale devrait être en Afrique et ailleurs. Trois arguments étroitement liés sont avancés tel qu'il suit : premièrement, le déploiement de la CPI pour aider à réparer les violations graves aux droits humains sur le continent a ses avantages et ses inconvénients, mais son déploiement pour jouer une central comme il le fait actuellement est très questionnable ; deuxièmement, lorsqu'il s'agit de réparer des violations graves des droits humains qui sont commis sur le continent, comme ailleurs, la CPI n'est pas la seule option viable et disponible – il existe une gamme d'autres options raisonnable dans le répertoire de la loi et de la politique pénale internationale ; et troisièmement, c'est largement à cause de l'interaction des matrices de pouvoir domestiques et globales (et certainement pas à cause de quelques sens de moralité immanente ou de logique) que la justice pénale internationale eu de plus en plus tendance à adopter une forme particulièrement, généralement inflexible, forme de CPI dans sa rencontre avec les violations graves des droits humains en Afrique.

Introduction

That power, be it of the military, economic, political, social or ideational kind, can markedly affect the nature and orientation of international norms and praxis is so well accepted a proposition that an attempt to adumbrate and justify it should not detain us here.[1] What can often require explanation are the specific ways in which this phenomenon actually plays out in the various possible contexts. For example, in what ways and to what extent do global and domestic power matrices affect the character and behaviour of international criminal justice norms, including our sense and sensibility of what the ideal, standard, or model approach to international criminal justice ought to be – either in general or in specific socio-political contexts? More specifically, in what ways and to what extent do these global and domestic power matrices affect our sense of the appropriateness or desirability (or otherwise) of deploying the International Criminal Court (ICC) in an effort to redress the incidence of gross human rights abuses – and thus to presumably 'do justice' – in one part of the world or another? As important, are these global and domestic power matrices responsible to any significant extent for the apparent 'crowding out' and displacement of alternative criminal justice approaches to the gross human rights violations that have occurred on the African continent owing to ICC prosecutions?[2] As important as the deployment of the ICC is to the overall effort to end impunity for gross human rights abuses around the world and in Africa in particular, to what extent is the Court's increasingly central role on the African continent – to the total exclusion of all other continents – more a function of the play

of power than of the manifest or intrinsic appropriateness of that approach or posture? It is to these more specific questions that we turn most of our analytical attention in this article.

As such, this article attempts to explore in more depth the causes, effects and implications of the Court's near-total focus on Africa, and whilst showing that a plethora of other reasonable options are available to be deployed, in conjunction with an appropriately reduced usage of the ICC, to effectively work towards international criminal justice in Africa – hence debunking the 'ICC-or-nothing' myth. To this end, the article is divided into five sections. In the second section, the pros and cons of the increasing deployment of the ICC as the principal way of addressing the incidence of gross human rights abuses in Africa are examined. Section three considers the question of the existence, nature and character of a (two-dimensional) sliding scale of international criminal justice; one that adjusts itself from continent to continent and place to place. In section four, the relationships among global and domestic power matrices on the one hand, and the tendency to dispatch the ICC to deal with gross human rights abuses in Africa, and Africa alone, on the other hand, are analysed. In section five, a summary of the arguments and some concluding comments are presented.

The Pros and Cons of ICC Deployment on the African Continent[3]

The Positive Implications

If we consider the categories of persons, in terms of their level of power and the extent of their responsibility for the conflict, who have either been successfully brought before the ICC to answer for their crimes or have ICC warrants of arrest pending against them, it becomes quite easy to appreciate how some good could result from the engagements of the ICC in parts of the African continent, especially in relation to the important effort to stem the culture of impunity which prevails in too many places. For instance, without the ICC's intervention in Sudan, there would have be even less hope than there currently is today of bringing the most powerful elements within that country to justice. This is not to suggest, of course, that Sudan is even close to being the only place where a culture of impunity exists of the kind that an ICC intervention may help. For after all, aside from a few of the usual suspects, who has been brought to justice for the many international crimes allegedly committed in Iraq, Afghanistan and Chechnya?

A closely related point is the fact that the ICC now serves as a significant (though invariably quite modest) alternative judicial framework to weaker domestic judicial institutions that are confronted with the relatively

enormous challenge of mediating the process of transition from a period of conflict or gross violation of human rights towards a more peaceable and democratic epoch that is more firmly premised on accountability for past and contemporary acts of criminality and human rights violations. For example, it is doubtful that an immediately post-conflict Syria, Afghanistan or Libya will have the kind of strong judicial institutions needed to bring the most powerful elements within those countries to account for their possible gross human rights violations and international crimes. The ICC can serve as a modest, if clearly partial, alternative to the weaker judicial institutions existing in these types of situations. However it must be kept in mind that global power matrices often function in ways that ensure that the criminal justice systems of the more powerful states, which are sometimes visibly weak in the face of the commission of serious international crimes by soldiers or leaders from such states, are hardly ever categorized as functionally 'weak'; at least not to the point of necessitating ICC intervention.

Although there are some who, on reasonable grounds, doubt the viability of the deterrence argument to the extent that criminal trials and punishment can ever deter future criminal behaviour, the ICC and the relatively stronger prospect of eventual punishment that it offers in certain contexts should exert some measure of deterrence on at least some persons in positions of authority, in at least some state signatories to the Rome Statute (Brierly 1927; Jalloh 2010). For these purposes however, as the question of the possible deterrent effects of criminal trials and punishments has been the subject of an enormous amount of scholarly literature, a detailed discussion of that issue should not detain us here.

The Negative Implications

A first negative consequence is somewhat ideational and conceptual; that the relatively invasive involvement of the ICC in Africa, especially as compared to other continents or places, has masked much more than it has revealed about the character, imperatives, and high politics of transitional justice praxis itself. As a result, this has left many with the decidedly wrong impressions. Both in and of itself, and as the most prominent 'representative' of international criminal justice today, the ICC's apparent 'geo-stationary orbit' over Africa – its near-total focus on that continent – has wittingly or unwittingly significantly masked the enormity and vast extent of the incidence of international criminality in many other parts of the globe. Given their notoriety, it is hardly necessary to name all of these other places, but Chechnya, Iraq, Afghanistan and Colombia (where by conservative estimates tens of thousands have been slaughtered in a manner that suggests international criminal conduct) come to mind in this respect.[4]

Additionally, this very invasive involvement of the ICC in Africa may appear to suggest to the inattentive mind that only one viable approach to international criminal justice exists or is suitable for the broad African context, when in fact this is not the case. International criminal justice theory and praxis are hardly monolithic, settled or representative of a tightly coherent discipline. Thus, the second negative implication of the centrality that the ICC is increasingly assuming in Africa is that it can and does produce significant displacement effects on competing or alternative, or more nuanced international criminal justice approaches, despite the fact that these alternatives may in some cases have a better chance of meeting the justice of the particular circumstances at issue. For instance, while a 'truth and reconciliation' approach, which ensured that virtually no one was ever punished for the particularly egregious crimes committed against that country's black population by its white apartheid regimes, was adopted in the case of South Africa, and although that version of international criminal justice was widely praised around the world, this kind of alternative approach has hardly, if ever, been allowed to play nearly as central a role in any other African state – despite the alleged crimes committed in some of these places being comparatively much less egregious than in the South African case.[5]

The third adverse effect which is likely to result, if it has not already done so, from the centrality that the ICC is increasingly assuming in Africa, is that this phenomenon tends to denude that Court of a significant degree of its bulwark of popular legitimacy especially within the weaker targeted states. Paradoxically, this then functions to arm certain domestic political actors who have been or could be targeted by the Court with a powerful argument for gaining or retaining domestic political power and influence. There is significant worry, even among strong supporters of the ICC, that the Court, especially because of the behaviour of its first prosecutor, has wittingly or unwittingly laid itself wide open to the charge that it is has become an instrument for the subordination of weaker African states, at the same time as it seems to be exhibiting a glaring impotence in the face of global power.[6] The point here is less about the accuracy of this charge, and more about the *perceived* legitimacy of the Court and its activities (Okafor 1997). For instance, whether or not one agrees with him, the charge famously levied by the then Sudanese Ambassador to the UN against the ICC's first prosecutor – referring to him as 'a screwdriver in the workshop of double standards' – resonated among a significant percentage of observers on the African continent, and not just within the ranks of cynical leaders (Tisdall 2008).[7] This charge is connected, for many on the continent, with a deeply-held and historically understandable aversion to imperialism, foreign subjugation and racially

discriminatory conduct – an aversion that remains widespread within and beyond the continent to this day (Okafor 1997; Tharoor 2002). As former UN Assistant Secretary General Sashi Tharoor once wrote while in office:

> …those who follow world affairs would not be entirely wise to consign the issue of colonialism to the proverbial dustbin of history. The last decades of the twentieth century suggest that, curiously enough, it remains a relevant factor in understanding the problems and the dangers of the world in which we now live (Tharoor 2002:1).

It was no wonder then that this issue of ICC double-standards has gained so much currency that the former chair of the AU, for his part, openly complained that while the AU was 'not against international criminal justice' it seems that 'Africa [had] become the laboratory to test the new international law' (BBC News 2008). If this is so, then it should not surprise us that the central place that has been assigned to the ICC in transitional justice praxis on the African continent can, against the background of its perceived anti-African partiality, indirectly arm certain domestic leaders and actors with a more or less powerful argument for gaining, retaining or augmenting popular support, power and influence. With its perceived popular legitimacy denuded in significant measure by its apparent geo-stationary orbit over Africa and the active, and sometimes cynical, mobilization of that fact by political agents and leaders on the continent, certain political leaders who have been targeted by the Court may paradoxically gain in popularity in some of these places, in part because of their perceived 'victimization' (in terms of being singled out) by the Court, or their perceived 'resistance' to that Court. Indeed as many knowledgeable observers of Kenya have testified, this was precisely the case during the last Kenyan presidential elections (BBC News 2013).

The last negative implication of the centrality that the ICC is increasingly assuming in transitional justice praxis in Africa is that, somewhat paradoxically, this approach can – in certain contexts – lead to the exacerbation or augmentation of domestic repression, conflict and/or violence. Here the point is that given the expectation of certain serving officials, including sitting presidents, of a targeted country of being hauled before the ICC and subsequently tried, convicted and jailed, should they ever leave office; and given the concomitant fact of the protection that sitting tight in office usually affords most of them; the incentive structure that is increasingly being produced by the frequent and liberal deployment of the ICC in Africa tends to encourage highly repressive and violent leaders to do all that is possible to remain in office as long as they possibly can, so as to avoid arrest and prosecution by the ICC. This is especially so when the relevant leaders are not particularly favoured by the relevant global power matrices. Moreover, the road to their continued

stay in office is unsurprisingly lined with the bodies of killed, tortured or otherwise seriously abused opponents and ordinary citizens. The prospect of a humiliating trial at The Hague and spending one's last days locked up in a jail can concentrate the mind, albeit not always in a positive way. Thus, wherever this sort of incentive structure is produced, it usually contributes significantly to the exacerbation or augmentation of domestic tensions, repression, conflict and violence. This paradoxically impedes the search for a just and lasting peace in the country at stake. For example, there is a good argument to be made that the prospect of being hauled before the ICC or similar could have helped shape Robert Mugabe's insistence on hanging on to power at any cost, despite his grand old age. This is also likely the case with Sudan's al-Bashir. In both cases, repression, conflict and/or violence were accentuated as a result.[8] There is a good argument to be made that were the ICC not to have been assigned as prominent a role in redressing gross human rights abuses in Africa, were it not to appear as poised and anxious as is seemingly the case to fill its docket with each and every African case it can get its hands on, and had alternative international or domestic criminal justice approaches been considered more seriously in the African context, we would have seen many more agreements of the type brokered by Nigeria in relation to Liberia, which were designed to prevent, and did prevent, millions from being killed in an all-out assault by the then rebels on the capital, Monrovia. That agreement famously secured the voluntary consent of Charles Taylor, the then elected president of Liberia to abdicate from power and leave the country in return for the rebels standing down from their siege on Monrovia. It can be argued that this was a more humanitarian and even more just outcome than would have been the case had Charles Taylor not been coaxed out of power with a promise of amnesty, in which case the rebels would have been forced to storm Monrovia resulting in millions of civilian lives being lost. This is a type of approach that, whatever its limits from an idealist human rights perspective, does tend to reduce, rather than augment, conflict and violence in certain contexts.

The overarching point is thus that the deployment of the ICC to help address gross human rights abuses on the African continent has its pros and cons, but that its deployment to play as central a role as it currently does in this geo-political region is fraught. As such, it should be realized that just as not every deployment of the ICC to Africa is a cynical or imperialist exercise (for after all it was victorious or sitting African heads of state in the Democratic Republic of Congo, Uganda and Côte d'Ivoire who called in the ICC), not every objection or opposition to such ICC deployment is ill-motivated or anti-human rights. As we have seen above, legitimate, and indeed powerful, objections may be raised to the liberal, frequent and central utilization of the ICC in the African context. The strength of these legitimate

objections is reinforced by the existence in the *living* international criminal law or policy of a sliding scale; that is, by the realization that there is a sense in which international criminal law and policy, as it is actually practised and experienced by real living people, may in fact be defined by such a sliding scale. It is to the actuality, nature, and implications of this sliding scale that our attention now turns.

The Existence of a 'Sliding Scale' in the Living International Criminal Justice Praxis

Africa and the world are not faced with some type of a 'Faust-like bargain' in which we must either relentlessly deploy the ICC, or some other high agent of international criminal justice, to redress every single incidence of gross human rights violations in Africa or elsewhere, or else effectively surrender our moral integrity at the feet of power or in pursuit of success at a purely pragmatic form of reconciliation and peace-building. In other words, it is clearly not a choice between ICC-style prosecutions and trials or nothing (van der Laan and Weeks 2013).

Even at a very basic legal and textual level, it seems fair to state that every scholar of international criminal law and policy would know that this idea – that it is not 'either the ICC or nothing' – is, however insufficiently, built into the Rome Statute.[9] The term which has come to describe this idea's iteration in the Rome Statute is 'complementarity' (Yang 2005). Although it is nowhere defined in the Rome Statute itself, the term denotes the basic idea (Rome Statute: Article 17) that the ICC is not designed to be, and is not generally expected to become, the primary site for redressing, or trying people criminally for, gross violations of human rights that amount to international crimes. Instead, domestic criminal justice systems of the relevant countries are meant to play the more central role in such endeavours – but only as long as they are willing and able to do so. Here, unwillingness is mostly a function of political will and domestic power calculus, and inability is more a function of physical and/or institutional incapacity.

One important feature of the design of the ICC regime, though not necessarily of its real-life workings in relation to Africa, is the built-in recognition that its deployment is hardly the only available, or even reasonable, step to take in each and every circumstance in which gross human rights abuses have been committed. Other viable approaches are available, and some of these may be reasonable (or even more reasonable) options, depending on the context at issue. This is one argument in support of the existence on paper at least (and even in the praxis of the ICC in relation to situations outside Africa) of the type of sliding scale of international criminal justice that was referred to

above; *a sliding scale of geographical weightin*g. It is also a vertical kind of scale. Some indication of the nature of that scale is also evident from this discussion – the general weighting of that scale in favour of domestic criminal justice; although, in practice, this weighting seems to have been turned upside down in relation to the African continent.

What is more, it is clear that even in the face of weaker or incapacitated domestic criminal justice institutions, or of recalcitrant and resistant but powerful domestic political forces, there is a lot of space between outright impunity, and the total surrender of our moral integrity at the feet of power and in unprincipled pursuit of success at reconciliation and peace-building, and the inexorable and relentless deployment of the ICC, or some other high agent of international criminal justice, to redress each and every single incidence of gross human rights violations in Africa. From the constructive impunity that effectively resulted from post-apartheid South Africa's rather peculiar sort of 'truth and reconciliation' process; through variations of that process that were adopted elsewhere (Avruch and Vejarano 2002); through general amnesties, limited amnesties, limited or mass domestic prosecutions, and mixed international and domestic courts (Jalloh 2010; Adjovi 2013; Williams 2013); to the proposed African Court of Justice, Human Rights and Crime;[10] there is a large field that lies in between outright impunity on the one hand and fully international or ICC-style prosecutions and trials on the other hand. The ICC option has never been inflexibly applied around the world, and many of the non-prosecutorial options outlined above have been applied in respect of gross violations that have been at least as egregious as the ones that have attracted the ICC to its current African orbit. For example, the violations committed in Côte d'Ivoire were no more brutal than those so far committed in Syria.[11] These alternatives between either outright impunity or the inflexible deployment of the ICC are each part of a range of reasonable available options to be selected depending on the context by those who would achieve reconciliation and/or build peace in other ways. They have been adopted either singly or in combination with one or more options, again depending on the context. Thus, in the sense of the availability of a range of reasonable options and the fact of their contextually variable utilization around the world, a sliding scale clearly exists in the living international criminal justice system and in ICC praxis. This may be described as *a sliding scale of remedial options*, and is also a horizontal type of scale.

A concomitant realization from the foregoing discussion is that it is simply not true to allege or imply, as too many commentators have done, that were the ICC not to play as central a role as it currently does in the African context, and were it not to engage in every one of the prosecutions it has undertaken

in that region, then the heavens of justice would collapse (Keppler 2012). Clearly, given the broad range of different options that have been applied more or less effectively in different situations around the world to deal with similarly egregious abuses of human rights – almost all of which did not include ICC-type trials (e.g. in South Africa, El Salvador, Nigeria, Argentina and East Timor) – any such suggestion does not have much merit. What is more, the heavens of justice did not fall open when the international crimes allegedly committed by the great powers and powerful domestic elements in places such as apartheid-era South Africa, Chechnya and Iraq were met with outright or constructive impunity.

The overarching point being that when it comes to redressing gross human rights abuses that are committed on the African continent (as elsewhere), it is not a case of the ICC or nothing at all. A range of other reasonable options exist in the repertoire of international criminal law and policy. In practice, the choice to deploy one or more of the available remedial options (be it the ICC, truth and reconciliation, an amnesty, or something else) does tend to be adjusted to the peculiarities of each situation at issue. Thus, when judged by its behaviour on a global scale, as opposed to assessing it based on its approach to Africa, it becomes clear that international criminal justice does tend to be characterized, oriented and defined by a particular, more or less two-dimensional, kind of sliding scale.

International Criminal Justice Norms and Praxis in the Crucible of Power

If this is so, why then has international criminal justice increasingly tended to take one particular, generally inflexible and seemingly monolithic form in its encounters with situations in which gross human rights abuses have been committed in Africa? In the face of the occurrence of many similarly egregious abuses of human rights in many other places around the globe, why has the ICC focused its prosecutorial lenses almost exclusively on the African continent; and why is this 'global' court playing a far more central role in Africa today than it has ever done anywhere else in the world?[12]

Clearly, if the intensity and frequency of such abuses in Africa are not much higher (and are in some respects lower) than on some other continents, this tendency of the ICC to fly in a kind of geo-stationary orbit over only Africa cannot be explained by simply stating the obvious fact that such abuses do occur too often in that region.[13] As such, some other factors must also be at play in the production of such a biased outcome, which is playing a more important, if not more critical, role in circulating the punishing winds of ICC justice only toward African skies.

One of the main suggestions developed here is that one of these more important, if not pivotal, factors is the play of *global* power matrices, where power includes not just military, political and economic power, but *also social and ideational* power.[14] As it turns out, and not all that surprisingly, these global power matrices exert a strong influence on how, and in which direction, international criminal normativity circulates, and on how ICC praxis plays out. It is impossible to completely work out and explain all the ways in which this plays out, but a number of examples suffice to support and illustrate the argument. For example, certain great powers (such as Russia, China and the US) have opted out of the ICC's jurisdiction and reach,[15] and have generally been able to remain immune from its grasp in actual praxis, largely because of the net effects of the economic, political, social and ideational power and influence which they tend to wield on the world stage.[16] In effect, the status of some of these great powers as permanent members of the UN Security Council, and the consequential veto power they exercise over that body's decision-making, has meant that the Council (the only body that can refer a person or situation to the ICC when the targeted state has otherwise completely opted out of the ICC system), is almost totally incapable of forcing them into the ICC's orbit via a reference to that alleged 'global' court. Of course, some much weaker states which are not permanent members of the Security Council (such as Rwanda, Libya and Sudan) have, on paper at least, also opted out of the ICC's reach, yet their weak influence in international relations has meant that in reality they have far less chance of avoiding being pushed into the ICC's orbit or of evading the ICC's grip. This has certainly been the case with Libya and Sudan – at least in relation to some of its citizens.[17] As importantly, the strongest states, especially the five permanent members of the Security Council, have generally been able to throw their considerable weight around in order to protect their protégé states from Security Council sanctions: an example being Russia vis-à-vis Syria and the US vis-à-vis Israel (Black 2014). As such, it is reasonable to suggest that neither Syria nor Israel are likely to be pushed into the ICC's orbit by the Security Council. Even more importantly for present purposes, the weakest states economically, militarily, politically, socially and ideationally, most of which are in Africa, are often left almost completely exposed to the possibility of ICC intervention. As such, they become the paths of least resistance, or the weakest links, which a new global court like the ICC (operating in a world of power politics and which was in the beginning without a single case in its docket, with none likely to come to it easily) can focus and depend on to build its docket, use to find some work for its teeming staff and generally justify its existence and operational costs.

Another of the more important, if not pivotal, factors that appear to have driven the ICC's virtually exclusive concentration on prosecuting Africans is the interplay play of *domestic* power matrices within the relevant African countries themselves. These domestic power matrices can exert a stronger or weaker influence on how, and to where, international criminal normativity circulates, and on how ICC praxis plays out. Here again, although space limitations do not allow a full adumbration of all the various ways in which this occurs in practice, a couple of examples suffice to substantiate and illustrate the argument. First, domestic leaders who wield sufficient influence locally or even internationally can become (at least partially) immune to ICC action when they either stay out of the system completely (in the case of Rwanda) or choose to align themselves closely with a veto power-wielding country which is prepared to block any Security Council referrals of its situation or citizens to the ICC (for example Syria and Israel). And more importantly for present purposes, such domestic powers can and do sometimes 'self-refer' their own local rivals and enemies to the ICC (although of course the vice versa is hardly ever possible). Of the eight situations before the ICC at the time of writing, four of them arose from (African) state party referrals. Uganda, the DRC, the Central African Republic (CAR), and Mali self-referred situations occurring in their territories to the International Criminal Court (ICC: 'Situations and Cases'). Thus, as such 'self-referrals' are one of the important reasons why many of the African cases before the ICC got there in the first place. The responsibility of some members of the governing elite in some African states for exercising their domestic power in ways that have contributed to pushing the ICC into its geo-stationary orbit above Africa, and which has in turn led to the significant displacement from the continent of alternative international criminal justice approaches to gross human rights abuses, is palpable.

Of course, a sceptic may counter that some other factors – other than military, political, economic, social and ideational power – could have contributed to the seeming excess of the ICC's virtually exclusive focus on African countries. One such factor that comes readily to mind is the nature of the agreed legal framework that helps shape ICC-related praxis, the treaty referred to as the Rome Statute. The plausible and even unassailable point could be made that it is this treaty that provided for highly politicized processes such as Security Council referrals to the ICC, and allows domestic leaders to refer their local rivals and enemies to the ICC without referring themselves (even though the relevant atrocities are almost always committed by both sides), and provides for the discretion of the Prosecutor of the ICC

to allow this kind of bias to obtain. Yet it should be remembered that it is military, political, economic, social and ideational pressures in a world of grossly unequal power that shaped and defined the very contents of the Rome Statute itself and continue to shape and orient ICC praxis, regardless of the contents of the text of the Rome Statute.

Overall, the key point is that international criminal justice has increasingly tended to take one particular, generally inflexible, ICC-heavy, form in its encounters with gross human rights abuses nearly exclusively in the case of the African continent, largely because of the interplay of domestic and global power matrices. The fact that the ICC is now playing a more central (nay near-exclusive) role in Africa and eschews such a role anywhere else in the world is not simply due to the fact that too many egregious abuses of human rights have occurred on that continent, but is better explained by the interplay of such domestic and global power matrices. This interplay is pivotal in shaping international criminal texts, normativity and justice, as well as actual ICC praxis, and does so in a way that produces the peculiar sort of 'afro-centrism' that the ICC has thus far exhibited.

Conclusion

This article has argued, *inter alia*, that although there are pros and cons of the deployment of the ICC playing a central role in the effort to redress gross human rights abuses in Africa to achieve healing and a sustainable and just peace in every relevant situation on the continent, the frequency and near tunnel vision with which that Court is being deployed in almost every possible situation on the continent, as if it that were the only possible posture to take or stance to adopt, is fraught with questions. Secondly, the article suggests that the nature of the choice before us is not a case of the ICC or nothing at all. A range of other reasonable options exist to be selected from the repertoire of international criminal law and policy. In living international criminal law, the choice to deploy one or more of the available remedial options (be it the ICC, truth and reconciliation, an amnesty, or something else) tends to be adjusted to the peculiarities of each country or situation at issue. Thus, in spite of the tunnel vision with which the ICC option now tends to be selected, actual international criminal justice praxis is in fact defined by a particular, more or less two-dimensional, kind of sliding scale. The most pivotal explanation (among many possibilities) for this type of tunnel vision, i.e. the ICC-heavy form that international criminal justice praxis tends to take in its encounters with gross human rights abuses in Africa, and the partial eclipsing over only African skies of the sliding scale that otherwise defines international criminal justice, is the

interplay of domestic and global power matrices where power is understood not merely in military, economic and political terms, but also in social and ideational senses.

Finally, to be clear, no outright opposition to the deployment of the ICC in Africa is articulated or even suggested in this article. The background point is that reasonable and viable alternatives to ICC deployment do exist, and may in some cases be better suited to the particular context at issue. The knee-jerk, inexorable deployment of the ICC, which in any case has tended to be over-determined by power, ought to be eschewed. Just because we have the ICC hammer does not mean that every gross human rights abuse problem is a nail.

Notes

1. This proposition is accepted by virtually every 'school' of international relations, from realism (which emphasizes it) through liberalism (which does not emphasize it as much) to constructivism (which emphasizes it the least among these three schools). For a summary of all of these approaches and their relationship to the theories of human rights institutions, see Okafor 2007b.
2. As is now well known, the ICC and the prosecutorial/punitive international criminal justice approach that it exemplifies has become the preferred way (indeed the major way) of addressing the incidence of gross human rights abuses (that constitute international crimes) in Africa. This is so despite the failure of the ICC to launch even a single prosecution anywhere else in the world. E.g. see Tiladi 2009; and Keppler 2012.
3. This section of the paper is based on our article entitled 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections' (2015) 9 (1) International Journal of Transitional Justice 90 – 108.
4. For an example pertaining to British forces, see Reilly and Drury 2014.
5. On the 'truth and reconciliation' approach to transitional justice and aspects of the South African instantiation of this approach, see Avruch and Vejarano 2002.
6. The Court may be taking steps to dilute this perception. It has recently announced an investigation of alleged international crimes committed by British forces in Iraq. See Reilly and Drury 2014: n5.
7. For example, see Keppler (2012: 6n2), who has noted, correctly, that 'meanwhile, African civil society has firmly and consistently raised its voice in response to attacks on the Court. More than 160 organizations based in more than thirty African countries have spoken out about the ICC's importance for Africa, and the need for the Court to receive adequate cooperation from states in response to the AU call for non-cooperation. Civil society organizations have repeatedly collaborated on letters, analyses and meetings with officials of African ICC states to convey

the need for strong African government support for the ICC'. However, what Keppler fails to appreciate is that one can support the ICC and still argue that it should not be in a kind of geo-stationary orbit above *only* Africa. One need not always ask for *fewer* prosecutions by the ICC, but can ask for *more* such trials from other places and of other kinds of alleged international criminals. The fact that many analysts have attributed the victory of Uhuru Kenyatta and William Ruto in the last Kenyan presidential and vice-presidential polls respectively to their being dragged before the ICC, and their mobilization of public antipathy for the seeming total focus of that Court on targeting Africans, should give scholars pause before toeing Keppler's line. For more information, see BBC News 2013. Again, it should be remembered that civil society groups in Africa, especially those of the ilk that Keppler relies on, are not always deeply rooted among their own people and do not always reflect the popular perspective in whole or even in significant part. See Okafor 2007a; Mutua 1996.

8. In Zimbabwe an upsurge in violence and repression greeted the prospect that the opposition would unseat Robert Mugabe in the 2008 elections. See Amnesty International 2008. This repression continues to this day, although it is no longer as violent. Violence became less necessary since the opposition has been largely defeated politically and otherwise caged by Mugabe. See Human Rights Watch 2014. In Sudan, al-Bashir's repression has ebbed and flowed through his tenure, but has continued at a high intensity since his indictment in 2009 by the ICC. See Bashir-Watch n.d.
9. The Rome Statute is the constitutional framework that guides and gives life-sap both to the ICC and to much contemporary international criminal justice praxis. See the *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, (1998) 37 I.L.M. 999 [Rome Statute].
10. This Court appears to be the AU's response to the perceived shortcomings of the ICC and their perceived need for a more balanced transitional justice mechanism in Africa.
11. Over 160,000 persons have thus far been killed in Syria. See Huffington Post 2015. By contrast, the number for Côte d'Ivoire is estimated at 3,000 (i.e. less than 2.5 per cent of the Syrian death toll thus far). See Wells 2013.
12. The University of Uppsala, Sweden's 'Uppsala Conflict Data Program' has produced a telling 2013 graph that justifies this position. This map shows, for instance that there has been a much higher incidence of such abuses in Asia than in Africa. See Uppsala Conflict Data Program, 'Armed Conflict by Region, 1946-2012', available at http://www.pcr.uu.se/digitalAssets/66/66314_1conflict_region_2012.pdf.
13. There is no disagreement that the ICC has thus far focused virtually all of its attention on the African continent. See Keppler 2012.
14. On this point we draw on and agree with constructivist international law and IR scholars (broadly defined). See Okafor 2007a: n.1.
15. For a comprehensive list, see *International Criminal Court,* 'States parties to the Rome Statute', available at http://www.icc-cpi.int/en_menus/asp/.

16 In the US case, it has – so far successfully – gone to great lengths to conclude bilateral treaties with a host of countries to ensure that its citizens would never be hauled before the ICC. See *Coalition for the International Criminal Court,* 'A Universal Court with Global Support; USA and the ICC, Bilateral Immunity Agreements', available at http://www.iccnow.org/?mod=bia.

17. On 26 February 2011, the UN Security Council decided unanimously to refer the situation in Libya since 15 February 2011 to the Office of the Prosecutor (OTP) at the ICC. On 3 March 2011, the OTP announced his decision to open investigations into the situation in Libya, which was assigned by the ICC presidency to Pre-Trial Chamber I. On 27 June 2011, Pre-Trial Chamber I issued three warrants of arrest respectively for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 until at least 28 February 2011, through the State Apparatus and Security Forces. On 22 November 2011, Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi following his death. The other two suspects are not in the custody of the Court. See *International Criminal Court,* 'Situations and Cases', available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20 cases/Pages/situations%20and%20 cases.aspx. Regarding Sudan, the situation in Darfur has given rise to five cases in the ICC.

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Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan

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Abstract

The International Criminal Court (ICC) was established as a permanent independent institution to prosecute individuals who have committed or are implicated in the most serious crimes of international concern including genocide, crimes against humanity and war crimes. This study assesses the challenge of ensuring peace and reconciliation while holding leaders accountable, with specific reference to the politics of the ICC cases in Sudan (Darfur) and Kenya. In particular, this article argues that the issue of prosecuting alleged perpetrators is problematic with respect to the cases that the ICC is currently engaged in. The study argues that since the ICC has become involved in peace, reconciliation and political processes, it thus has the potential to disrupt such initiatives if its interventions are not appropriately sequenced. The study further argues that both President Omar al-Bashir of Sudan, and subsequently President Uhuru Kenyatta of Kenya, managed to politicize the ICC interventions in their countries. The article concludes that this process of politicization of the Court's interventions in Sudan and Kenya, eventually led the ICC into a political stand-off with the African Union (AU), with the United Nations Security Council being an unresponsive but implicated secondary actor. The study also concludes that since neither the ICC nor the AU have managed to find a way out of the impasse, there is a need to develop some innovative strategies. This article therefore offers some insights into a prospective way forward.

Résumé

La Cour pénale internationale (CPI) a été mise en place en tant qu'institution indépendante permanente pour poursuivre les individus qui ont orchestré et mis en œuvre les crimes les plus sérieux de préoccupation internationale, y compris

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les crimes contre l'humanité et les crimes de guerre. Cette étude évalue le défi d'assurer la paix et la réconciliation tout en tenant les dirigeants responsable, avec une référence spécifique à la politique de la CPI sur les dossiers au Soudan (Darfour) et au Kenya. En particulier, cet article soutient le point de vue que la question de la poursuite des auteurs présumés est problématique en ce qui concerne les dossiers dans lesquels la CPI est actuellement engagé. L'étude soutient que puisque la CPI est devenu engagé dans la paix, la réconciliation et les processus politique, il a le potentiel de perturber de telles initiatives si ses interventions ne sont pas adéquatement séquences. Elle soutient aussi qu'à la fois le Président Omar al-Bashir du Soudan et ensuite le Président Uhuru Kenyatta du Kenya, ont réussi a politiser les interventions de la CPI dans leur pays. Cet article conclut que ce processus de politisation des interventions de la Cour au Soudan et au Kenya, a finalement conduit la CPI dans un affrontement avec l'Union Africaine (UA), avec le Conseil de Sécurité des Nations-Unies étant un acteur non-réactif, mais impliqué. L'étude conclut aussi que puisque ni le CPI, ni l'UA n'ont réussi à trouver une voie de sortie de l'impasse, il y a besoin de développer certaines stratégies innovantes. Cet article offre en conséquence certaines réflexions sur une marche en avant.

Introduction

The International Criminal Court (ICC) was established as a permanent independent institution to prosecute individuals who have orchestrated and implemented the most serious crimes of international concern including genocide, crimes against humanity and war crimes. The Rome Statute, which entered into force on 1 July 2002, is explicit on the role of the Court in exercising a criminal jurisdiction over perpetrators of these crimes. This study will assess the challenge of ensuring peace and reconciliation while holding leaders accountable, with specific reference to the politics of the ICC cases in Sudan (Darfur) and Kenya. In particular, the study will argue that for the cases that the ICC is currently engaged in, such as Sudan and Kenya, the issue of prosecuting alleged perpetrators is problematic. It is evident in practice that the individuals who have been subject to the jurisdiction of the Court are also key interlocutors in ongoing peace processes with all the complexities that this entails. Therefore, the study will argue that since the ICC has become implicated in peace, reconciliation and political processes, it also has the potential to disrupt such initiatives if its interventions are not appropriately sequenced.

African countries were actively involved in the creation of the International Criminal Court and played a crucial role at the Rome conference when the Court's Statute was drafted and adopted. To date, Africa represents the largest regional grouping of countries within the ICC's Assembly of States

Parties. While African countries were initially supportive of the ICC the relationship degenerated in 2008 when President Omar al-Bashir of Sudan was indicted by the Court. Following this move the African Union, which is representative of virtually all countries on the continent, adopted a hostile posture towards the ICC. The African Union called for its member states to implement a policy of non-cooperation with the Court, which remains the stated position of the continental body. This study will argue that both President Omar al-Bashir and subsequently President Uhuru Kenyatta of Kenya, managed to politicize the ICC interventions in their countries. Furthermore, al-Bashir and Kenyatta were able to pan-Africanize their criticisms and contestations against the ICC through the African Union (AU) which was pre-disposed to challenging the Court's interventions on the continent.

The study will suggest that even though both organizations share a mandate to address impunity, the stand-off between the ICC and AU suggests that they are in fact engaged in practicing a variation of 'judicial politics' and 'political justice'. The study concludes that this process of politicization of the Court's interventions in Sudan and Kenya ultimately subsumed the ICC into a political stand-off against the African Union (AU), with the UN Security Council as an unresponsive but implicated secondary actor. The study will also conclude that since neither the ICC nor the AU have managed to find a way out their impasse innovative strategies need to be adopted to ensure that both organizations fulfil their mandate to address impunity on the African continent. This study offers insights into a prospective way forward for confronting impunity and holding leaders accountable, while ensuring the promotion of peace and reconciliation in Africa. This study draws from literature in a range of disciplines including international law; international relations and political studies. Consequently, it provides an interdisciplinary contribution to the discourse relating to the ICC and its relationship with Africa.

Africa and the Establishment of the ICC

The Trajectory of International Criminal Justice

The establishment of the ICC was the culmination of an evolution of international justice that can be traced back to the Nuremberg and Tokyo trials following the Second World War. The Rome diplomatic conference which led to the signing of the Statute establishing the Court, in July 1998, was a long and arduous affair of international negotiation and brinkmanship. The majority of countries represented at the Rome conference, including

African countries were of the view that it would be a positive development in global governance to operationalize an international criminal justice regime which would hold accountable individuals who commit gross atrocities and violations against human rights. Specifically, the Court has jurisdiction over war crimes, crimes against humanity and genocide; and the intention is that its jurisdiction over the crime of aggression will become operative by 2017. The reality of the Rwandan genocide of 1994 also convinced many African governments of the need to support an international criminal justice regime which would confront impunity and the persistence of mass human rights violations on the continent. African countries were therefore part of a wider campaign of support for the ICC.

The Court also had its opponents. At the 1998 Rome conference, 120 participants voted for the final draft of the Rome Statute, but twenty-one abstained and seven voted against. From its inception, 'the Court faced a strong challenge from the United States, which first signed the Statute and then "unsigned" it' (Sriram 2009: 315). The failure of powerful countries, including Russia and China, to proactively support the Court and subject themselves to its criminal jurisdiction, immediately began to raise alarm bells about the reach and ultimately the efficacy of the Court. The concern was that the remit of the Court would be confined to the middle and weaker powers within the international system. The Statute required sixty ratifications to come into force, which were obtained in April 2002, paving the way for the launch of the ICC in July 2002. The African governments subsequently raised objections about the self-exclusion by powerful countries, underpinned by concerns about how the original noble intentions of the Court had become subverted by the political expediency of the interests of the great powers.

Interventions of the ICC and Perceptions in Africa

The Advent of Political Justice

The Court's current prosecutorial interventions are exclusively in Africa: the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda, Libya, Côte d'Ivoire, Mali and Kenya. Through a combination of self-initiated interventions by the former Prosecutor, Louis Moreno Ocampo, as well as two UN Security Council referrals, and the submission by individual governments of cases to the Court, this Afro-centric focus has created a distorted perception within the African continent about the intention underlying the establishment of the Court. It is important to note that the cases in the Central African Republic, the Democratic Republic of the Congo and Uganda were self-

referrals by the governments of these countries. However, the fact that these cases were referred by presidents of countries whose political intention was to target their political opponents indicates that the ICC became a willing accomplice to the machinations of domestic politicians. This has discredited the ICC in the eyes of the political opponents and their supporters who were summoned by the Court. This means that the ICC, by association with the ruling regime, effectively became instrumentalized as a 'political weapon' in these countries. Consequently, there is sense in which 'political justice' is informing the cases currently before the ICC notably in Sudan, Kenya, Uganda, DRC, Côte d'Ivoire, CAR and Mali.

The Reality of Selective Justice

In addition, there is the issue of international political perceptions of the ICC interventions in Africa. By examining each African case one might be able to formulate a rational explanation as to why all the current cases of the ICC are from Africa. One can observe that there is a combination of domestic and international political interests behind the submission of, for the time being, only African cases and UN Security Council referrals to the ICC. The UN Security Council is effectively dominated both diplomatically and financially by its Permanent Five (P5) – China, France, Russia, United Kingdom and United States, which constitute the global power elite. The reality is that African countries voluntarily signed up to be subject to the jurisdiction of the Court, so some have questioned why they subsequently have criticized the Court for doing its work. However, one might argue that it is possible for a neutral observer, who critically analyses the facts, to develop the perception that the ICC was established for the sole purpose of prosecuting cases from Africa, given the fact that all of the individuals who have been summoned are African.

Irrespective of the prism through which one chooses to assess the situation, there is a perception among several African governments that the Prosecutor has been selective in submitting cases to the ICC Pre-Trial Chambers. The selective justice in the Court's current prosecutions is seen as an injustice towards the African continent and a form of 'judicial politics'. War crimes are being committed across the world and the ICC has opened a number of preliminary investigations in non-African countries including Afghanistan, Georgia, Colombia, Honduras and Korea. In 2014, the ICC opened preliminary investigations into potential war crimes committed in Iraq by military personnel and political leaders from the United Kingdom, based on a dossier submitted by civil society activists. However, the slow pace, and as some have argued the 'non-movement' in bringing preliminary

to the point of issuing summons and initiating prosecutions of non-African cases, suggests to analysts and politicians in Africa, that a more insidious agenda is in fact in operation as far as ICC interventions and Africa are concerned. Hence, it appears to African governments that the ICC is keen to pursue cases on their continent only, where the states are weak when compared to the diplomatic, economic and financial might of the US, the United Kingdom, Russia and China. This has hit a diplomatic nerve within the African continent. According to some African officials, there is an entrenched injustice in the selective actions of this international criminal court system whose primary function is to pursue justice for victims of gross violations. Proponents of the Court end up engaging in highly convoluted and incoherent arguments as to why there are no cases from outside Africa.

The Moral Integrity of the ICC System

The moral integrity of the ICC system, including the UNSC referral mechanism, has therefore been called into question by a number of commentators and observers in Africa. The essential accusation is that cases are not being pursued on the basis of universal demands of justice, but according to the political expedient of choosing cases that will not cause the Court and its main financial supporters any concerns.

Crisis in Kenya: The Challenge of Holding Leaders Accountable

A History of Violence in Kenya

Following the presidential elections held in Kenya on 27 December 2007 the results of the poll were heavily contested by the two main political parties, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM). When the contested results were announced, violent protests, ethnic profiling and killings afflicted the country in the early months of 2008 across Kenya. The violence affected communities in the low-income areas of the capital city of Nairobi, as well as in key urban and rural centres including Mombasa, Kisumu, Eldoret and parts of the Rift Valley, Nyanza, Western and Coastal Provinces. Over a six to seven week period an estimated 1,200 people were killed in the violent clashes and approximately 450,000 people were internally displaced and forced to flee their homes as a direct result of the violence. A National Accord and Reconciliation Agreement was mediated by the Kofi Annan-led Panel of Eminent Personalities, under the auspices of the AU, on 28 February 2008. The Agreement stipulated the need to convene commissions of inquiry to assess the electoral process and also to investigate the post-electoral violence.

Efforts to Domesticate the Prosecution of International Crimes

The Kenyan Commission of Inquiry into Post-Election Violence (CIPEV – the Waki Commission) was mandated to investigate the facts and circumstances surrounding the post-electoral violence. On 11 December 2008, the Kenyan Parliament passed the International Crimes Bill which effectively domesticated the Statute of the International Criminal Court. The passage of this Bill empowered the Kenyan state to investigate and prosecute international crimes committed locally or abroad by a Kenyan or committed in any place against a Kenyan. The passage of this Bill was a key recommendation of the Waki Commission. The next step was supposed to be the establishment of a Special Tribunal of Kenya to begin the process of adjudicating on cases relating to the organizers and perpetrators of the post-electoral violence in Kenya.

The Aborted Special Tribunal of Kenya

To confront impunity, the Waki Report called for the establishment of a Special Tribunal of Kenya to try suspected sponsors and organizers of the post-electoral violence. This would serve as an in-country legal framework for the adjudication and administration of justice for the alleged suspects. Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for in-action or intransigence. Specifically, the Waki Report states that if 'an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted', then 'a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court' (CIPEV 2008: 473). This sunset clause effectively laid the foundation for the Prosecutor of the ICC to intervene in Kenya. Subsequently, Kofi Annan submitted the list of suspects to the first Prosecutor of the ICC, Louis Moreno Ocampo, who selected six names, which were subsequently reduced to four names by the ICC trial chambers.

Conflict in Sudan: The Challenge of Holding Leaders Accountable

Post-colonial Sudan was beset from the outset with political tension, which escalated in the early 1970s into a war of secession by the south. By the 1990s, the Sudanese National Islamic Front (NIF) of President Omar al-Bashir, who took power through a military coup in 1989, launched an Islamist-based domestic and foreign policy, thus perpetuating tension including among

the Christian and Animist communities in the south of the country. The longstanding dispute between the Sudanese government and the secessionist southern Sudan People's Liberation Movement/Army (SPLM/A) significantly affected the dynamics of the region. Relations with Ethiopia and Eritrea, who were engaged in a border war, deteriorated. The conflict between the Government of Uganda and the Lord's Resistance Army (LRA) in northern Uganda is also affected by the situation in Sudan, since Ugandan resistance militia are launching their attacks from Sudanese territory. Hundreds of thousands of Sudanese refugees are now camped in neighbouring countries.

The Conflict in Darfur and the Sudan Regime's Atrocities

In 2004, the conflict in Darfur in western Sudan devastated social infrastructure and subjected a large number of people to starvation (IRIN 2004). The situation turned out to be the most difficult humanitarian challenge that the African continent has experienced. The conflict in this area was initiated in February 2003 when local movements rebelled against discrimination towards the region's three main indigenous ethnic groups – the Fur, Massalit and Zaghawa. They also demanded greater political participation in their own affairs and the adoption of programmes to genuinely promote economic development. These populations organized themselves into armed groups known as the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM). Subsequently, these armed groups have splintered and fragmented into a broad range of militia.

From the outset, the al-Bashir-led government of Sudan engaged, and continues to confront, these groups in armed confrontation. By the mid-2000s pro-government militia (also colloquially known as the Janjawid) and anti-government militia, SLA and JEM, were fighting over control of pastoral and agricultural land. The majority of humanitarian workers on the ground as well as the victims suspected that the Janjawid was receiving covert support from the government. The pro-government militia aggressively conducted violent pogroms against the people of the region. In particular the pro-government militia was accused of stealing cattle and taking over the region's grazing lands and scarce water sources from the Fur, Massalit and Zaghawa ethnic groups of the region.

The United Nations Referral of the Darfur Situation

In addition to the fighting there has been a pattern of organized attacks on civilians and villages, including killings, rape and abductions. A particular conflict strategy seemed to be predicated on the forced displacement,

through the destruction of homes and livelihoods, of farming populations in the region. Estimates indicate that sixty per cent of the villages in this region of Darfur, which is home to about 1.5 million people, have been destroyed, burned or abandoned because of fear of attacks from the warring parties, aerial bombardments from government troops and compulsory recruitment by the SLA and JEM. In 2005, the unfolding situation motivated the United Nations Security Council (UNSC) to refer the situation in Darfur to the ICC.

The Politics of the ICC Cases in Sudan and Kenya and the African Union's Involvement

The quest to hold leaders accountable in Sudan and Kenya gradually became transformed into a contestation between the African Union and the ICC. It is often the case that individuals and leaders who have been accused of planning, financing, instigating and executing atrocities against citizens of another group, all in the name of civil war, can be investigated by the ICC if the country in question is a States Party or if the issue is referred to the Court by the UNSC. However, it is often the case also that those individuals and leaders are the very same people who are called upon to engage in a peace process that will lead to the signing of a peace agreement and ensure its implementation (Meernik 2005: 272).

ICC Interventions in Sudan Relating to the Darfur Region

In the situation in Darfur, the case of *Prosecutor v. Omar al-Bashir* proved to be controversial. The ICC Pre-Trial Chamber I has issued an arrest warrant for al-Bashir for genocide, crimes against humanity and war crimes. Meeting shortly after the Court's decision, the African Union Peace and Security Council issued a communiqué on 5 March 2009 which lamented that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan (African Union 2009). Additionally, through its communiqué of 5 March 2010, the AU Peace and Security Council (PSC) requested the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer the indictment and arrest of al-Bashir. The AU PSC subsequently expressed its regret over the UN Security Council's failure to exercise its powers of deferral and effectively postpone any action of the ICC. Consequently, on 3 July 2009, at the 13th Annual Summit of the Assembly of Heads of State and Government held in Sirte, Libya, the African Union decided not to cooperate with the ICC in facilitating the arrest of al-Bashir. This decision led to a souring of relations between the AU and the Court.

The AU was making the case for sequencing the prosecution by the Court due to the fragile peace in Darfur. There were undoubtedly political reasons for such a request by the AU, since the arrest and arraignment of a sitting head of state in Africa could set a precedent for a significant number of other leaders on the continent, who could potentially be subject to the criminal jurisdiction of the ICC for their own actions. Therefore, rallying behind al-Bashir, who was re-elected as President of Sudan in April 2010, could be construed not only as a face-saving exercise.

To date, the Office of the Prosecutor of the ICC has so far been faced with non compliance by the Government of Sudan with regard to the arrest warrant for al-Bashir, and even other African countries have declined to arrest Bashir when he has travelled there, including Djibouti, Kenya, Ethiopia, South Sudan and Chad. In this case, the prosecution is being delayed not because of the decision and discretion of the Court but because of the non compliance of African countries and the international community in seeing through its request (De Waal 2008: 31).

In the majority of cases that the ICC is currently engaged in, the issue of prosecuting alleged perpetrators is problematic. As noted earlier, given the contentious reality that, more often than not, individuals who have been subject to the jurisdiction of the Court are also key interlocutors in ongoing peace processes, the Court is currently implicated in influencing the dynamics of peace-building in countries in which prosecutions are pending or ongoing. Therefore, the ICC has the potential to disrupt in-country peace-building initiatives if its interventions are not sequenced appropriately (De Waal 2008: 31).

On 29 and 30 January 2012, the 18th Ordinary Session of the Assembly of AU Heads of State and Government, which was held in Addis Ababa, Ethiopia, reiterated its position not to cooperate with the International Criminal Court. It stipulated that all AU states had to abide by this decision and that failure to do so would invite sanctions from the Union. In particular, the decision urged 'all member states to comply with AU Assembly Decisions on the warrants of arrest issued by the Court against President Bashir of the Sudan' (African Union 2012: paragraph 8). The African Union further requested its member states to ensure that its request to defer the situations in Sudan, as well as Kenya, was considered by the UN Security Council.

ICC Interventions in Kenya

On 31 March 2010, Pre-Trial Chamber II granted former ICC Prosecutor Ocampo his request to open an investigation using his proprio motu powers into the situation in Kenya. On 15 December 2010, Ocampo identified

six individuals whom he suspected of orchestrating the most serious crimes during the Kenyan post-electoral violence of 2007 and 2008. The so-called Ocampo Six included Uhuru Kenyatta (former Deputy President), William Ruto (former Minister), Henry Kosgey (former Minister and Member of Parliament), Joshua Arap Sang (radio presenter), Mohammed Ali (former Head of the Police) and Francis Muthaura (former Head of the Civil Service). Subsequently, the ICC Pre-Trial Chamber II found that there was a reasonable basis for all six to appear before the Court for alleged crimes against humanity. On 8 March 2011, the ICC issued a summons to appear before the Court. On 7 and 8 April 2011, all six individuals voluntarily appeared before Pre-Trial Chamber II. Between 1 September and 5 October 2011, the confirmation of charges hearings took place. On 23 January 2012, the Pre-Trial Chamber II found that the ICC Prosecutor's evidence failed to satisfy the evidentiary threshold required in the case of Henry Kosgey and Mohammed Ali. In terms of Francis Muthaura, even though his charges were initially confirmed, they were subsequently dropped. On 29 March 2012, the ICC Presidency constituted Trail Chamber V to conduct the Ruto, Sang and Kenyatta cases. In a subsequent ruling the ICC postponed Kenyatta's trial to April 2013 after the presidential election. Legal analysts would argue that this was well within the ICC's right, however, political analysts have argued that this was a pragmatic political decision by the ICC in order to avoid entangling itself in the Kenyan presidential poll which took place in 2013. This intention was however subverted by events on the ground as the ICC became increasingly politicized within the Kenyan domestic political scene.

'Choices have Consequences': The Politicization of the ICC in Kenya's 2013 Elections

In parallel to these ICC proceedings, the politicization of the Kenyan ICC cases was unravelling in Kenya, in the lead-up to the presidential elections which were due to take place in March 2013. In particular, Kenyatta and Ruto combined their political forces to establish the Jubilee political party, and accused the former Prime Minister, Riala Odinga, who was leading the CORD political party, of having engineered the submission of their names to the ICC. The specifics of how Odinga was supposed to have orchestrated this political sleight of hand were never explained by the Kenyatta-Ruto axis, and as time progressed the issue of 'how' became less relevant as high octane politics consumed the Kenyan populace. The phrase that was regularly utilized to politically taunt Kenyatta and Ruto was: 'don't be vague and go to The Hague'.

As a counter-argument, the Kenyatta-Ruto axis, nicknamed 'Uhuruto', argued that Odinga should have been among those named to the ICC given his role as Prime Minister and one of the principals fomenting civil unrest during the 2007 and 2008 post-election violence. Analysts have suggested that if one were to broaden the net, then Mwai Kibaki, as the President of the country at the time, and the ultimate chief executive, or as some would argue 'chief executor', should also have been among the names that were submitted to the ICC Prosecutor. The legal arguments as to whether the two principals, Kibaki and Odinga, as the individuals who are ultimately responsible for decisions and actions taken by their subordinates, have since been drowned out by the political narrative which consumed Kenya between the summons to appear before the ICC and the presidential poll of March 2013. International actors joined the political bandwagon and chose their sides in this cacophony of the domestic politicization of international criminal justice processes, with a US Assistant Secretary of State Johnnie Carson, having stated in effect that 'choices would have consequences' if Kenyatta and Ruto were elected as president and deputy president respectively (Voice of America 2013). Oblivious to the incendiary nature of such a comment coming from the world's only super-power, Carson unwittingly played into Kenyatta and Ruto's game of politicizing their ICC cases. Carson's utterances further fuelled the notion that foreign interests, and now specifically the United States government, was tacitly supporting Odinga as their preferred candidate for Kenya's presidency, despite a subsequent claim by President Barack Obama that his administration was neutral on the issue. Kenyatta and Ruto were able to play the 'foreign interests' card all the way to the day of the elections.

In an outcome that surprised a number of observers, Kenyatta won the presidential poll in March 2013 and Ruto became his deputy. Kenyatta and Ruto did not waste any time in manoeuvering to avoid taking part in the ICC trial process. A broad range of political and diplomatic strategies and tactics were deployed, and continue to be deployed, to avoid Kenyatta in particular appearing before the ICC. At the heart of Kenyatta's strategy was to pan-Africanize the issue of his summons before the ICC as a sitting head of state, by appealing to the African Union for support and endorsement of his position. The African Union had been embroiled in a stand-off with the ICC, fuelled by the UN Security Council referral of Bashir, and therefore Kenyatta found a willing interlocutor among his peers at the AU.

On 12 October 2013, an Extraordinary Session of the Assembly of Heads of State and Government of the African Union was convened in Addis Ababa, Ethiopia, to discuss Africa's relationship with the ICC. The African Union issued a series of decisions, including the need to 'safeguard the constitutional order, stability and integrity of member states' by ensuring that 'no charges

shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such a capacity during their terms of office' (African Union 2013: paragraph 10 (i)). Furthermore, the AU Heads of State called for suspension of the trials of Kenyatta and Ruto until they have completed their terms of office. In a controversial move, the AU Assembly also stipulated 'that any AU member state that wishes to refer a case to the ICC may inform and seek the advice of the African Union' (African Union 2013: paragraph 10 (viii)). In a direct challenge to a case before the International Criminal Court, the AU Assembly decided 'that President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its member states have been adequately addressed by the UN Security Council and the ICC' (African Union 2013: paragraph 10 (xi)).

This in effect confirmed that Kenyatta had found a willing partner in the AU in terms of taking on and amplifying the criticisms of the ICC's interventions on the African continent, just like Bashir had achieved before him. Some analysts have argued that this series of decisions signified the AU as consolidating and entrenching its position with regard to the ICC. The notion that an AU member state has to inform and seek the advice of the Union if it wishes to refer a case to the ICC has been criticized for its overt politicization of what should be impartial legal processes.

The UNSC Meeting on a Deferral of the Kenyan Cases

On 15 November 2013, at the 7,060th Meeting of the UN Security Council, a Resolution seeking to request the ICC under Chapter VII of the UN Charter to defer the investigation and prosecution of President Kenyatta and Deputy President Ruto for twelve months, in accordance with Article 16 of the Rome Statute, failed to win a majority. In terms of the vote, seven members voted in favour and eight members abstained, which prevented a mandatory nine votes being secured. Thus there was no veto to pass the Resolution. This enabled African member states in favour of the UNSC at the time to criticize the Council for its selective application of the powers of the ICC, notably in situations that were not under the 'patronage' of the P5 members.

The ICC Assembly of State Parties meeting on Leadership Immunity

Since the indictment of Bashir, the African Union has argued that the Rome Statute cannot override the immunity of state officials whose countries are not members of the Assembly of States Parties. The African Union sought an advisory opinion from the International Court of Justice on the immunities of state officials within the rubric of international law.

On 22 November 2013, there were early indications that the ICC system was open to addressing the concerns of African countries when the 12th Session of the Assembly of States Parties to the Rome Statute of the International Court convened a special segment, at the request of the African Union, on the theme of 'Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation'. The speakers included the former AU Legal Counsel, Djenaba Diarra, and the Kenyan Attorney General, Githu Muigai. Diarra commended the Assembly of States Parties for convening the debate and then went on to reiterate her organization's concern about the failure of the ICC to undertake prosecutions outside Africa, as well as the impact of international criminal proceedings upon efforts to promote peace and stabilize regions. Muigai argued that immunities for sitting heads of state already exist in domestic jurisdictions and that it would be anachronistic for them not be recognized and implemented at an international level.

Rome Statute Provisions: Sequencing of Punitive Justice to Enable Peace-building

The mandate of the ICC is unambiguous, as stated in Article 1, in that it seeks to 'exercise it jurisdiction over persons for the most serious crimes of international concern' (Rome Statute 2002: Article 1). Article 5 lists these as: a) the crime of genocide; b) crimes against humanity; c) war crimes; and d) the crime of aggression (Rome Statute 2002: Article 5(a)–(d)). The mandate of the Court is therefore to prosecute individuals who commit these crimes either acting alone or in concert with others. Therefore, in this sense the function of the ICC is to mete out retributive or punitive justice. It views atrocities of 'international concern', as requiring a process of redress, so as the Preamble to the Rome Statute states 'to put an end to impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes' (Rome Statute 2002: preamble). In effect, the ICC views itself as having a preventive and deterrent role through its rulings (Cassese, Gaeta and Jones 2002).

Whilst the Preamble of the Rome Statute however also recognizes 'that such grave crimes threaten the *peace, security and well-being of the world*' (Rome Statute 2002: Preamble) the Statute does not further elaborate how the Court will contribute towards advancing 'peace' in the broader sense beyond ensuring that the perpetrators of these crimes are punished. In fact, the Rome Statute does not engage with the issue of peace beyond making this point in the Preamble.

The Rome Statute does not explicitly articulate a definition of justice, but it does tacitly allude to the need for international justice to 'put an end

to impunity' and redress the effects of 'unimaginable atrocities that deeply shock the conscience of humanity' (Rome Statute 2002: Preamble). The Rome Statute does indicate that the ICC is 'complementary to national criminal jurisdictions' (Rome Statute 2002: Preamble). However, it does not refer explicitly to other quasi-judicial mechanisms such as truth commissions. Therefore, there is scant guidance within the Rome Statute as to whether the ICC can complement and enable national restorative justice processes. In effect, there are no explicit provisions within the Rome Statute to provide an insight as to whether there should be the sequencing of the ICC's criminal jurisdiction with the domestic efforts of truth commissions and other restorative justice processes. In September 2007, the Office of the ICC Prosecutor issued a 'Policy Paper on the Interests of Justice' in which it acknowledged that 'it fully endorses the *complementary role* that can be played by *domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of broader justice*' (OTP 2007: 8). More specifically, the Office of the Prosecutor 'notes the *valuable role* such measures may play in dealing with large numbers of offenders and in addressing the *impunity gap*' (Ibid.).

Deferral of Investigation or Prosecution

Specifically, with reference to the deferral of investigation or prosecution, Article 16 states that 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect' (Rome Statute 2002: Article 16). Article 16 of the Rome Statute implies that the initiation, or the threat of the initiation, of an ICC prosecution is part and parcel of the range of provisional measures that the UN Security Council can call upon. The framers of Article 16 of the Rome Statute included the reference to Chapter VII of the UN Charter because it is traditionally associated with the body's authority to impose punitive sanctions.

Sequencing and the Interests of Justice

Another stipulation within the Rome Statute which can provide a basis for sequencing retributive and restorative justice is outlined in Article 53-1(c) which states that the Prosecutor can decline to initiate a process if he or she determines that after 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice' (Rome Statute 2002). As indicated earlier the Rome Statute does not proffer a definition

of justice beyond making reference to what it should be seeking to redress – namely impunity for serious crimes of international concern. Therefore, the reference to the 'interests of justice' in Article 53 of the Statute opens up the possibility for a broader interpretation of the notion of justice. Article 53 effectively gives the Prosecutor the discretion to decide on whether there are 'substantial reasons' not to initiate an investigation.

The Statute of Limitations and the Sequencing of Justice

As far as the non-applicability of the Statute of Limitations is concerned, Article 29 states that 'the crimes within the jurisdiction of the Court shall not be subject to any Statute of Limitations' (Rome Statute 2002: Article 29). In effect, as far as the ICC is concerned there is no time limit imposed upon the prosecution of individuals who commit atrocities and the most serious crimes of concern to the international community. This therefore provides an opening as to how ICC prosecutorial interventions can be sequenced with national efforts to promote restorative justice. Specifically, given the fact that there is in effect no time constraint on when the ICC can initiate, implement and conclude the prosecution of perpetrators, there is thus scope for the Court to sequence its interventions in ways that enable other peace-building process such as the establishment and operationalization of restorative justice processes to take precedence.

The Second Chief Prosecutor and the Prospects for the AU-ICC Relationship

In December 2011, the Assembly of States Parties appointed Fatou Bensouda, former Attorney-General and Minister of Justice of the Gambia, as the consensus choice for the Office of the Prosecutor. Bensouda was a key member of the Ocampo team, as the Deputy Prosecutor in charge of the ICC Prosecutions Division, and it is unlikely that she will digress significantly from the parameters stipulated in the Rome Statute.

Ocampo's Judicial Politics

The former Chief Prosecutor Ocampo was emphatic that he did not 'play politics', but it was all too obvious that he was more enthusiastic about initiating prosecutions in African cases only, not even undertaking preliminary investigations into alleged war crimes in Gaza, Sri Lanka and Chechnya, due to the politically sensitive nature of such actions. The Office of the Prosecutor has conducted preliminary investigations in Afghanistan, Georgia, Colombia, Honduras, Korea and Nigeria. However, in Ocampo's

version of international justice these preliminary investigations took on an air of permanency. 'Permanent preliminary investigations' are essentially a technical way of avoiding launching prosecutions indefinitely.

The historical discrepancy in Ocampo's behaviour and attitude towards non-African war crime situations was not lost on African leaders. In fact, this fuelled allegations that the ICC Prosecutor was implementing a thinly veiled pro-Western neo-colonial agenda, even though he was emphatic in denying this. Critical scholars like Adam Branch have argued that there is no valid reason why Ocampo could not have instigated prosecutions in non-African countries during his tenure (Branch 2011, 2012). As a consequence, Ocampo's version of the execution of the Court's mandate was viewed with suspicion by some actors in Africa, as a form of 'judicial politics' and at a more insidious level a virulent form of 'judicial imperialism'. For example, Ocampo's indictment of six individuals with regard to the crimes against humanity committed during Kenya's post-electoral violence was one of the ways in which the Court was used as a tool for political opportunists to dispose of opponents. The appointment of Bensouda as the Prosecutor was a move calculated to appease the African members of the Assembly of States Parties, and to communicate the notion that it does not view the Court as advancing an anti-African agenda and that the ICC is not a neo-colonial instrument of judicial imperialism to curb for disciplining the 'untamed and still barbaric' African landscape.

Parallel Mandates: ICC, AU and the Prospects for Holding Leaders Accountable

The AU constantly 'reiterates its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union' (African Union 2000). According to officials of the AU, what the body takes exception to is being constrained by how other international actors choose to fight impunity on the African continent.[1] The organizations diverge in that the AU is a political organization and the ICC is an international judicial organization. In this divergence lies the key to how the two organizations go about 'addressing impunity and ensuring accountability for past violations, atrocities and harm done'. The AU, by its very nature, will gravitate first to a political solution and approach to dealing with the past, which places an emphasis on peace-making and political reconciliation. The ICC, by contrast, will tend to pursue international prosecutions, because this is written into its DNA, the Rome Statute. On paper it would appear that the two approaches may never converge.

Indeed, both the AU and the ICC, both of which have in fact been practising a variant of 'political justice' and 'judicial politics', need to

re-orient their stances. The AU needs to move away from its exclusively political posture towards embracing international jurisprudence and the limited interventions by the ICC. Conversely, the Court needs to move away from its unilateral prosecutorial fundamentalism and recognize that there might be a need arrange its interventions in order to give political reconciliation an opportunity to stabilize a country.

On 30 June 2014, at its Annual Summit of the Assembly of Heads of State and Government in Malabo, Equatorial Guinea, the AU issued the Malabo Protocol, which extended the jurisdiction of the African Court of Justice and Human Rights to cover international crimes, along the lines of the Rome Statute. Consequently, when fifteen AU state parties ratify the Malabo Protocol it will come into effect, granting international jurisdiction to the continental court. On 30 January 2015, the AU Assembly of Heads of States and Government began the process of ratifying the Malabo Protocol. However, whether the African Court is empowered with such continental jurisdiction is beside the point; the key issue is that the continental body views its relationship with the ICC as having deteriorated to such a point that it is exploring actively how to make the Court's presence in Africa an irrelevance in the future. International organizations such as the League of Nations have folded when their members effectively ignored their mandates. Will the ICC suffer the same fate?

This question became more poignant when on 5 December 2014 the ICC Prosecutor Bensouda issued a statement indicating that she would withdraw the charges against Kenyatta noting that the she 'did not consider the available evidence to be sufficient to be sufficient to prove Mr. Kenyatta's alleged criminal responsibility beyond a reasonable doubt' (ICC 2014). Bensouda reiterated that she was 'guided by the law and the evidence' and 'not any other consideration', which was an attempt to assuage any fears that she may have made the decision for political reasons. Kenyatta issued a statement immediately also reiterating what he had stated all along that the case against him was fabricated by his political opponents and their Western backers in Washington. Ultimately, Bensouda's withdrawal is a political victory for Kenyatta and now places the ICC on a more precarious footing in terms of its relationship with Africa.

The ICC and Africa: Beyond the Impasse

The need to address impunity is not in question. The question arises as to whether any trust can be ascribed to an international criminal justice system that seems to have created a two-tiered framework, one for the weak and one for the powerful. Specifically, if selective justice is applied what

will be done about the impunity of the powerful countries, notably the P5, who are paradoxically amongst the leading purveyors of violence on the planet. In addition, it is important not to adopt a position of prosecutorial fundamentalism and blind adherence to the principle of pursuing impunity when the trade-off is ongoing violent conflict and the potential death of thousands of people, notably African citizens. The Court's Chief Prosecutor, Fatou Bensouda, needs to appoint a senior political adviser to act as a liaison with political organizations such as the AU. It should be noted that there are diverging opinions about the ICC within the AU. Botswana has publicly disagreed with the AU's decision not to cooperate with the Court, quoting its international obligations under the Rome Statute. Francophone countries within the AU, still besotted with and in some cases beholden to the influence of their former colonial power France, have adopted a lukewarm stance when it comes to confrontation with the ICC. Indeed, in December 2014, the Senegalese Minister of Justice, Sidiki Gaba, was appointed as the President of the ICC Assembly of State Parties. Given Bensouda's position as Chief Prosecutor, there is a Sene-Gambian axis at the helm of the ICC system, which should play into the hands of the AU – in theory. Yet this has not led to the thawing of relations between the ICC and AU. South Africa has also reiterated its commitment to upholding its legal obligations as a State Party to the Rome Statute. These diverging opinions could be leveraged to assist with efforts to accredit the ICC to the AU headquarters in Addis Ababa. Bensouda should also issue a series of OTP Policy Papers on sequencing the administration of justice to enable the promotion of peace-building, particularly in countries still affected by war.

Global Power and the Corruption of International Justice

The International Criminal Justice System: A Question of Legitimacy

According to a number of African governments, a court that does not apply the law universally does not justify the label of a court (Branch 2011: 213). This is particularly important if the jurisdiction of the Court does not apply to some Western or P5 countries that are actively engaged and operating in African conflict zones. What would happen if a citizen of these non-signatory states to the Rome Statute commits war crimes in Africa; who will administer international justice in those particular cases? Although pursuant to the territoriality principle that the ICC would have jurisdiction over such crimes if committed on the territory of an African States Party to the ICC Statute, African leaders seem to be convinced that the Court would not take up the cases, in the same way they seem to be convinced, which has

subsequently proven to be accurate, in believing that the UNSC would not take any step in deferring the prosecution of the Kenyatta and Ruto cases. This glaring discrepancy undermines the evolving international justice regime and reverses gains made on constraining the self-serving agendas of powerful countries, particularly where their relations with weaker states are concerned. The view in Africa is that if one demands accountability for African leaders then the same justice should be demanded also of Western, Russian and Chinese leaders, particularly in situations where there is the perception that these leaders have committed the most serious crimes of international concern (Schabas 2010). In the absence of an overarching system of global political administration or government, international criminal justice will always be subject to the political whims of individual nation states.

The ICC's Subservience to Global Political Imperatives

William Schabas has argued that the ICC has 'moved into dangerous political territory by jeopardizing its base of support among the African States' in the specific case of the arrest warrants issued with reference to Darfur (Schabas 2010: 149). Schabas is identifying a key concern that has begun to taint the supposedly well-intentioned interventions by the ICC, namely the notion that the Court is somehow politically motivated. The cases with respect to Darfur were referred to the ICC by the UN Security Council, which is effectively dominated both diplomatically and financially by its Permanent Five (P5) – China, France, Russia, the United Kingdom and the United States (Happold 2006). Given the historical fact of the politicization of the actions of the Security Council, not least its failure to act during the April 1994 Rwandese genocide, international observers and other countries have intimated that even this deferral was tainted by political imperatives. This exposes the ICC, which is supposed to be an independent Court, as a useful tool to achieve the Security Council's objectives if it cannot fulfil them by other means.

The failure of UNSC to refer Syria to the ICC between 2013 and 2014, despite the commission of specific war crimes, such as a chemical weapon attack in Damascus in September 2013, exposes the fact that when it comes to international criminal justice the legal criteria for criminal liability are not sufficient for a case to come before the ICC for prosecution. As far as the innocent civilians, notably war-affected children in Syria, are concerned, international criminal justice was sacrificed at the altar of geo-political expediency by the very same P5 member of the UNSC who proselytizes to other nations. In May 2014, the US Ambassador to the UNSC, Samantha Power lamented before the Council that 'our grandchildren will ask us years

from now how we could have failed to bring justice to people living in hell on earth'. This was in the context of an argument in favour of referring to the situation in Syria to the ICC. Yet US congressional records reveal that the US has actively campaigned against the ICC all along. The US instrumentalizes the ICC in the worst way possible and according to Somini Sengupta 'it is seen as supporting the body only when it suits the administration's foreign policy agenda, using the threat of prosecution to skewer its foes while protecting its friends from its reach' (Sengupta 2014: 1). This suggests that in the eyes of the US administration the ICC is a useful tool to advance its imperial agenda. This fact alone should raise serious alarm about the ICC which was established to confront impunity. In addition, the US has not ratified the Rome Statute, which reveals the hypocrisy of on the one hand talking up the merits of international law, while surreptitiously undermining it on the other. The ICC is now an extension of global politicking and a terrain of power contestation. International law is only a secondary after-thought. This is in line with the US predisposition to global rules, which it has always believed were a ploy utilized by weaker nations to constrain it actions and full spectrum-dominance of the planet. As the international lawyer, Philippe Sands has argued the US's 'approach to the ICC is symptomatic of a more generalized opposition to international rules and to multilateralism' (Sands 2005: 48).

Schabas argues that 'it is fine for the Court to provide a service to the Security Council, but it must understand that when it does so, it becomes necessarily subservient to political imperatives' (2010: 147). Sengupta argues that in light of the ICC's evident instrumentalization 'such actions have also politicized the notion of international criminal justice and in turn undermined its credibility' (2014: 2). Fanon warned following the UN debacle in the Katanga region of the DRC, that 'in reality the UN is the legal card used by the imperialist interests when the card of brute force has failed' (Fanon 1964: 195).

The issue is no longer whether international criminal justice and the ICC are beholden to global power, the issue now is whether the ICC is subservient to global power. The secondary question is whether it is effectively being utilized as a form of legalized coercion of African countries. Niall Ferguson the controversial British historian made the argument that 'the experiment with political independence, especially in Africa, has been a disaster for most poor countries ... might it not be that for some countries some form of imperial governance … might be better than full independence, not just for a few months or years but for decades?' (Ferguson 2004: 46).

The Dilemma for International Civil Servants at the ICC

The tragedy is that there are extremely capable individuals, including Africans, who are working as international civil servants within the ICC who remain silent despite the evidence of the gradual corruption of their institution. Such officials need to make the argument in defense of the independence of the ICC. If they feel that they do not have the autonomy or freedom to make these arguments, and if they continue to hide behind the argument that they are administering objective and neutral justice, then they will be guilty of practicing self-evident double-standards and hypocrisy in light of the operationalization of the ICC's politicized actions. Such staff members, not least members of the Office of the Prosecutor of the ICC, need to grow political antennae, and acknowledge the highly politicized milieu in which they operate. ICC officials need to become political actors. Otherwise they become lackeys and modern servants to the global paymasters; they expose themselves to the allegation that they are obsessed by the 'paraphernalia of power', while in fact they are mere instruments and pawns in a much larger game of legalized coercion.

Conclusion

The ICC is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity. While the Preamble to the Rome Statute recognizes 'that such grave crimes threaten the peace, security and well-being of the world' (Rome Statute 2002) it does not elaborate how the Court will contribute towards advancing 'peace' in the broader sense, beyond ensuring that the perpetrators of these crimes are punished. The Rome Statute does not make any special provisions for restorative justice, peace and reconciliation processes. This is clearly an omission that needs to be rectified given the highly volatile and politicized situations that the ICC has become involved in and may in future engage in. The merits for sequencing should be informed by an understanding that there can be a constructive relationship between administering punitive sanctions and pursuing inclusive peace.

In Africa, the activities of the ICC have focused on exercising its criminal jurisdiction without engaging the wider issue of how its actions contribute towards consolidating peace. The Court's relationship with Africa and in particular, with the AU, deteriorated following the arrest warrant issued for President al-Bashir of Sudan, and worsened with the summons to President Kenyatta. The AU's policy of non-cooperation with the ICC is undermining the prospects for the development of international justice, particularly on the

African continent. The refusal of some countries to place themselves under the jurisdiction of the Rome Statute means, according to African governments, that the ICC will fall short of being a genuinely international court. Some African governments view this limited and restricted mandate as undermining the principles of international justice. The former ICC Prosecutor Ocampo indicated to interlocutors that he could not apply the same remit of justice to cases in Chechnya, Iraq and Afghanistan because this would be difficult politically. Both Bashir of Sudan and Kenyatta of Kenya, as well as the AU, were able to politicize and pan-Africanize their criticisms of the ICC, to the extent that the dominant view in policy making circles in governments is that the reality of the ICC's interventions amount to there being one law for the powerful and another law for the weak, and selectivity in the administration of international justice. In the face of illegitimate global power, international criminal law becomes a legalized form of coercion, control and dominion, which some would consider to be a form of judicial imperialism. The international criminal court is neither international, in terms of its scope, nor has it upheld the basic tenets of impartial legal criteria in its summons and prosecutions. As such it does not live up to the nomenclature of being a 'court', the only word left in its appellations being 'criminal'. There is an element of 'criminal' failure of the ICC system, to the extent that there is criminal negligence of the needs of victims, due to its inability to serve as a truly international system for all victims.

There is a need for an increased understanding on the part of the Court and its officials of the utility and necessity of the issue of sequencing. The ICC needs to recognize the merits of sequencing and establish the necessary modalities to operationalize its interventions in a way that can complement efforts to promote restorative justice. This suggests that an attitudinal change might be necessary. A purely prosecutorial fundamentalism can cause more harm than good, but the opposite is also true, in the sense that an allergy towards prosecution can prevent serious atrocities from being addressed, which would impact upon achieving sustainable peace in the future. A modus vivendi between retributive and restorative justice needs to be found. A more nuanced approach to instituting cases is required, based on an assessment of what is in the interests of justice and what sort of justice should be pursued at what juncture to support peace and reconciliation processes. On this basis, the sequencing of retributive and restorative justice would thus contribute towards the overall goal stated in the Preamble of the Rome Statute to ensure the peace, security and well-being of the world.

There is an urgent need to chart a different way forward for the relationship between the AU and the ICC, if both institutions are to achieve the goal of

holding leaders accountable for mass atrocities. Both organizations need to recognize that while they are fulfilling different functions - delivering justice in the case of the ICC, and looking out for the interests of African governments in case of the AU - they need to find a way to ensure that the administration of justice complements efforts to promote political reconciliation.

In a contest between the implementation of international justice, which would hold leaders to account, and the securing the political interests of African countries, continued tension between the two organizations does not augur well for improving the relationship. The UN Security Council also has an important role to play to communicate formally with the AU on issues that have been raised in the Council relating to Sudan and Kenya. Ultimately, the UN Security Council is integral to charting a way forward for the AU and ICC, which will need to be predicated on addressing the perceptions of political justice and judicial politics that persist.

Note

1. Off the record discussions conducted with AU officials at their headquarters in Addis Ababa, Ethiopia, March 2013.

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Intricate Entanglement: The ICC and the Pursuit of Peace, Reconciliation and Justice in Libya, Guinea, and Mali

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Abstract

International justice is not merely a function of legislation and adjudication. It depends on the extent to which it is viewed as legitimate by litigants and others based on perceptions of the relationships of the operations of existing regimes of dispensation of justice. This is a reflection of the operations of the institutions of justice and those of the international order: including but not limited to the actions of judicial authorities and other judicial auxiliaries and intermediaries who give effect to justice through their interpretation and application of the law. From this perspective, justice extends beyond the ability of courts to specify the legal, material and moral dimensions of an offence. International justice has social ends that are easily undermined by self-interested attempts to delegitimize judicial institutions – a charge often levelled at the African Union – but also by the desire of others to preserve, as a matter of political inherency, their own sovereign spaces. Above all, the social ends of social justice, which is the end of international justice, is undermined by elevating judicial or punitive justice over larger social goals – as the examples in this article suggest.

Résumé

La justice internationale n'est pas simplement une fonction de législation et de décision. Elle dépend du degré auquel elle est vue comme légitime par les parties au litige et d'autres, partant des perceptions des relations des fonctionnements des régimes existant d'administration de la justice. Cet article est une réflexion sur le fonctionnement des institutions de justice et de celles de l'ordre international, y compris, mais limité aux actions des autorités judiciaires et d'autres auxiliaires judiciaires et intermédiaires qui donnent effet à la justice à travers leur interprétation et application de la loi. A partir de cette perspective, la justice va au-delà des tribunaux a spécifier les dimensions

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juridiques, matérielles et morales d'un délit. La justice internationale à des buts sociaux qui sont facilement fragilisés par des tentatives de son intérêt propre à délégitimer des institutions judiciaires – une accusation souvent formulée à l'Union Africaine – mais aussi par le désir des autres à préserver, en tant qu'élément d'inhérence politique, leurs propres espaces souverains. Par-dessus tout, l'objectif de justice sociale, qui est le but de la justice internationale, est fragilisé en élevant la justice judiciaire ou punitive au dessus des buts sociaux – comme le suggère les exemples dans cet article.

Introduction

International criminal justice (IcJ) and the International Criminal Court (ICC) face a number of significant challenges today. Many of these challenges have appeared in the relationship between 'Africa', represented by the African Union (AU), and the ICC (Roth 2014). At first glance, the implied tension between these two organizations has a simple cause: an opposition between the ICC, viewed by its proponents as an institution created to end impunity around (international) crimes, and a continent perceived by its critics as seeking immunity from prosecution for actual and potential culprits (Halakhe 2014). In fact, Africa and the ICC are involved in a deeply complicated, contentious and entangled relationship around international justice (Clarke 2014). This relationship is mediated by conflicting interests and expectations reflected in the actions of the two contenders (Maunganidze 2012). It would be therefore simplistic to assume that the African Union's opposition to some ICC actions and modes of operation exhaust all African views of the ICC. In fact, African views of deficiencies (and yes biases too) in the operations of the ICC may not be too easily dismissed in the main.

It is without question that the AU is integral to the global consensus around the ICC and IcJ. Africa retains the distinction of being the most implicated in actions prohibited under the Rome Statute (RS) – the founding law of the ICC. This singularity has elicited a number of reactions from interested observers from the United Nations Security Council (UNSC) to transnational humanitarian organizations who had been tempted to place Africa under political and legal receivership: a form of modern trusteeship in which the only acceptable position for Africa and Africans is to acquiesce to 'injunctions' to prosecute under the threat of sanctions and/or referrals to the ICC. These injunctions have mostly been framed as moral imperatives: 1) to 'end impunity' and 2) to render justice to the victims as cornerstone of IcJ (OTP 2007). As it happens, the protagonists of IcJ also include victims and perpetrators but also those acting on their behalf in judicial proceedings. They also include referees; prosecutors and their intermediaries; defence lawyers and national and international authorities; and, evidently, judges and the

international community of states and international society writ large. One would not expect these parties to have uniform interest in justice, even if the events and circumstances in question fall under the general rubrics of genocide, war crimes, and crimes against humanity. These entities adhere principally to the principle of 'ending impunity' in regard to peremptory crimes.

The quasi-theological principle of 'ending impunity' has generated unanimity as to the ends of justice, particularly whether it is to 'avenge' or placate 'victims' or produce a broader form of justice in the interest of social peace. Regardless, Africa has emerged as the space for legal, moral and political experimentation. The purpose of this essay is to investigate, first, what it means to uphold the general principles of law and international jurisprudence in situations arising from civil wars and political protests and, second, whether one may do so without losing sight of the moral purpose and constitutionality of justice afterwards. The first stresses, but not exclusively, judicial neutrality; prosecutorial independence and impartiality; transparency and the avoidance of conflicts of interest in the collection and processing of evidence. The second pertains to the constitutional alignment of the moral purpose of justice (social peace) on the constitutive dimensions of its object: social existence and its life forms.

This essay is mainly predicated on it being the nature of international crimes that they are committed in times of war, conflict or political contestation by unincorporated or incorporated bodies of multitudes, all of whom are neither indictable nor innocent and yet have followers, associates, and sympathizers within the body politic. Whatever one may think of the conduct of particular parties, therefore, the claims leading to crimes are not always illegitimate. The particular actions may be. While these are the titular objects of ICC proceedings, judicial interventions may reflect on the underlying claims of conflict and therefore may have larger social, moral and ethical implications. In short, it is not entirely unreasonable to imagine that the prosecution of international crimes and the resolution of the underlying political conflicts are more often than not intertwined. This latter point remains central to the AU's ambivalence toward the ICC: that is, whether the 'end of impunity' must necessarily transit through the 'avenging of victims' or whether there is a necessity whenever possible to resolve the political conflicts leading to the crimes in conjunction with other modes of individualized forms of justice: compensation, satisfaction, apologies, reconciliation, restitution and the like.

I have three objectives. The first is to test the validity of AU objections to the modes of operation of the ICC against 1) notions of justice professed and promoted by the UNSC and executed by the ICC; 2) demands by transnational and domestic human rights organizations professing to represent

victims; 3) the moral credibility of agents of IcJ competing with or opposing African states in their claims to jurisdiction; and 4) the transparency of the motives of those who would refer African cases to the ICC. The article also offers an opportunity to clarify competing African positions and interests on international justice in conjunction with the underlying jurisprudence. My second objective is to highlight flaws in the jurisprudence emerging from the ICC's Office of the Prosecutor (or OTP) in actual cases involving Libya, Guinea and Mali that may validate AU positions. In the final instance, I return to political, moral and ethical questions that lay at the edges or external walls of justice and sovereignty, in psychic, symbolic and cultural spaces beyond the control of self-proclaimed trustees of international justice, the state and judicial entities that must necessarily figure in the evolving jurisprudence of IcJ. The latter spaces are the domains of different forms of justice whose ethics extend far beyond the capacities of the administrators of justice. They are also the ultimate spaces of the enactment of social peace.

Illusions and Disillusions of IcJ

From a certain absolutist perspective in legal positivism, the parameters of IcJ are as clearly stipulated as the facts of international crimes are easy to establish through the proper application of judicial norms and procedures. This positivist view is based today on the well-worn narrative that the Nuremberg and Tokyo trials established judicial precedents with which to confront crimes associated with war: the crimes of aggression, war crimes and genocide and, lately, crimes against humanity – most of which fall within the jurisdiction of the ICC. From this perspective too, the Geneva Conventions further outlined the obligations of combatants and in so doing the material, moral and political dimensions of international crimes. Consistently, the ICC, particularly its OTP, maintains that the implementation of IcJ merely requires 1) a straightforward application of the rules and procedures outlined in the RS and existing jurisprudence and 2) the goodwill and cooperation of sovereign states, their agencies, international lawyers and citizen advocates (OTP 2010).

This positivist schema, however, does not exactly correspond to the manners in which IcJ takes form in practice. The latter does not depend solely on the strict application of and/or compliance with the letter of the law and attendant judicial procedures. Any law or legal text necessarily contains gaps, aporias, ambiguities and contradictions that result from compromises and deals made at the moment of legislation. The function of the court is not to flatten the language of the law but to align its own implementation with the purpose of legislation: universal justice. It follows that the coming

into form of the symbolic image of justice – articulated in terms of either justice, fairness, equity or the like – necessarily requires judicial actualization by adjusting application in manners that eliminate inconsistency or the appearance of discrimination. In this sense, the embodiment and the spirit of law lives on through jurisprudence, the interpretation of the law and its authoritative translation into a common good.

The idea of complementarity, for instance, is not simply to defer to municipal courts; it is giving actuality to the need for co-production of international justice; a needed recognition of legal pluralism, and an aspiration to a jurisprudence reflective of multiple realities. In this sense, the purpose of the deference and autonomy afforded to municipal courts would be to enable legal insights and the authorization to experiment toward the expansion of international law. Indeed local judicial authorities have a singular advantage over international judicial organization in that they have access to the relevant cultural idioms of justice as well as local vernaculars of the relevant morality. It is these idioms and vernaculars that give a sense of inclusion in and ownership of the law by all interested parties, including victims and perpetrators. As the result of individualized translations, these idioms and vernaculars give effect to proximity to the law as well as a sense of participation in the production of IcJ. In short, the relationship between law and justice is mediated by the idioms of implementation which are more directly accessible to legal subjects as measures of the conduct and performance of enforcement by various authorities.

From this perspective, justice is first and foremost an institutional answer to deeper moral and political questions about global constitutional life. Judicial justice gives specific applications to these larger moral questions as they emerge in the particular context of specific cases. However, judicial justice is neither sufficient nor altogether without its own problems. As has become apparent in ICC interventions in Africa, international judicial justice can in fact subvert the larger goal of just and peaceful existence. First, it is a justice that applies selectively to the signatories of the RS alone. The paradox here is that whereas ordinarily the sovereign is bound only by its own will, the RS is applied to peremptory norms of international customary law that admit no derogation. Worse, the non-signatories number hegemonic states, including permanent members of the Security Council, that would normally refer other states for violations: China, Russia and the US. Their own state officials, military and paramilitary officers, and citizens are thus exempt from a process that they deem indispensable to international stability and peace.

The implied double-standard gives sustenance to the idea of international duplicity in the administration of justice. This is not simply a matter of

perception as Europe (from Belgium to the United Kingdom) and the US have actively undermined the idea of universal justice; the one by abandoning the principle of universal jurisdiction and the other by seeking immunity for, or the non-application of Articles 27 and 98 of the RS to, their own officials or security personnel. In effect, IcJ has become an arena of political transactions where immunities are afforded to some, favours rendered to friends, while the rest are targeted for punishment with prosecutorial zeal. It is no wonder that attention has now turned to prosecutorial zealotry and malfeasance. I identify three such areas below: the terms under which ICC initiates investigation under the Proprio Motu clauses (RS, Articles 15 and 53); the determination of gravity, or the criteria for moving beyond preliminary investigations (deGuzman 2012); the selection of intermediaries (who provide information to the OTP and receive communications from it); and the selective use of existing jurisprudence particularly in regard to its own autonomy and agency in the development of international criminal law (IcL) (Turner 2014). It is worth noting in passing, for instance, that while the ICC has been reluctant in its historic responsibility as the designated world body to develop jurisprudence in IcL towards universality, it was willing to take up the case of post-electoral violence in the Kenya case even in the absence of referral by either signatory powers or the UNSC. In contrast, the ICC found refuge in jurisdictional questions while rejecting broader responsibility to the international community by refusing to open investigation into the 2008-09 Israeli military intervention in Gaza. All this is to suggest that it is impossible at present to detect what has and will become of some of the most basic tenets of the administration of justice: good faith, equity, reasonableness, proportionality, legal certainty, and equality before the law.

The ICC often feigns ignorance of the impact of the most basic organizing principle of the international order, namely a form of hierarchy to which all other principles are subordinated. This singular hierarchy is the primary mechanism of authorization for the enjoyment of the general goods, including sovereignty. It is born historically of affective terms or conditions that are based on geography, political assets, and, yes, race. The ICC cannot review or overturn the resulting affectations and politics through individual cases. The ICC is not a 'Supreme Court' with the explicit powers of judicial review. But it would be absurd to grant that the ICC can effectively interpret the law (in this case, the RS), within the bounds of legitimacy, without a modicum of attention to the operations of the law itself. This subtler form of judicial review is intrinsic to the general principle of equity and equality before the law. It is also the single most important ingredient of legal certainty, judicial reasonableness and predictability.

Without equity, equality, and judicial reasonableness and predictability, the other terms upon which the ICC seeks vindication of its authority – the law, morality and the materiality of crimes – remain meaningless. It does not take a 'genocidal genius' to draw out the ironies in arguments presented against AU reluctance to cooperate with the ICC: that African states are legally obligated to submit to international scrutiny for criminal activities because of their obligation under international treaty law; that Africa is in 'need' of greater attention because it lacks the judicial institutions and the will to prosecute 'its own' criminals; that complementarity still allows African states to demonstrate that they can punish perpetrators; and that the international community, particularly the victims of crimes, need to put an end to impunity. In theory, and from any standpoint but the ones already noted above, these arguments are meritorious and legitimate. Taking them collectively and in practice, however, these arguments have generated the spectre of subordination and subsidiarity of African sovereignty, even if leaving aside the charge of double-standards described above.

These counter-arguments lose their potency when, as they must, they are projected through universalist discursive frames. In this moment, the case may be presented that there should be neither solace nor judicial reprieve from prosecution for peremptory crimes nor inherent liability for moral rectitude in ratifying the RS. Likewise, while it is true that African states may lack the institutional capacity to administer justice in cases of say crimes of war, or crimes against humanity, there is not a single country or region of the world that has mustered the political and moral wherewithal to adequately judge its own rulers according to universal norms in times of war or emergency. It stands today, for instance, that the US and the EU have defended immunity for (democratically-elected) heads of state while in office; that they have objected to the idea that there may be a hierarchy of jurisdictions in which state courts act as subordinates to international organs as a matter of subsidiarity; and that they are protective of their servicemen and women such that they do not surrender them for trial to any other judicial organs but those they themselves have instituted nationally for such purposes.

The schematization of IcJ today calls for broader ethical and moral discussions than has happened thus far. In the meantime it is inescapable that hegemonic powers divided the moral universe of justice between, on the one hand, those whose will alone serves to legislate but are not be subjected to the terms and strictures of the law and morality, and, on the other, those who are criminally convictable but are not allowed to legislate or even clarify for themselves the terms of law and morality. This is not a red herring; it is a fact of imperial and colonial tradition in which the West acted as non-indictable trustees, free to set policy for themselves as a matter of sovereignty, while

setting legal and moral limits to what others may or may not do as a matter of imperial interest. This reality is not offset by criticism that the AU is a club of largely unelected heads of state who do not hesitate to turn their guns against their own people.

Imperial Folly, International Justice

It does seem that there is more to sovereign inherency than critics of the AU allow that give justification to the idea of preserving moral spaces for autonomous self-regulation in the domains of law, ethics and politics. Understood as a right to self-determination, sovereignty actualizes spatial and cultural norms bearing on responsibility and judgement that are neither misguided nor mistaken. On the contrary. Self-determination is a conduit to the inherent goodness of multiplicity, pluralism and inclusion. From this perspective, Africans (and the AU) may legitimately postulate, and indeed pursue the idea that justice extends beyond the ability of courts to specify the legal, material and moral dimensions of non-normative behaviours and, correspondingly, to adjudicate or apply abstract rules. Nor is it *necessarily* a surreptitious attempt to subvert peremptory customary law or the RS to argue that reconciliation and peace are integral to justice. The latter form of justice may obey a cultural logic that is foreign to those to whom judicial justice and penal retribution is the only functional mode of justice, but it is neither alien, illegitimate nor irrelevant to the individualized form of justice that is familiar to most good liberals.

There is much history and logic in favour of the AU's position. Historically speaking, attempts by outsiders to resolve African problems with total disregard for their socio-political contexts have backfired. The most recent case of this is the rejection by the UNSC in 2011 of the AU proposal for political transition in Libya (Grovogui 2011). Neither the mandate of the UNSC, nor NATO intervention, nor ICC indictments have stabilized Libya after the fall of Mohammar Gaddafi. The impulse of these organizations was, of course, to rectify the situation in Libya, but it is now clear that their actions lacked foresight, pragmatism and wisdom. It is not a minor point to ask whether there is an historical pattern that sets Africa apart, wherein political experimentation is allowed to proceed without full consideration of the consequences where it would not have been the case elsewhere (Bonneuil 2000). The Congo Free State experiment, the mandate and trusteeship systems, the responsibility to protect as practised in Libya have all been political experimentations that failed the people in the relevant spaces – miserably. The answer to the question of why these experiments are allowed to proceed without due regard to their potential consequences is indeed central to the debates animating the division between Africa and the ICC and its supporters. The division runs

through 1) the charge emanating from Africa of an ICC 'Africa obsession' that highlights regional prosecutorial disparities; 2) the conduct of the OTP before and after indictment of alleged perpetrators; 3) the relationship between the ICC and national judicial organizations; 4) the relationship between the OTP and civil society intermediaries; and 45 the decision of the African Union to suspend collaboration with the ICC resulting from its indictments of presidents al-Bashir of Sudan and Kenyatta of Kenya.

It would be disingenuous for anyone to entertain the view that political entities that exempt themselves from review by the ICC could unquestionably refer ring signatories on the grounds that there should be no impunity for peremptory crimes. Equally disingenuous would be the proposition of non-derogation for the intended purpose of deliberations on the legal, ethical and moral consequences of the prescribed steps. I suspect that the singular focus on prosecution could turn out to be disastrous for Africans, not least because the consequences of prosecution in volatile political environments are yet to be fully measured. Already, the first ten years of the ICC have revealed severe flaws and gaps in the RS. These analyses have also revealed insufficiencies in the operations of the Court, particularly with regard to the actions of the Office of the Prosecutor (OTP) and to the conduct of trials. A number of essays have highlighted some crucial problems in this sense, however they all seem to treat these problems as so many technical or institutional deficiencies to be fixed overtime by adjusting existing judicial processes and mechanisms of IcJ. To wit, some have imagined the problem of IcJ to be solely attributable to either ICC hesitation to creatively broaden its mandate under its founding RS (Jurdi 2010; Grewal 2012). Others have noted the failure of the ICC to implement or execute specific articles and/or clauses of the RS either forthrightly or to the letter (Deguzman 2012; Iverson 2012; Amnesty International 2010). The vast majority of critics, however, have espoused the view that the crisis of IcJ arises from the failure of signatory states to assist the ICC in its implementing (Mariam 2014).

The Libyan case demonstrates that IcJ is often mobilized by the desire to punish without ethical and social purpose. It shows that political expediency – and not international morality – has often been instrumental to the modes of referral practiced by the UNSC. In this case, as in many, calls to prosecute often resembled emotional manipulation and not a plea for creating a stable and rule-bound context in which the alleged crimes of the Libya government could be investigated and the alleged purity of motive of its opponents verified. The calls for intervention by the UNSC and the ICC followed outrage at statements made by the then Libya Guide, Gaddafi, that he would crush his opponents like cockroaches and the imputations to his regime of gruesome violations of human rights.

To be sure, Gaddafi's statements gave sustenance to much worry about violence and human rights abuses prior to intervention. However, the UN Security Council's account of politics and political life in Libya then was wilfully jaundiced. In fact, the interpretations given to UNSC resolution 1973 by the intervening coalition made it abundantly clear that there were ulterior motives fuelling the haste to intervene. For instance, the 'Arab Spring' that had broken out across the Arab world was met with state violence in a variety of countries, most notably in Bahrain and Yemen. In Egypt too, the army had committed gross violations of human rights. The question then became: why Libya? Why the particular actions being proposed? And why was the AU being systematically side-lined? These questions had uncertain answers. The crimes imputed to Gaddafi, although surely gruesome and the cause of the revolution, belong to a past during which the Libyan Guide was welcome in Western chanceries. In addition, the nature of the crimes was not beyond any threshold set in other countries undergoing revolution.

The rest of the story is well known. Gaddafi did have dangerous weapons but, contrary to all imputations of unreasonableness and instability, he did not use them against the protestors. These weapons are now in the hands of Libyan militias, autonomy-seeking Sahelians, and, yes, terrorist organizations. There was a siege of a large metropolitan area in Libya, but not in Benghazi, which the West had proclaimed was under threat of bloodbath. The siege and bloodbath took place in Sirtre, Gaddafi's home town. The siege lasted four months and was executed with the support of NATO forces. Zuma's mediation and the AU proposal for political transition would have side-lined Gaddafi as transitional leader but included his son and heir as spokesperson for their region and tribe. This was rejected by the US, France and Britain in favour of proposals by Qatar and other Gulf states to simply overthrow Gaddafi. Gaddafi was overthrown and peace did not materialize. What was anticipated as rule of law became, rather, rule by militias, and summary execution of their opponents has continued as in Gaddafi's time, only more spectacularly and unpredictably, to which the summary executions of Gaddafi and his children, some of which can still be viewed online, can testify.

The stories of the 2011 Libyan revolution and of Gaddafi's reign thus unfolded with the differential play of subjects and the attendant significations of their respective actions. In this play of (liberal-)democratic champions (the proper role of the revolution and who properly represents the Libyan people and its desires) and deviants (the regime, its political ideology, its model of national unity, and foreign policy actions) a duality was constructed, bearing the starkest of contrasts. This differential play of sets of good subjects and bad subjects occurs in conjunction with the signification of their respective actions as being responsible, grave, transparent and normative, and/or their

opposites. These plays and games manifest themselves differently for different subjects at all levels of political deliberation and judicial proceedings. In Africa, where these operate differently than they do in Europe and elsewhere, claims of goodness and evil, rightness or wrongness, appear in logical sequences that include proximities or distances of subjects and actions under consideration, on the one hand; to and from Western subjects and/or norms, on the other. All descriptors of events proceed from the underlying logics. Hence, 'people', 'revolution', 'justice', and the correctness of the cause can only apply to militias that seek Western advice and support and whose call is answered by the West. By contrast, negative connotations were ascribed to everything Gaddafi did: from nationalizing oil to supporting the AU and promoting African unity, to building mosques and factories throughout Africa. These actions were by the requirements of the play of difference and signification both corrupt and ill-intentioned or indicative of a *folie de grandeur*, a 'Napoleonic' complex, or a troubling ambition that had to be curtailed. It is in fact impossible to imagine in this logic – and the associated discourses and structures of attribution – that an African state, any African state, may legitimately claim to act strategically in accordance with its own self-defined national interest. Finally, within the same play of difference and signification, it would be impossible to allow that Gaddafi might be trusted to reform either by necessity or dint of reason – a deathbed conversion of sorts.

The ICC may be imagined to be above this political drama (or tragedy, depending on how one views it). Yet, here too, the manner in which evidence is constituted bears fingerprints of the prior or framing political discourses. This is to say that the triggering events that lead the OTP to assume that a threshold of gravity has been crossed; that there is evidence of a criminal enterprise; that there is widespread and systematic attack on any group are often represented within the ideological lenses described above. They necessarily assume at some basic level irrationality, danger and risk flowing from one direction to another. To return to the Libyan case, the indictments and orientations of ICC inquiries seem to mistake political uncertainties and moral ambiguities for legal certainties and factual clarity, and vice versa. For instance, while the implication of Saif al Islam is yet to be demonstrated in court, it is a fact that Moatassem-Billah Gaddafi was last seen in a cell with thorn shirts and pants, clearly under arrest by revolutionary militias. He was later found dead shortly afterwards and his body joined with that of his father.

Two logical questions flowing from international criminal jurisprudence might be posed here. The first, proceeding from the precedent set in the case of Charles Taylor linking criminal activities to the larger enabling political context, is whether NATO may be assumed to have aided in the systematic

physical decimation of the Gaddafi clan in providing material assistance and military support to revolutionary activities. The second is whether it is proper under any circumstance to proceed with the trial of Saif while there was no standing indictment for the murder of his relatives? The ICC has not entertained the first question. It has maintained that it intends to indict criminal activities by the revolutionaries but that it must proceed with deliberate intent and sequentially, according to its own priorities and in the interest of justice. Meanwhile, the ICC has acceded to complementarity in the Libya case by allowing the new government to try Saif. This might technically be taken as an admirable approach, if in fact the relationship between the suspect and the new government was different from how it currently stands. In the present context, the revolutionary government can take its revenge on a remaining member of the Gaddafi family under legal guises authorized by the ICC and the UNSC – granting a kind of justice to the victims of Gaddafi's reign, as it were. In the meantime, we can take stock of the fact that the political experiment that was Western intervention in Libya failed and that the ICC prevarication afterwards has dispensed with any hope that impartial justice will be done – ensuring that private vengeance in that country, both individualized and organized, will continue unabated until the parties return to the AU initiative that the 'revolutionaries' once rejected: national reconciliation and power sharing during political transition.

The Risks and Limits of Prosecution for the Ends of Justice

To the extent that judicial legitimacy depends on whether different parties feel vindicated or not, legitimacy is thus a question of the cultural logic of judicial proceedings and decisions, and whether these correspond to the values, interests and expectations of the communities affected by ICC interventions. Hence, the end(s) of justice must correspond to certain ideas of moral rightness with rationalities that may well exceed those of judicial processes. Depending on one's life world, such rationalities may in fact privilege social peace, reconciliation, and equitable constitutional life over the terms of judicial justice (the latter being understood as the administration of the law based on contrived histories of political life that strip the events recounted therein of their more dynamic dimensions). This is the risk that the ICC runs in its current adjudication of events in Guinea on 28 September 2009.

If the Libya experiment shows that not all political and/or legal experimentation should be taken up unquestionably, it should also alert initiates to what might arrive in other contexts if political injunctions and legal initiatives are embraced without reflection. Guinea-Conakry is one of those places. Much like Libya, Guinea was led by a left-leaning progressive

leader with an irrepressible authoritarian bent from independence in 1958 until 1984, the year of his death. Sékou Touré was also on the other side of the Cold War, alternating his alliances from the Soviet Union to China to the Non-Alignment Movement.[1] The main opposition to Sékou Touré largely derived from the region that benefited from colonial education and alliances more than any other. By independence, the Futa Jallon boasted more intellectuals and businesspeople than any other region. Its elites were also more connected than any other, benefiting from a regional diaspora of professionals and traders in the sub-region as well as connections abroad in countries where countless Peulhs (or Fulahs, Fulanis, also Fulbè[2]) received their education.

With the overthrow of Togo's Sylvanus Olympio in 1963, Touré began to suspect the onset of a new era in African politics. In 1964, he accused his generals of attempting a Togolese scenario. Touré's worst nightmare was realized in November 1970 with the NATO-assisted invasion of Guinea. This nightmare turned into a murderous paranoia for all, particularly the Peulhs. Pointing to the presence of some Peulh elites on the list of a Portuguese-approved potential government, Touré subjected Peulh elites to a horrific witch-hunt. There were the torture chambers of Camp Boiro; the cleansing of the bureaucracy of suspected disloyal Peulhs; the barring of Peulhs from foreign scholarship, among other familiar atrocities of humanity and justice. In reaction, Peulh elites abroad and in Guinea set to memorialize what had been an actual persecution. Yet, as is often the case, one must apply caution towards the gaps that might separate narratives of what is said to have happened and what actually happened. It suffices to say that politics in Guinea had many more protagonists and antagonists than appear in accounts that focus on Touré, his Peulh opponents and the political coalitions that supported each side. This is pertinent to the manner in which the apparent persecutions of the Peulhs appear in statements and communications around the events of 28 September 2009 in which the vast majority of the rape and murder victims were also Peulh.

To be sure, much that was reported to have happened – murder, rape and torture – rings true. Having lost its freedom-fighting social revolutionary ethos upon the death of Touré, the national army had become a personal political instrument under Lansana Conté. Not only used as a labour supply for the Contés' farm, the army had also become an arm of his political party to be used against opponents. By this time, as divisions of this army returned home from interventions in Liberia and Sierra Leone, rape had become one of the instruments of warfare that it frequently deployed. Mass rape was thus a time bomb ready to explode before the public eye, and it did. In the meantime, the army had also become a repressive killing machine for Conté

and his party. In fact, a mere two years before 28 September, in March 2007, the army had fired on students and merchants in a local market in the capital killing more than 100 people (HRW 2007). If the OTP maintains that any collective decision to repress public assembly by the opposition is evidence of conspiracy, then it would have to investigate the events of March 2007 in the interest of justice: the same army, the same method, the same offence. In both events, the decision to tolerate political assembly and social protest was made at the highest level. In both instances, the leadership of the government was structured around one ethnic group such that ethnic slurs and harassment became a staple of state tactics of intimidation. In both instances, repression was systematic and attacks against individual opponents had the stink of ethnic hatred. The similarities between the two events would hold irrespective of which legal criterion of liability were invoked.

No one expects the ICC, or any court for that matter, to cure all that ails a country through a single prosecution and trial. However, if one were to follow some of the logic of prosecution in Guinea today, one would have to conjoin the events of 2009 and 2007. This is because the much dubious theory of joint criminal enterprise and its modes of liability seem to be at play in this case (Sliedregt 2012). In this instance, it is assumed that the entire leadership of the state had conspired to perpetrate the killing and rape. I am actually inclined to support such a view, *prima facie*, until proven otherwise. To prove this case, however, one would have to grant that a criminal enterprise or a conspiracy to engage in one exists whenever a prosecutor can prove the existence of a decision to confront a crowd. But, surely, the court cannot expect to find an order from the highest level of government directing the commission of rape! To believe that it could would be to dangerously misunderstand the nature of sexual crimes and their association with historical forms of masculinity, patriarchy and other dubious ideologies that women face under the conditions of state- and capital-centric political life.

The ICC risks credibility, however, in prosecuting one event and not the other. Correspondingly, it matters what principle of liability is applied to 28 September, whether the leadership of the army is held to be liable because it has normative control over the organization, or whether specific individuals are held to account because they participated in a crime whose commission cannot be said to have been specifically mandated, in which case they were merely accessories to the crime. The applied jurisprudence in the case to characterize the event that the OTP chooses to prosecute would be held up as a mirror to events in 2007 and beyond, during which time Guinea was signatory to the RS. In any case, the OTP is bound to establish criteria for given priority to one event over another. The fact of referral, which the OTP has so often branded,

may satisfy the ICC initiates and the victims of 28 September but it only adds a political dimension to prosecution and a sense of crisis to the victims of March 2007 and the elements of the army now prosecuted by the ICC, rather than inoculating the court therefrom. As a technique of judicial dissuasion, this hardly sets the ICC on solid political and moral ground.

To the extent that one might wish to isolate the events of 28 September from those of March 2007, one would, perhaps futilely, but crucially need to account for the haunting presence of discourses implicating the victims' identities. By definition then, and in politically poignant ways, one would need to perform the same exercise with regard to the accused. In this sense, it is indeed inescapable that the vast majority of the victims, women and children, were Peulhs, and that this had added a powerful emotional content to the need to act that brings in a prior history of persecution. This fact has several dimensions with an inescapable optic that 28 September seems to have mobilized in many sensible souls – women and men of all ethnic groups and political and religious persuasions because of the heinous nature of rape. What is imperceptible to the untrained ear of an outsider, though, is that those who are accused of the rape, the so-called *forestiers* (or forest dwellers,) have historically been the objects of social contempt in Guinea on account of their non-religiosity, animism, and all other epithets that go along with the ways in which their identity is often framed. It is also the case that, among some of the intermediaries, the thought of being at the receiving end of violence by the *forestiers* was particularly galling because of its implied lack of morality. It is not lost on the *forestiers* that their paganism and animism has worked against them, from the time of colonialism when they were denied education. They are even accustomed to hearing that the crimes of morality committed on 28 September could only have been committed by them alone.

This is the set up. One sense of victimization (by the state) comes up against another set of victimization (this time social). One kills the body by physical death. The other kills the soul by social ostracism. Although I hold this only anecdotally, it is my contention that many *forestiers*, whether relatives or not of the accused, would readily proclaim that the vast majority of court intermediaries providing evidence to the OTP are either themselves ethnically Peulh, or are plugged into networks whose Guinean members or affiliated are predominantly Peulh (as are the majority of Guinea's human rights NGOs), or at minimum have been exposed to the predominant Peulh narrative of victimization. Apart from occasional appearances of conflicts of interest, there are no absolute moral, ethical and/or legal grounds to *a priori* doubt the credibility of these entities. Yet, for people who do not possess the language to articulate what they see as an injustice, conspiracies might

just be plausible. To add to the sense of unfairness, *forestiers* can point to the absence of their members among elements of the army and the police that had been responsible for state repression since independence. For these and other reasons, they now remind themselves, in private and not-so private murmurings, of frequent instances of murders of their members in the Futa Jallon on account of their apparent animism, a theological 'transgression' for which they would also be denied burial in cemeteries that contain Muslims.

The two senses of victimization and the concomitant crimes are far from being alike. I relate them simply to point to an historical irony in which the *forestiers* – thought to be the least educated, pagan or animist, with no significant political or economic power – would bear the brunt of punishment for the crimes of the postcolonial state. Moussa Dadis Camara, it is known, stumbled into leadership in Guinea by sheer accident of fate and his reign lasted barely two years. Whatever may be said of his leadership, however, the *forestiers* had not been associated with state violence in the entire modern history of the country. The obverse is true. They have been recipient of state violence but unfortunately, as they will let you know, this is a violence that has not recorded the murder of political leaders prior to independence, violent campaigns of interdiction of their rituals of initiation, a political history of repression of uprising, and so on.

There are many reasons why the army in Guinea needs restructuring and discipline – the latter literally and metaphorically – and the entire political class of Guinea needs a moment of self-examination for their role in state violence that even precedes independence. I doubt very much, however, that a judicial proceeding that focuses on the liability of a limited few in a singular event will be a proper and sufficient venue for that kind of examination. This is why I am especially compelled by alternative options that prioritize social peace over vengeance for a rather isolated set of victims, who no doubt have suffered as a consequence of these more complex and endemic social dynamics. Regretfully, the Peulhs have much more to lose in a judicial process that looks like a witch hunt against an otherwise marginalized minority. While the Peulhs are particularly vulnerable, they are still the most mobile segment of the population in Guinea both within and without, the wealthiest, the most educated, and the most networked. The *forestiers* find themselves in the exact opposite situation. Fewer of them live outside of the Forest region and the capital of Guinea, Conakry. Fewer still live in the Futa Jallon. They have fewer relatives and no significant property or place outside of their own region. It is not an exaggeration, therefore, to say that the Peulhs have vested interest in social peace in Guinea. The extent to which the ICC can and will be able to facilitate such a peace in seeking vengeance for the Peulhs remains, at best however, quite unclear.

Prosecution as a mode of social and political dissuasion thus often displaces the forms and spheres of conflicts, driving their overtly political forms toward more insidious inter-communal violence for which no leader and organization can be blamed in isolation. The number of people who have died in Guinea from 'spontaneous' outbursts of violence against the Peulhs, for instance, can be numbered in the thousands. These victims are not the sympathetic, highly educated and politically connected Peulhs. They are small peddlers, handymen (and women), bakers and the like, who pay the price for communal resentments that find no political resolution and are therefore driven toward darker psychic zones and physical responses. Unorganized, triggered by everyday encounters, and with no visible premeditating agents, these forms of violence are at present unclassifiable as crimes against humanity and/or genocide. They claim, however, far more victims than can be accounted for, victims who will find little hope in the prosecution of a very limited number of state officials on the basis of an incident that brackets off these everyday violences as inconsequential, not to mention similarly symptomatic massacres.

Lacunae of Justice: Investigation, Prosecution and Partiality

The politics of aspirations towards and practices of IcJ are often fairly obvious, as should now be clear. In the case of Mali, for instance, Prosecutor Bensouda clearly stated that it was in the interest of justice to 'play its part in supporting the joint efforts of the ECOWAS, the AU and the entire international community to stop the violence and restore peace to the region' (OTP 2013). This admission has political and ethical implications beyond the referral process. Again, the OTP: 'Following the referral of the Situation in Mali by the Malian State, the Office may investigate and prosecute any crime within the ICC jurisdiction committed on the territory of Mali since January 2012. In the course of the preliminary examination, the Office has identified potential cases of sufficient gravity to warrant further action' (OTP 2013). *Prima facie*, this last point is a simple one, but in actuality it comes up against the objectives, actions and expectations of, first, the government of Mali and, second, the external actors named above. One question that emerges is whether the ICC can in fact investigate the referring agent, the state, which is party to the conflict in northern Mali.

The other, perhaps more contentious question arises from the OTP statement that militia and political factions of northern Mali 'passed sentences' and 'carried out executions without previous judgement pronounced by a regularly constituted court' (OTP 2013). The question here is the extent to which legal pluralism and cultural logics of justice may survive under the RS within either diminishing the universalist impulse of the ICC or

the sovereignty of the post-colonial state. Specifically, the conflict in Mali coheres around questions political autonomy and the ability of populations to maintain modes of life that correspond to their environment and moral horizons. It is not clear to me if the above objection, then, consists in the absence of officially-constituted courts, or if the intimation is that legally-constituted courts lawfully apply the law and whether execution is lawful under those circumstances.

There are significant gaps in the RS between, on the one hand, the commitment to justice enunciated in the law proper and, on the other, the manners in which enforcing authorities – such as the OTP, governments and UNSC – have thus far interpreted their own role in regard to the purpose of the law and justice. It is in this sense that the lack of independence and/or the apparent absence of autonomy of the OTP from political processes begin to gnaw at the credibility of the ICC. In Mali thus far, as it was in the case of Côte d'Ivoire, the rubrics of war crimes and crimes against humanity have appeared in the OTP communications and actions completely detached from their political context. It is incredulous, really, to imagine the criminal activities attributed to entities in the north, without regard to the politics in which they are rooted. As a result, the indictments in those cases have necessarily aligned with the interests of the governments in place and their allies, principally France, the UNSC, and to a lesser extent, ECOWAS.

To say that the populations in northern Mali continue today to be at risk 'of yet more violence and suffering' as Prosecutor Bensouda has said, takes on a quality of banality coupled with an acceptance of the political dynamics and normative boundaries in the region since the inception of the Trans-Sahara Counter-Terrorism Partnership (TSCTP), initiated by the US with NATO support, that has transformed this region into a hunting ground for real and imagined Al-Qaeda affiliates. Before the advent of this initiative, Mali managed to contain tensions between the many Sahelian populations, significantly, in the face of a harsh climatic environment and attendant lack of resources. Trade and the ability to move and to farm have been caught up with the related quest for life. In 1996, the larger factions of the populations of northern Mali seemed to be satisfied that the central state had given due consideration to their concerns to preserve identity, culture and interest in the region. They therefore entered into a peace compact that led to the Flame of Peace being built from more than 3,000 weapons that the Tuaregs voluntarily surrendered in a wager for peace.

One is led to suspect, therefore, that the current intransigence of the central state in its non-concession posture toward the Tuareg is partly the result of the TSCTP. Namely, arms and technological supplies from the

US and NATO encouraged the Malian army's ill-informed confidence in its ability to defeat the Tuaregs militarily. This posture has inevitably had political and constitutional implications. The political consequence has not merely been to negate the possibility of peace between the central government and its constituents units. It has also surrendered centuries-long traditions of institutional bricolage that made an uneasy coexistence possible (Grovogui 2010). The difference between the current political environment and the one that existed prior to the TSCTP is the role of the state and the manner in which the state understands its constitutional obligations. Prior to the current neoliberal state, the developmental welfare state had built-in ethos of entitlements, solidarity and therefore responsibility of government to the citizenry. Constitutionally then, the state could not demand total subordination from entire regions because the possibility of development depended on institutional collaboration and cooperation. Until recently, the constitutional requirements of the state had acted as vessels through which memories of prior collaboration among the diverse groups in Mali were recalled. Historically, in fact, sedentary populations in the south of Mali and the more nomadic ones in the north had agreed to share resources through informal and formal understandings such as the Dinah. These attendant reflexes have vanished under a neoliberal, securitized state where the priorities have shifted toward state arbitration of the ends of different forces within so-called civil society, industry and capital. Where once the requirements of life preoccupied the state, today those of capital, industry and the army – to invest, produce and protect property and the interest of the state – seem to have come to the fore, above all else. There are therefore rebellions in the Sahel that have to do with the degradation of the environment, of life and of human activities outside of industry. There are also rebellions that have to do with the preservation of culture and religion that have nothing to do with Al Qaeda.[3]

The situation in Mali is the clearest evidence yet that the ICC is implicated in a larger normative political project, beginning with the emergence of geopolitical justifications for referral, and extending to the Court's own algorithm of what it takes to be prosecutable offenses and subjects. The government's referral request, whereby the OTP is invited to interminably investigate potential crimes, undercuts the latter's investigatory prerogatives insofar as it provides a list of offences while at the same time pointing to government antagonists: murder, mutilation, cruel treatment of persons and torture, summary trials and executions, pillaging, and rape, and the intentional destruction of protected objects such as cultural artefacts, monuments and archives. As we have seen in all cases of civil wars and the breakdown of law and order upon the collapse of state institutions, it would be hard to imagine that the army and government-affiliated groups would not also be implicated

in such actions, with the possible exception of the intentional destruction of protected objects. It is no cheap cliché to demand in this sense then, to demand that to the extent that judicial justice has to be part of the process of bringing order and stability to the region, that its administration has to be seen to be fair. For the inhabitants of the north, this would mean that there is no separate justice for the state and all other actors in the region including peace-keeping forces. Consistent with the cases of Libya and Guinea, one can say of Mali that possibility of fairness is foreclosed when the identities of subjects and their political agendas – and not their criminal deeds – are the starting point of prosecution.

In any case, Mali cannot afford an ICC that succumbs to either geopolitics (by aligning itself with the interests and desires of hegemonic powers) or strategic moralism whose affectations ooze of mere lip service to the plight of victims. The obligation imposed by legality to fight impunity in accordance with the spirit of law and justice has transmuted into a weak, and dangerous, legalism. That is, in the ICC's investigation of Mali one finds only a pretence to strict adherence to the principles of law, but an adherence that ultimately vacates the law from its spirit of social peace and reconciliation in favour of judicial crusades against the 'orphans' of the new world order: those rendered invisible to the structure of interests, values and norms favoured by the hegemons of the international order. This understanding of the end(s) of justice may be legal but its relation to the idea of IcJ, and therefore its lawfulness, may be suspect. Indeed, there are equations emerging, not least for Africans, that point to the 'unlawfulness', sui generis, of the actions of the OTP in which complementarity morphs into conspiracy (however soft and unintended); referrals resemble the onset of a rendition of one side to the other; the determination of gravity becomes character assassination; the interest of justice is expressed by taking the side of the culturally-legible sympathetic figures: rape victims; propertied classes; well-connected elites; and assimilated ethnic or racial groups.

If this scenario were to prevail in Mali, the ICC would have laid the grounds for further rounds of recriminations and conflicts in the future. The only way to avoid this scenario will be for the ICC to establish its identity as explicitly and markedly independent from *all* parties to the conflict, and particularly the referees and intermediaries who would make submissions to the court. In the case of Mali, the referee would be a central state which has, in effect, failed to convince a significant portion of its citizens in the north that they are concerned with the constitutional compact from which it draws its supposedly legitimate authority. A second parameter, connected to the first, stands in contradistinction with ICC doctrine regarding the interests and desires of parties: that is the prioritization of an interest in social peace as the

functional principle animating the interest in justice. On this matter, the RS is altogether silent, insofar as it does not specify the factors or circumstances that should be taken into account in determining the interests of justice. For its part, the OTP stresses 'ending impunity' and the 'interests of the victims' as the basis of an interest in justice, which we have seen, often belies and avoids altogether the larger questions of social peace that are necessarily entangled with the basis of justice thus conceived. The contradiction stems from, on the one hand, those approaches the OTP understands to be the basis of justice, and on the other, the stress the OTP places on a variety of political factors in its prosecutions: protection or safety; stable political environment; physical and psychological well-being; and dignity. It would seem that interests and personal circumstances of victims and witnesses are not separable from the interests of society at large. The OTP's fraught insistence on the distinction has only compromised its own credibility at times, particularly when it seeks out the views of local religious, political and tribal leaders, together with those of non-governmental organizations and victims' representatives, in order to determine the interests of the victims even as it conducts its investigations. It is hardly a stretch, therefore, to say that the OTP is seen as, at best, a highly partial agency in these cases. At a minimum, it undermines a general principle of law according to which the accused have an equal interest in justice as the victims, albeit in separate measures.

Conclusion

In theory as in practice, justice exceeds the mechanics of its delivery. The concept of justice appeals to faculties that are understood to be shared by all human populations: sensitivity to injury by others; a sense of moral rightness; an acknowledgment of the utility of respect for laws and the rule of law; and an inclination to value peace and therefore to accept punishment, restoration and reconciliation as a sufficient outcome that follows criminal injury. In this final regard, the effectiveness of judicial justice is measured by the satisfaction found in its mode and mechanism of delivery, which need not be exclusively punitive (and indeed, are quite unsatisfactory when they are of a punitive nature). Satisfaction is a sensorial experience manifest at the time of 'delivery' of justice: it takes the form of a temporality that at once transcends and recodes the past (when the crime(s) in question were committed), so as to encompass and re-inflect the present (when the meaning of morality as legal interdiction and sanction is actualized), so as to condition the future otherwise from the course that might follow from the unresolved social, psychic and bodily trauma of the original crime (that is, allowing for the possibilities of better becomings for all parties). Justice thus is the cumulative and combined

effects of cognitive, sensorial, affective and emotional events that extend from the moment of the commission of crimes to prosecution; the setting into motion of post-indictment events; the operations of judicial and non-judicial processes; the collection of evidence; the trial and verdict; and the more intangible expectations for a better future.

The underlying dramas are thus not as individuated and individualized as the OTP suggested in its 2007 policy paper that seeks to set the objectives of judicial justice off from those of peace. The crimes of genocide, war, and against humanity are inherently political: from the selection of victims, to the modes of targeting, to their objectives of cleansing the body politic as 'sovereign' privilege, to their intended outcomes, which are of course the subordination or elimination of political or ethnic rivals. This is perhaps one of the reasons that the OTP relies on intermediaries, community leaders, and the like to both collect information and ascertain the interests of victims. Politics is not problem for the ICC, rather, it is the claim that the ICC is not subject to politics that is the problem, which is compounded by the appearance of extra-judicial pressures in execution of its mandates.

There are other reasons for Africans to worry about the direction taken by the ICC that are more related to the performance of the current staff of the ICC than its modes of operation alone. These can be found in ICC approaches to the ambiguities and silences of the law. The ambiguities are resolved through clarifications provided by the Court to itself as well as to others. This essay is not the venue for showing both the timidity and confusions created by the ICC with regard to its interpretations and understanding of the purposes of IcJ and the RS. The more important question is what to do with silences in the law or, as is the case today, imperfections of the law. This is the area in which the AU is justified in asserting its sovereign will, in the process creating sovereign spaces for deliberations and adjudications of the legal, political and moral purposes of IcJ. The AU is correct that the RS needs to be supplemented to include consideration of peace through reconciliation and constitutional reforms that satisfy victims, eliminate the causes of conflict, and create more stable political environments for all. This is not retaliation but wisdom. In the long term, it is the best chance that justice might have.

Notes

1. It is a matter of record that Sékou Touré had been hostile to Western interests during the Cold War. They had also supported national and independence movements that aligned themselves on either China or the Soviet Union. Touré had been a main supporter of Lumumba during the Congo Crisis, a backer of

the Algerian exiled government during the Algerian war. He sent members of his army, advisors, and technicians to assist the Marxist regimes of Angola and Mozambique.

2. Henceforth, I will use Peulhs to reflect the official designation.
3. There are of course, those rebellions seeking to turn the clock back to the times of the Jihad when empires and states were built around Islam, commerce and warfare. One of the great ironies of the situation in Mali, however, is that some of those groups that now identify with the cause of jihad acquired their weapons after Western intervention in Libya and the fall of Muhammar Gaddafi.

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The Justice versus Reconciliation Dichotomy in the Struggle Against Gross Human Rights Violations: The Nigerian Experience

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Abstract

The Boko Haram conflict in Nigeria has caused a lot of deaths, mass abductions and gross human rights abuses resulting in the dislocation of several families as refugees in neighbouring countries. Other victims have been rendered homeless and destitute as internally displaced persons. The Nigerian government's response has not been very effective fuelling the suspicion that the insurgency is a combination Islamic militancy and political competition for power. It does not seem that the solution to the Boko Haram conflict is military engagement as other conflicts have shown. This article uses the Nigerian experience between the Niger Delta militants and the Boko Haram insurgency as a case study to discuss the difficult choices between peace, justice and reconciliation. It focuses on the activities of international justice institutions, provisions of the Rome Statute of the International Criminal Court, and the debate between amnesty, prosecution and the interests of justice. The article argues that the emergence of Boko Haram as a terrorist group in Nigeria affiliated with other international terrorist groups has raised the stakes. The involvement of the Court in the conflict is also very significant as it is not bound by any amnesty or reconciliation programme that could be reached between the Nigerian government and Boko Haram members.

Résumé

Le conflit Boko Haram au Nigéria a causé de nombreux morts, des enlèvements de masse et des abus grossiers des droits de l'homme, résultant dans la dislocation de plusieurs familles comme réfugiés dans les pays voisins. D'autres victimes ont été rendu sans-abri et pauvres en tant que personnes déplacées. La réponse du Gouvernement nigérian n'a pas été très efficace, attisant la suspicion que la

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rébellion est un combiné de militantisme islamique et de compétition politique pour le pouvoir. Il ne semble pas que la solution au conflit Boko Haram soit l'engagement militaire comme d'autres conflits l'ont montré. Cet article utilise l'expérience nigériane entre les militants du Delta du Niger et la rébellion comme étude de cas pour discuter des choix difficiles entre paix, justice et réconciliation. Il met l'accent sur les activités des institutions de la justice internationale, les dispositions du Statut de Rome du Tribunal Pénal International et le débat entre amnistie, poursuite et intérêts de la justice. L'article soutient que l'émergence de Boko Haram, en tant que groupe terroriste au Nigéria affilié à d'autres groupes terroristes internationaux, a élevé les enjeux. L'implication de la Cour dans le conflit est aussi très significative, puisqu'elle n'est pas liée par un programme d'amnistie ou de réconciliation qui pourrait être réalisé entre le Gouvernement Nigérian et Boko Haram.

Introduction

Conflicts bring out the worst in human beings. During civil wars or internal conflicts, a lot of things go wrong and a lot of people are affected. People suffer unnecessarily. For example, the suffering in Syria by the civilian populations has been unprecedented. And they are not alone. From Iraq to Mali, from Nigeria to Pakistan, conflicts exact a huge price on the civilian population. Victims and survivors of crimes want justice. Several of them will demand the punishment of perpetrators while others will want peace and reconciliation. There is no easy way to define the relationship between justice and reconciliation. While some see the two as diametrically opposed to each other, others insist that the two have to work together to resolve conflicts and move a nation forward. A vivid example in Africa where the issue of justice and reconciliation became very controversial is when the people of northern Uganda, consistently terrorized by the Lord's Resistant Army (LRA), pressurized the government of President Yoweri Museveni to enact an Amnesty Law granting the LRA officials immunity from prosecution. Although the government was reluctant in acceding to the request, the president realized that this was a people driven process which he had to support.

On the other hand in Nigeria, when the militants in the Niger Delta threatened the main source of the Nigerian economy – oil, the government of late President Umaru Musa Yar'Adua granted the militants amnesty in order to end the insurgency. With the escalation of the Boko Haram insurgency in Nigeria, the issue of amnesty has come to the fore again. The Boko Haram insurgency has put Nigeria in the spotlight for the wrong reasons. Nigeria is currently under preliminary examinations and the prosecutor of the International Criminal Court (ICC) has declared that the conflict in

Nigeria is a non-international armed conflict between the government of Nigeria and the Boko Haram terrorists. The abduction of over 200 girls from Government Girls Secondary School, Chibok raised the stakes. Although the girls are yet to be rescued, the reverberations of the incident continued to haunt the erstwhile government of President Goodluck Jonathan and the international community regarding the inability of both local security forces and international intelligence to secure the release of the girls. The question in the minds of several Nigerians is whether Boko Haram is ready to lay down their weapons and embrace dialogue with the federal government just like the Niger Delta militants.

This article uses the Nigerian experience between the Niger Delta militants and the Boko Haram insurgency as a case study to discuss the difficult choices between justice and reconciliation. It focuses on the activities of international justice institutions, provisions of the Rome Statute of the ICC, the debate between amnesty, prosecution and the interests of justice. The article is divided into four sections. The second section discusses the provision of the Rome Statute on issues of justice and reconciliation through the interests of justice provision in Article 53 of the Rome Statute. The third section applies the findings of the discussions to the conflicts in Nigeria with special emphasis on the conflicts in the Niger Delta and northern parts of Nigeria. The fourth section is the conclusion.

Justice, Reconciliation and the 'Interests of Justice' in the Rome Statute

There are several definitions of justice. For example, the United Nations defines 'justice' as 'an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of the society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant'.[1] On the other hand the Nuremberg Declaration on Peace and Justice defines 'peace' as sustainable peace and 'justice' as accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs.[2] In addition, reconciliation is a transitional justice procedure where two warring parties are reconciled. It is embedded in the African cultural experience and has been documented in several countries like Uganda and Rwanda where they have used mechanisms like Mato oput and Gacaca as instruments for justice and reconciliation.[3] It has been shown that citizens of these countries identify more closely with these ceremonies

than with Western justice mechanisms because they provide opportunity for truth and reconciliation of warring parties to a considerable extent.[4]

However, there have been arguments and counter-arguments on the need to prosecute individuals who commit international crimes or to grant them amnesty which reinforces the option of reconciliation.[5] For example, Diane Orentlicher supports the view that prosecution of international crimes promotes peace and justice by arguing that criminal prosecutions act as deterrence against impunity, future abuses and repression.[6] However, Charles Villa-Vicencio has stated that there are instances, especially in transitional societies, when amnesties and alternative means of conflict resolution will have to be applied to ensure the survival of the state.[7] The 'interests of justice' provision in Article 53 of the Rome Statute presents the dilemma between peace and justice and has been the subject of intense debate, discussions and analysis by academics and scholars.

The former Secretary General of the UN Kofi Annan stated in 2004 that, '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities'.[8] The current UN Secretary General Ban Ki-moon has also argued that '[f]ighting impunity and pursuing peace are not incompatible objectives – they can work in tandem, even in an on-going conflict situation. This requires us to address very real dilemmas, and the international community must seize every opportunity to do so'.[9] These dilemmas confront sub-Saharan Africa daily where there have been several wars with high human casualty and untold hardship on the civilian population especially affecting the vulnerable in society including women, children and the aged.

Background Information on Rome Statute Negotiations on Amnesties

During negotiations in Rome, states could not agree on the whether amnesty for atrocities should be allowed to trump prosecution of international crimes because of the sensitivity of the issue.[10] Though some delegates were sympathetic with countries like South Africa in relation to the Truth and Reconciliation Commission set up by the government to review the injustices of apartheid, there was concern that amnesty provisions obtainable in some countries will defeat the cause of justice.[11] The United States government also issued a document during the discussions at Rome requesting the recognition of amnesties in judging the admissibility of a case. Several delegates did not accept the proposal and there was no consensus on amnesty in the Rome Statute.[12] The 'interests of justice' provision in Article 53 of the Rome Statute

is a compromise provision to avoid the debate on whether amnesties for international crimes should be recognized by the ICC.[13] Kofi Annan stated in 1998 that the amnesty offered by the South African government to its citizens through the establishment of the Truth and Reconciliation Commission will pass the ICC test of accountability for international crimes.[14]

Literature Review on Article 53 of the Rome Statute

Several authors and commentators are divided on the meaning of interests of justice and whether Article 53 of the Rome Statute accommodates alternative justice mechanisms. While discussions in this section cannot be said to be conclusive of the ideas on the issues, we argue that they reflect the general views of scholars on this issue as ideas and views are divergent and vary from one author to the other. For example, Kai Ambos has noted that the 'interest of justice' in the Rome Statute is not limited to criminal justice only but includes alternative forms of justice.[15] This involves an overall assessment of the reality on the ground taking into account the fact that peace and reconciliation are the ultimate goals of every process of transition.[16] Michael Scharf argues that Article 53 'reflect[s] "creative ambiguity" which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the Court'.[17] Mahnoush Arsanjani is of the view that '[u]nder Article 53, the [Rome] Statute allows the Prosecutor to refrain from proceeding with an investigation if it would not serve "the interest of justice"'.[18] Thomas Clark has stated that 'the legal regime established by the Rome Statute does not, in cases where the jurisdictional requirements of the Court are otherwise met, foreclose the use of amnesties and alternative justice mechanisms when they are in "the interests of justice"'.[19] Furthermore, Charles Villa-Vicencio has argued for the recognition of 'restorative justice' as opposed to retributive justice in the fight against impunity.[20] Drazan Dukic has stated that 'it is clear that, [a]rt 53 intends to formulate some circumstances in which the initiation of an investigation or prosecution would be ill-advised'.[21]

Other authors have stated that 'individual interests measured by the gravity of the crime and the interests of victims must be weighed against a more general interests of justice'.[22] Eric Blumenson while acknowledging the limitations placed on the Prosecutor by the Rome Statute argues that 'one justification for declining to pursue a case is that doing so would serve the interests of justice, the Rome Statute should not prevent the prosecutor from considering a broad range of conflicting considerations when their weight is very great'.[23] Richard Goldstone and Nicole Fritz argue that 'there are contexts in which the award of amnesty will comport with the "Interests of justice" provided that

these adhere to international prescribed guidelines'.[24] They further argue that the Rome Statute, 'allow for the accommodation of amnesties where these are consistent with justice'.[25] Chris Gallavan is of the view that the Rome Statute revolves around the interests of victims with a presupposition for prosecution why ignoring issues of reconciliation and the fact that justice may be achieved without criminal prosecution.[26] He further argues that the prosecutor should be availed of the ability to consider the political ramifications of instigating an investigation or prosecution.[27] Article 53 'potentially gives the Prosecutor, the ability to consider wider issues of justice beyond those directly involved in the case'.[28]

Jessica Gavron argues for and against the application of amnesties by the ICC. In the first instance she is of the view that the interest of justice 'is usually limited to considerations directly bearing on the case itself'.[29] However, she also states that it is 'potentially arguable that a prosecution that is likely to spark further atrocities is not in the interests of justice'.[30] Carsten Stahn is of the view that 'Article 53(2)(c) suggests that the term "interests of justice" may embody a broader concept, which is not only confined to considerations of "criminal justice". The Prosecutor might invoke the concept of interests to justify departures from classical prosecution based on both amnesties and alternative methods of providing justice'.[31]

Despite the arguments above, the prosecutor and several NGOs argue that Article 53 of the Rome Statute should be given a restrictive interpretation. The NGOs argue that the application of the 'interests of justice' should be limited in scope in relation to the prosecutorial discretions of the prosecutor. For example, HRW argues that the prosecutor 'should adopt a strict construction of the term "interests of justice" in order to adhere to the context of the Statute, its object and purpose, and to the requirements of international law'.[32] HRW further argues that the 'prosecutor may not fail to initiate an investigation or decide not to proceed with the investigation because of national efforts, such as truth commissions, national amnesties, or traditional reconciliation methods, or because of concerns regarding an ongoing peace process, since that would be contrary to the object and purpose of the Rome Statute'.[33]

However, Human Rights Watch (HRW) alternatively argues that it is the responsibility of the UNSC under Article 16 of the Statute to make a determination if there is a tension or conflict between the work of the ICC and the maintenance of international peace and security. HRW argues that it is the UNSC and not the prosecutor that is empowered to act when an investigation or prosecution of international crimes is a threat to peace and security.[34] HRW also argues that allowing the prosecutor to make decisions based on political developments will undermine the independence and integrity of the ICC.[35] HRW correctly argues that during the negotiations

for the Rome Statute, there was no consensus on the meaning of the phrase 'in the interests of justice'.[36] However, HRW questions the interpretations of participants at the Rome conference who argue that Article 53 gives the prosecutor an opportunity to recognize alternative justice mechanisms in the prosecution of international crimes.[37]

Another non-governmental organisation, Amnesty International (AI) supports the views expressed by HRW regarding the interpretation of Article 53 of the Rome Statute. In an open letter to the prosecutor of the ICC, AI argues that Article 53 of the Rome Statute does not give the prosecutor the power to suspend investigations and that only the UNSC acting under Article 16 of the Rome Statute has such powers.[38] AI is also of the view that the suspension of investigations by the prosecutor under Article 53 of the Rome Statute will be prejudicial to the right of victims.[39] Furthermore, AI argues that suspending investigations will affect the public perception of the general public in relation to the independence of the prosecutor from external diplomatic or political pressure[40] Another NGO, FIDH argues that in any decision not to prosecute, the 'prosecutor will have to account for the inevitably negative impact that a potential decision not to investigate or not to prosecute could have for the end of impunity, the prevention of the most serious crimes of international concern, and the lasting respect for and enforcement of international justice'.[41]

Views of the Prosecutor of the ICC

The Office of the Prosecutor (OTP) of the ICC currently occupied by Fatou Bensouda prefers a restrictive interpretation of the 'interests of justice' on the assumption that the primary responsibility of the ICC is exclusively criminal prosecution.[42] This view is shared by non-governmental organisations like HRW and AI who are Steering Committee members of the Coalition for the International Criminal Court.[43] Errol Mendes argues that 'Article 53 does not provide an exhaustive list of considerations for the Prosecutor to consider what may be in the interests of justice in determining whether to begin an investigation or prosecution…[g]iven the high thresholds of jurisdiction and admissibility, there is the strongest of presumptions in favour of seeking accountability for the most serious of crimes'.[44]

The OTP in the policy paper on the 'interests of justice' has stated it 'fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice'.[45] The paper further argues that 'the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the

mandate of other institutions'.[46] In making this statement the papers alludes to the provision of Article 16 of the Rome Statute[47] which provides the Security Council with the opportunity to defer investigations by the ICC in a resolution adopted by the UN Security Council under Chapter VII of the Charter of the United Nations.

Errol further believes that the Security Council is better equipped to deal with the issue of justice and security as provided under the Rome Statute in order to avoid the ICC becoming enmeshed in politically charged situations.[48] However, Henry Lovat argues that Article 16 confers only a right but not a duty or obligation on the UNSC to defer investigations and prosecutions of the ICC in the interest of international peace and security.[49] This means that the deferral of cases should not be exercised only by the UNSC under Article 16 of the Rome Statute but should be expanded to accommodate the role of the prosecutor in Article 53. It further raises the issue whether the deferring cases under the 'interests of justice' will involve the OTP making political decisions or whether prosecutorial discretions are political in nature.

The OTP does not see its activities as having political undertones.[50] The OTP has argues that it applies the law without political considerations.[51] However, it appears the OTP is not immune from political considerations and decisions in the prosecution of international crimes.[52] The Court can minimize its exposure to political decisions by managing expectations and having minimum thresholds in its rules of engagement in the investigation and prosecution of international crimes. Furthermore, the OTP should also use the principle of positive complementarity to enhance the activities of the ICC.[53] The current confrontation between the ICC and critics is as a result of undue expectations on the part of those who believe the Court to be a perfect justice institution. This ideal is misplaced as the ICC is far from perfect.[54] The Rome Statute contains glaring ambiguities which has led to different interpretations by several scholars.[55] It has also been the subject of intense debate in relations to its activities in Africa where all the cases are currently situated. An effective communication policy backed with openness in addressing issues of impunity will help the OTP's prosecutorial policies to develop positively.

Justice, Reconciliation and Transitional Justice: The Nigerian Experience

In relation to truth, reconciliation and victims' rights to reparation, the Nigerian criminal law system does not recognize the right of victims of crimes to reparations. This is similar to several countries in Africa that operate the common law system. However the Rome Statute Bill currently before

the Nigerian National Assembly provides for a Special Victims Trust Fund which is a welcome development.[56] In addition, there have been various attempts to address human rights abuses in Nigeria through transitional justice mechanisms. For example, the Nigerian government in June 1999 set up the Human Rights Violations Investigation Commission (Oputa Panel) which sat from June 1999 to May 2002 and submitted its report to the government of Nigeria. The Oputa Report holds military incursion into politics as one of the issues responsible for human rights violations in Nigeria. The report argues that '[m]ilitary rule has left, in its wake, a sad legacy of human rights violations, stunted national growth, a corporatist and static state, increased corruption, destroying its own internal cohesion in the process of governing, and posing the greatest threat to democracy and national integration'.[57] The open and transparent process adopted by the Oputa Panel allowed several Nigerians to present their views and seek for redress.

However, the government of Nigeria refused to release the report citing the judgement of the Supreme Court of Nigeria in Fawehinmi vs. Babangida as the reason behind its refusal to officially release the report.[58] The Supreme Court in that case held that under the 1999 Constitution, the Federal Government of Nigeria had no power to set up a Tribunal of Inquiry as the power was now under the residual legislative list exercisable by states only and not the federal government unlike the 1966 Constitution which made provision for such. The decision to withhold the report has been criticized by Nigerians including legal scholars as a means of suppressing the truth.[59] The report has been unofficially released online by CSOs in Nigeria and abroad.[60] A fall out of the Oputal Panel Report and the Supreme Court decision is the setting up of truth and reconciliation commissions by State governments in Nigeria to address human rights abuses. These include the Rivers State Truth and Reconciliation Commission set up in November 2007, Osun State Truth and Reconciliation Commission set up in February 2011 and Ogun State Truth and Reconciliation Committee set up in September 2011.

The next sections of this article discuss the Niger-Delta and northern Nigeria conflicts. These are not the only conflicts that have been recorded in Nigeria. However, it is argued that these two conflicts reflect deep-rooted contradictions of national development. They touch on two fundamental issues that threaten peaceful co-existence in Nigeria. These are issues of religion and resource control or self-determination, aptly represented by MEND and Boko Haram. It is conceded that Boko Haram has been denounced by mainstream Muslim organisations in Nigeria and has been labelled as criminal by the Organization of Islamic Conference.[61] However its attraction to militant Muslim youths in Nigeria remains a recipe for disaster and reinforces the

argument that its religious leanings cannot be denied. In fact some similarities can be drawn between Boko Haram and the Lord's Resistance Army (LRA) that operated in northern Uganda for more than two decades. While the LRA uses the ten commandment of the Bible as a weapon of influence and power, Boko Haram uses the Koran as a rallying point. In addition, the ultimate aim of Boko Haram and LRA is to overthrow the governments in Uganda and Nigeria using religion and brutal insurgency as weapons of warfare and as a foundation for achieving their political dreams and aspirations.

Resource Control and the Movement for the Emancipation of the Niger Delta

The complex mix between religion, ethnicity, politics and control of natural resources in Nigeria have led to the proliferation of ethnic based militia groups including the Movement for the Actualization of the Sovereign State of Biafra (MASSOB), Odua Peoples' Congress (OPC), the Movement for the Emancipation of Niger Delta (MEND), and the Movement for the Survival of Ogoni People (MOSOP) amongst others taking up arms against the state. The Niger Delta crisis is as old as the Nigerian nation. Early agitations for the emancipation of the Niger Delta were led by people like Isaac Adaka Boro alongside others who declared the Niger Delta Republic in 1967.[62] Though the insurrection lasted for twelve days, it ignited a quest for the emancipation of minority groups in the region. Later the agitation for resource control was taken over by renowned poet and author, Ken Saro Wiwa who formed MOSOP aimed at the self-determination of the Ogoni people. The non-violent protests of the group turned violent when prominent citizens of Ogoniland were killed by youths who accused them of selling out to the government.[63] This development led to the arrest of the MOSOP leadership. The Nigerian government also set up a kangaroo court that tried and sentenced Ken Saro Wiwa and nine others to death. There was wide spread condemnation of the sentences and plea for clemency. However, the Abacha-led government hanged Saro Wiwa and his colleagues leading to the suspension of Nigeria from Commonwealth as other sanctions were levelled against the government. The death of Saro Wiwa also led to the formation of other militant groups like the Niger Delta Volunteer Force led by Asari Dokubo and MEND led by Henry Okah. These two groups exerted maximum pressure on Nigeria's oil wells.

In June 2009, the government of the late Umaru Musa Yar'Adua declared an amnesty which allowed militants to hand in weapons for cash and other benefits of rehabilitation.[64] Both Asari Dokubo, Henry Okah and several other militants benefited from the amnesty. This was pursuant to the provisions

of the Nigerian Constitution of 1999.[65] The amnesty proclamation was in response to the agitation of Niger Delta militants for self-determination and the crippling effects of its campaign on the production and export of crude oil, the mainstay of the Nigerian economy. Okah was rearrested in October 2010 due to involvement in the 1 October bombing during the independence celebration. He was convicted by a South Africa Court and sentenced to twenty-four years imprisonment.[66]

With the emergence of Goodluck Jonathan as the President of Nigeria, the activities of Niger Delta insurgents were seriously reduced. It is also interesting that Boko Haram and its affiliates are the current threats to the cooperate existence of the Nigerian state. One issue that can be taken from the Niger Delta insurgency is the political dynamics of these groups. Most of the Niger Delta militants encouraged the erstwhile president to contest for the 2015 presidency. Meanwhile one of the problems the north had with President Jonathan was his refusal to abide by an unofficial agreement to run for only one term and the fact that the People's Democratic Party agreed to a power rotation by which the north was entitled to the presidency after the tenure of Olusegun Obasanjo. So there is a clear mixture of the campaign for self-determination and control of power. The same thing can still be witnessed in the discussions below regarding the political leanings of Boko Haram.

Boko Haram and Religious Insurgency in Northern Nigeria

The government of Nigeria is currently battling a militant Islamic group known as Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad (Boko Haram) accused of committing several human rights abuses against civilians.[67] According to a report by Human Rights Watch, Boko in the Hausa language means 'Western education' or 'Western influence' and haram in Arabic means 'sinful' or 'forbidden'. Boko Haram translated literally means 'Western education or influence is sinful and forbidden'. However the Nigerian Islamic militant group prefers to call itself 'Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad' which means 'People Committed to the Propagation of the Prophet's Teachings and Jihad'. There have also been allegations that Nigerian security forces have committed serious violations against its citizens while trying to end the terrorist attacks by Boko Haram.[68] The Office of the High Commissioner for Human Rights argues that some of the crimes committed by Boko Haram amount to crimes against humanity and has urged the Nigerian government to ensure that perpetrators of the violence are brought to justice.[69] The ICC has listed Nigeria as a country under preliminary examination and the office of the prosecutor of the ICC has

received several communications since 2005 in relation to the situation in Nigeria. These include the ethnic and religious conflicts that have occurred in central Nigeria since 2004 and violent clashes after the parliamentary and presidential elections in 2011.[70] In a visit to Nigeria, the prosecutor of the ICC, Fatou Bensouda stated that Nigeria is not under investigation but preliminary analysis and that as long as the government is prosecuting those responsible for international crimes, the jurisdiction of the ICC will not be activated.[71] From 2013 to early 2015 the Boko Haram conflict assumed a deadlier dimension leading to the deaths of thousands and displacements of Nigerians as internally displaced persons and refugees in neigbouring countries.[72]

The current war on terror against the Boko Haram sect is not a new phenomenon. The only troubling issue is that Boko Haram has assumed a wider dimension linking up with other AL-Qaeda affiliates in Africa. In addition, the attacks of Boko Haram have increased in intensity and sophistication.[73] In 2014 alone Boko Haram carried out a campaign of impunity in north-eastern Nigeria including bomb blasts in Abuja, Jos, Kaduna, Mubi and the abduction of over 200 girls of Government Girls Secondary School, Chibok in Borno State in April 2014.[74] In addition, the UN Security Council Al-Qaida Sanctions Committee has added Boko Haram to its Sanctions List.[75]

A former President of Nigeria Olusegun Obasanjo stated in 2014 that some of the kidnapped girls may never be found and the likelihood that some of the girls were pregnant by Boko Haram members is very high.[76] The kidnap of the Chibok girls unsettled the Nigerian government, exposed the weakness of the Nigerian military and led to both local and international campaign for the release of the girls.[77] Although a few of them have escaped, a good number of them are still held hostage by Boko Haram members many months after their abduction. Besides Boko Haram activities in Nigeria, the sources of conflicts in Nigeria are myriad. These include corruption, religious and ethnic issues, competition for scarce resources and an inability to implement laws for national development. Several conflicts in Nigeria have a combination of religious, ethnic and political connotations. In fact, most religious conflicts in Nigeria usually assume inter-ethnic colouration even when they begin as purely religious disagreements. In addition, the reverse is sometimes the case where socio-economic conflicts often degenerate into inter-religious conflicts. Hence, the boundary between ethnic and religious conflicts in Nigeria is very hazy and not well defined.[78] Nigeria has witnessed ethnic, economic, religious and political conflicts since independence and the current incursion by Boko Haram and affiliated groups is threatening the

security of the Nigerian state. The limited success recorded by the amnesty granted to the Niger Delta militants has also prompted several highly placed Nigerians including the Sultan of Sokoto to request the Federal Government to grant amnesty to Boko Haram members.[79] Whether the government will accede to the request is subject to debate. This is because the government has consistently maintained that Boko Haram members do not have any genuine interest in negotiating peace with the government.

From earlier discussions, it can be concluded that the 'interests of justice' provisions accommodate amnesties and alternative justice mechanisms; the analyses of Article 53 of the Rome Statute supports this claim. The OTP has the opportunity to defer investigations and prosecution of crimes when it is in the 'interests of justice' though this should be limited in scope and practice. Furthermore, it is reiterated that the alternative means of justice embarked upon by states should meet minimum standards of justice and have the support and input of victims and their survivors. Applying the discussions above to the Nigerian situation, there is nothing wrong with Nigeria granting amnesty to its citizens in promoting justice and reconciliation. Where it becomes problematic is when those granted amnesty may have committed international crimes and are subject to arrest warrants from the ICC. In addition, blanket amnesty without any form of restitution or show of remorse for crimes committed should be avoided in its totality. Some authors have discussed how amnesties can be made acceptable to the public and the international community. For instance, Robert Weiner believes that the following conditions should be met for an amnesty to be acceptable:

a) that the amnesty should not preclude an individual investigation and adjudication of the facts in each case;
b) that the amnesty should not prejudice the victim's opportunity to seek and obtain reparations from the state, even if it does foreclose civil liability for the individual guilty parties;
c) that the amnesty should not preclude and should be offset by public acknowledgment and publication of the relevant facts, including the identities of perpetrators;
d) that the amnesty should not be available to persons who have not submitted to the personal jurisdiction of the relevant authorities; and
e) that those seeking amnesty must affirmatively petition, and that they participate in the investigation of the facts by making a full disclosure of their role in the acts and omissions for which amnesty is sought.[80]

There is nothing currently on the ground to show that Boko Haram is willing to abide with the above conditions. In addition, while the government can

proclaim amnesty for the militants, it does seem that the federal government may be legally hampered in setting up another truth and reconciliation commission based on the outcome of the Oputa panel report. However, states that are currently affected by Boko Haram can set up truth and reconciliation commissions to probe atrocities and recommend individuals to the proposed amnesty commission as the case may be. The problem with this scenario is that both the government and Boko Haram are currently engaged in fierce military combat to the extent that Boko Haram has annexed some parts of Nigeria and declared them caliphates.[81] The general elections in Nigeria were recently postponed because the military could not guarantee the security of lives and property during the elections.[82] Furthermore, a regional task force against Boko Haram constituting soldiers from Cameroon, Chad, Benin and Niger has been set up to fight the insurgency and has the backing of the both the African Union and the UN.[83] Therefore, it can be concluded that the Boko Haram conflict is a threat to the corporate existence of Nigeria and other neighbouring countries which means that amnesty is currently not an option for Boko Haram members.

Conclusion

This article has looked at the dichotomy between justice and reconciliation using the activities of the Nigerian MEND and Boko Haram as case studies. It has discussed the provision of the Rome Statute on issues of justice and reconciliation through the interests of justice provision in Article 53 of the Rome Statute. In addition, the article has applied the findings of the discussions to the conflicts in Nigeria with special emphasis on the conflicts in the Niger Delta and northern parts of Nigeria. We argue that there is a difficult choice to make when one is asked to choose between justice and reconciliation. They are both very important elements. However, there are possibilities that the two can work together when they are used effectively. The deployment of the amnesty for Niger Delta militants achieved the goal of ensuing that the oils continued to flow. It did not solve the Niger Delta question. Following the emergence of Goodluck Jonathan, it appeared that the Niger-Delta militancy had been pacified. However, the underlying issues that caused the insurgency in the first place are yet to be addressed.

The emergence of Boko Haram as a terrorist group in Nigeria affiliated with other international terrorist groups has raised the stakes in Nigeria. The involvement of the ICC in the conflict is also very significant. This is because the ICC is not bound by any amnesty or reconciliation programme entered between the Nigerian government and Boko Haram members. Although, it can be argued that Article 53 of the Rome Statute allows the

Prosecutor to recognize non-judicial mechanisms, the interpretation of the ICC Prosecutor is different and very restricted in application. Until there is a shift, the likes of Boko Haram can only enjoy transitional mechanisms that operate within the boundaries of Nigeria and may be liable for prosecution if indicted by the ICC. In addition, the transnational nature of Boko Haram means that any of the West African countries neigbouring Nigeria where Boko Haram members operate can actually prosecute them for international crimes. For instance, the amnesty granted to members of MEND did not stop the South African government from prosecuting Henry Okah for terrorism related activities in Nigeria. Therefore, Benin, Cameroon, Chad and Niger all have primary responsibilities to investigate and prosecute Boko Haram members for international crimes committed either in Nigeria or under their territorial jurisdiction.

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Perceptions de la « justice des vainqueurs » : engagements de la CPI et processus de paix et de réconciliation en Ouganda, en République démocratique du Congo et en Côte d'Ivoire[1]

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Résumé

Le cycle des atrocités vécues dans les trois pays constituant notre champ d'observation tire principalement sa source dans la lutte pour la conquête ou la conservation du pouvoir couplée avec le non respect des règles. L'anéantissement des mécanismes d'alternance démocratique au pouvoir dans ces États définis comme des républiques génère des conflits armés infectés des crimes contre l'humanité et des crimes de guerre perpétrés par les différents protagonistes. Dans l'intermittence d'accalmie, les réclamations de la justice et le désir de la paix émergent comme préoccupations majeures. Comment les assouvir ? Que privilégier ? La justice ? Laquelle ? Ou plutôt la paix ? Laquelle ? À l'analyse, vraie justice, indépendante, impartiale, égale pour tous, et paix véritable ne sont pas des objectifs antinomiques. Des mécanismes nationaux et internationaux à déployer doivent tendre au triomphe de celle-là pour qu'advienne celle-ci et que règne une réconciliation durable. La CPI a des atouts légaux lui permettant d'y contribuer significativement, à condition que ces derniers soient mis en œuvre de façon efficiente.

Abstract

The cycle of atrocities experience in the three countries that constitute our field of study drawn primarily its source from the fight for power conquest or conservation, coupled with non-compliance with the rules. Annihilation of democratic alternation mechanisms in power in these States, defined as republic, generate armed conflict infected with crimes against humanity and war crimes perpetrated by various belligerents. During the Intermittence of lulls, claims for justice and desire for peace emerge as major concerns. How can

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they be responded to? What should be given priority ? Justice ? Which one ? Or peace rather ? Which peace? When we analyse, true justice: independent, impartial, fair to all; and true peace are not incompatible. The national and international mechanism to be deployed must move towards the triumph of the one for the other to come to reality and for sustainable reconciliation to reign. The ICC has all the legal assets which enable it to significantly contribute to that, provided these assets are put to work efficiently.

Introduction

L'analyse des évènements survenus dans les trois pays qui nous servent de champ d'observation, à savoir l'Ouganda, la RDC et la Côte d'Ivoire, permet de constater que le cycle infernal des atrocités qui y sont déplorées tire principalement sa source de la lutte pour la conquête ou la conservation du pouvoir couplée avec le non respect des règles, même constitutionnelles. Ces pays sont tous des Républiques,[2] c'est-à-dire, en gros, des États ayant opté pour un régime politique ouvert à tous les citoyens dans lequel le pouvoir est partagé entre le législatif, l'exécutif, le judiciaire, voire la société civile, et où la fonction de chef de l'État, qui s'acquiert par les urnes et non par l'hérédité, s'exerce durant un temps bien fixé.

Dans une République, les violences peuvent s'enclencher si un individu ou un groupe d'individus arrivés au pouvoir s'y accrochent farouchement et anéantissent toute possibilité d'alternance. Elles s'exacerbent lorsque ceux-ci, pour réussir dans leur œuvre, se permettent des actions dangereuses pour la cohésion sociale, comme par exemple :

- la dénaturation de l'armée, en lui ôtant sa vocation nationale pour la muer en milice privée, à dominante tribale ou clanique, chargée moins d'assurer la sécurité et l'intégrité du territoire que de réprimer les opposants et la population civile dite non fidèle ;
- la concentration des moyens économiques et financiers entre les mains d'une minorité, la majorité de la population étant au fond du gouffre.

Cette confiscation du pouvoir finit par générer des mouvements de contestation dont certains vont jusqu'à la rébellion. La lutte qui s'en suit s'accompagne de l'utilisation des crimes de sang, des tueries massives et des abominations criminelles sexuelles comme outils pour se hisser au pouvoir et s'emparer des structures étatiques ou les conserver. Les auteurs de ces crimes sont multiples et se comptent dans tous les camps qui s'affrontent.

Lorsqu'arrive le temps d'en demander des comptes, deux préoccupations majeures émergent : d'un côté la soif de la justice, réclamée par les victimes ; de l'autre le désir ardent de la paix, nécessaire à la reprise de la vie en société. Dès lors, que privilégier ? La justice ou la paix ? Et pourquoi pas les deux ?

Au plan interne, l'avènement de la justice bute sur une réalité complexe. On observe, en effet, que les acteurs sortis vainqueurs se servent du pouvoir conquis pour essayer de se blanchir. Ils opèrent des tris des poursuites, en faisant fi des règles existantes, suscitant ainsi les perceptions de justice des vainqueurs tout en compromettant le retour de la paix sociale (I). Cette situation, se traduisant par la permanence d'une tension explosive, ne peut laisser indifférents ni les autres États africains, ni la communauté internationale qui, se fondant sur des expériences pertinentes et douloureuses du passé, ont mis sur pied des mécanismes et institutions pouvant contribuer à la recherche de solutions efficaces. Parmi celles-ci figure la Cour pénale internationale (CPI), juridiction permanente créée par la volonté des États pour mettre fin à l'impunité des auteurs des crimes les plus graves touchant l'ensemble de la communauté internationale et concourir à la prévention de nouveaux crimes.[3] Le recours à la CPI peut aider à combler les défaillances de la justice interne, en application du principe de la complémentarité, à condition que cette instance, elle-même, échappe au risque d'instrumentalisation et poursuive comme objectif certes l'avènement de la justice mais aussi le retour de la paix (II). Dans cet élan, peuvent également être mis en œuvre des commissions dites « vérité et réconciliation » qui ont cependant montré aussi leurs limites et qui, à notre sens, ne devraient pas empêcher le déploiement de la justice, l'objectif de paix et de réconciliation et celui d'une vraie justice n'étant pas antinomiques (III).

Écueil interne : poursuites judiciaires sélectives et ressentiment de la justice des vainqueurs

Dans les trois pays observés, la lutte pour le pouvoir s'est jumelée avec la commission des crimes graves imputables aux différents protagonistes en présence. Dans la Région des Grands Lacs, ce phénomène a des racines lointaines. Le cycle auquel nous assistons jusqu'à ce jour semble avoir pris naissance en Ouganda en 1980 et avoir été introduit en RDC, alors Zaïre, en 1996. Ce recul temporel paraît suffisant et pertinent, car il montre comment les tueries ont servi d'ascenseurs et comment l'impunité génère la spirale des crimes avec la multiplication des actions des mouvements dits de libération, les massacres des millions de personnes, les viols de femmes, les déplacements innombrables des populations civiles, les destructions des biens, les pillages des ressources naturelles, etc.[4] Un processus similaire s'est développé en Côte d'Ivoire depuis 1993, s'est accentué en 1995 avec la mise sur pied du concept de « *l'ivoirité* », a été nourri, comme en RDC, des ingérences d'acteurs internationaux, notamment des pays voisins et des multinationales, s'est précipité en 1999 avec le coup d'Etat militaire, et s'est

prolongé par une sanglante controverse après la présidentielle de 2000, davantage aggravée à l'issue des élections de 2010. Suite à des contestations des résultats de celles-ci, le pays a sombré dans une longue crise au cours de laquelle au moins 3000 personnes auraient été tuées et 150 femmes violées, souvent dans le cadre d'attaques perpétrées par les partisans des deux camps.[5]

Dans ces trois pays, le schéma est donc similaire, même si chacun garde ses particularités. Il y a comme un mariage funèbre d'actions politiques, militaires, affairistes et éminemment criminelles. La sauvagerie des guerres de conservation ou de conquête fait qu'on bafoue les règles élémentaires régissant les conflits armés, on massacre impunément des civils, on viole, on pille, on terrorise pour conserver ou s'emparer du pouvoir et se faire ensuite blanchir. Car, une fois parvenus au pouvoir, les acteurs victorieux s'emparent des structures étatiques et des instruments de l'imperium, parmi lesquels la justice qu'ils instrumentalisent au moyen de plusieurs mécanismes dont l'interférence directe dans la sphère de compétence des organes judiciaires et la mise en œuvre des lois d'amnistie.

Interférence directe dans le cours du judiciaire

Ayant conquis le pouvoir, les opérateurs militaro-politiques n'hésitent pas à s'ingérer dans le domaine du judiciaire pour influencer les choix des personnes à poursuivre. Les membres de leur bord ne sont que rarement inquiétés, alors que d'autres, ayant commis des actes infractionnels d'égale ou de moindre gravité, sont soumis à la rigueur de la loi.

Pour nous limiter à l'illustration de la Côte d'Ivoire, selon plusieurs observateurs, le nouveau gouvernement, nommé par le chef de l'État élu, avait promis de réclamer des comptes, de manière impartiale, pour les crimes internationaux graves perpétrés lors de la crise postélectorale de 2010, et à traduire en justice tous les responsables, indépendamment de leur affiliation politique ou de leur grade militaire : promesse, semble-t-il, non tenue. Human Rights Watch (HRW), par exemple, dans un rapport fondé sur des travaux de recherche réalisés à Abidjan en septembre 2012 et sur des entretiens de suivi avec des responsables gouvernementaux, des juristes, des membres de la société civile, des représentants de l'ONU, des diplomates et des responsables d'organismes bailleurs de fonds, a analysé ce qu'il appelle les efforts inégaux déployés par la Côte d'Ivoire pour réclamer des comptes aux responsables de ces graves crimes internationaux.[6] De même, le chef de la division *Droits de l'Homme* de la Mission des Nations Unies en Côte d'Ivoire (ONUCI), a publiquement reconnu qu'

> « il y a encore pas mal de pas à faire en matière de lutte contre l'impunité, surtout lorsque ce sont des FRCI *[Forces républicaines de Côte d'Ivoire]* qui sont impliquées. Il y a pas mal de cas où les enquêtes devraient aller plus vite pour pouvoir mettre les responsables de ces actes devant leurs responsabilités. Quand vous regardez certains faits qui sont commis par certains responsables, notamment des FRCI, par rapport à la crise, quand vous voyez tout ce qui s'est passé à Duékoué ou ailleurs, il y a des victimes qui demandent que justice soit faite… »[7]

Il a également souligné la peur qu'éprouvent les juges et les procureurs dans le traitement d'un important dossier impliquant les hommes du camp au pouvoir.[8]

Une telle absence d'équité produit deux conséquences qui compromettent durablement la paix, à savoir le sentiment d'injustice, voire de persécution péniblement ressenti par les uns et la consécration de l'impunité dont jouissent allègrement les autres. C'est la justice des vainqueurs camouflant parfois l'impunité derrière des lois d'amnistie.

Lois d'amnistie

Pour s'assurer d'un parfait blanchissement, il arrive parfois que le nouveau pouvoir nomme des délégués issus de différents mouvements militaro-politiques ayant pris part à la lutte pour la conquête du pouvoir, et ces délégués forment alors un parlement avec d'autres personnalités également nommées ou prétendument élues. Par la suite, ce parlement est utilisé pour voter des lois, notamment d'amnistie, afin d'effacer certains crimes commis pendant la guerre.

Comme on le sait, l'amnistie est une mesure législative exceptionnelle qui enlève, rétroactivement à certains actes, leur caractère criminel. Elle est regardée comme une loi de l'oubli ayant pour finalité d'apaiser les esprits et les passions après une crise politique. L'objectif poursuivi paraît donc noble. Cependant, pour une paix véritable, il faut éviter d'utiliser cette voie pour faire échapper à la justice les auteurs des crimes graves, en l'occurrence des crimes de sang, des viols et violences sexuelles constitutifs de crimes contre l'humanité ou de crimes de guerre. On doit savoir que le génocide, les crimes contre l'humanité, les crimes de guerre, les violations graves de l'article 3 commun aux Conventions de Genève, ne doivent pas être amnistiés, car ils portent gravement atteinte aux valeurs essentielles de l'humanité ; ils sont d'une telle gravité qu'ils sont réprimés par le législateur international et sont et doivent être imprescriptibles.[9] Amnistier des crimes aussi graves aura pour effet non point d'apaiser les esprits ni les tensions, mais au contraire, d'exacerber les frustrations, d'attiser les haines, d'officialiser l'impunité, de

générer des vengeances,[10] de nourrir la spirale des atrocités en les légitimant comme mode normal d'accession au pouvoir.

Aussi est-ce avec bonheur que nous avons noté l'attention portée par madame le procureur de la CPI, au cours des séances de travail qu'elle avait eues avec les autorités congolaises dans le cadre de sa visite de travail en RDC en mars 2013, sur l'amnistie dont espéraient bénéficier des chefs de guerre, prétendant avoir mené des combats politiques. Elle avait affirmé, à juste titre, que « les crimes relevant de la CPI ne sont pas amnistiables ».[11] Effectivement, la loi n° 14/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques, a exclu de son bénéfice les auteurs de crimes de génocide, de crimes de guerre et de crimes contre l'humanité.[12] Cette exclusion est heureuse et s'impose, car, au regard de ces crimes, le rétablissement de la paix et de la réconciliation passe par l'administration d'une vraie justice sans laquelle il faut craindre le retour de manivelle et à l'avènement de laquelle la CPI est précisément appelée à contribuer.

Recours à la Cour pénale internationale et vigilance contre le risque d'instrumentalisation

Pour arrêter la spirale des crimes et permettre la réconciliation des peuples, la stabilisation durable des rapports humains et le retour d'une paix véritable, il faut que la justice intervienne. Mais il ne s'agit pas de n'importe quelle justice, ni de la pseudo-justice des vainqueurs. Il doit s'agir d'une vraie justice, capable d'établir toutes les responsabilités et de sanctionner, sans funestes atermoiements, sans complaisance, ni esprit revanchard, ni discrimination, tous les agents criminels identifiés, aussi bien les auteurs musculaires ou matériels que les opérateurs plus ou moins voilés ou les commanditaires qu'on peut qualifier d'auteurs intellectuels, nationaux ou étrangers ; d'une justice respectueuse des droits de tous les protagonistes et à même de procurer aux victimes la réparation des préjudices subis. À s'en tenir aux dispositions pertinentes du Statut de la CPI, on peut légitimement espérer qu'elle contribue significativement à l'établissement de cette vraie justice. D'où, le déferrement devant elle des situations en Ouganda, en RDC et en Côte D'Ivoire, par exemple, est en soi heureux, pourvu qu'il soit égal pour tous.

Qualités intrinsèques de la CPI

Elles sont cristallisées dans les dispositions fondamentales régissant cette Cour et réunissant les conditions de son efficacité. Certes, ces dispositions

à elles seules ne suffisent pas. Pour qu'elles produisent leurs effets, elles doivent être effectivement et rigoureusement appliquées par des animateurs compétents, expérimentés, déterminés, engagés à la cause de la justice.

Dispositions pertinentes du Statut de la CPI garantissant son efficacité

Pour traiter avec efficacité le phénomène criminel caractérisé par le mariage pouvoir-crimes et par la présence sur scènes d'acteurs puissants nationaux et extranationaux, la justice à intervenir doit revêtir les critères de supranationalité, d'indépendance réelle, de moyens d'action et d'indemnisation des victimes. Le Statut de la CPI contient des dispositions réunissant ces critères.

Supranationalité et coopération des États

Institution permanente indépendante, la CPI est dotée de la personnalité juridique internationale. Elle a la capacité juridique nécessaire lui permettant d'exercer ses fonctions et d'accomplir sa mission, celle de promouvoir la primauté du droit et de lutter contre l'impunité des crimes pénaux internationaux les plus graves et imprescriptibles, en l'occurrence le crime de génocide, les crimes contre l'humanité, les crimes de guerre et le crime d'agression. Pour atteindre cet objectif, la Cour peut exercer ses fonctions et pouvoirs sur le territoire de tout État-partie et, par une convention à cet effet, sur le territoire de tout autre État.[13] Elle tient ses pouvoirs et sa légitimité de la volonté des États qui ont signé, ratifié, accepté ou approuvé son Statut ou qui y ont adhéré conformément aux dispositions de l'article 125. Au 9 février 2015, « 123 pays sont États Parties au Statut de Rome de la Cour pénale internationale. Parmi eux, 34 sont membres du groupe des États d'Afrique, 19 sont des États d'Asie et du Pacifique, 18 sont des États d'Europe Orientale, 27 sont des États d'Amérique Latine et des Caraïbes, et 25 sont membres du Groupe des États d'Europe occidentale et autres États. »[14]

Les États-parties, dont les trois qui nous servent de champ d'observations, à savoir l'Ouganda, la RDC et la Côte d'Ivoire[15], doivent logiquement collaborer à la réussite de la mission de la CPI. Aussi cette Cour est-elle complémentaire des tribunaux pénaux nationaux. Elle n'exerce sa juridiction que si les États en cause sont dans l'incapacité ou n'ont pas la volonté de poursuivre les auteurs des crimes déplorés relevant de sa compétence.[16]

Indépendance et impartialité

Dotée de la personnalité juridique internationale, la CPI est une institution judiciaire indépendante reliée au système des Nations Unies.[17] Aux termes

de l'article 40 de son Statut, les juges de la CPI exercent leurs fonctions en toute indépendance. Ils ne doivent exercer aucune activité qui pourrait être incompatible avec leurs fonctions judiciaires ou faire douter de leur indépendance.[18] Ces principes d'indépendance et d'impartialité régissent aussi le Bureau du Procureur[19] à qui ils accordent toute liberté dans l'exercice de ses fonctions d'enquête, d'instruction et de poursuite, la recherche de la vérité étant le seul souci qui doit guider son action. Cette liberté rime avec impartialité. Ainsi, par exemple, pour établir la vérité, le procureur doit étendre l'enquête à tous les faits et éléments de preuve qui peuvent être utiles pour déterminer s'il y a responsabilité pénale au regard du statut de la Cour et, ce faisant, enquête tant à charge qu'à décharge.[20]

Moyens

La justice a un coût. Mener des enquêtes sur terrain, rechercher les auteurs présumés des crimes, réunir les éléments de preuve, protéger les victimes et les témoins, les déplacer pour audition, faire intervenir des experts…, tout cela demande des moyens. La Cour ayant été créée par la volonté des États, ceux-ci contribuent financièrement à son fonctionnement et à l'accomplissement de ses missions. Cette union ne peut que faire la force de la CPI, d'autant que cette dernière peut aussi recevoir des ressources financières de l'Organisation des Nations Unies, en particulier dans le cas des dépenses liées à la saisine de la Cour par le Conseil de sécurité.[21] De plus, la Cour peut recevoir et utiliser, à titre de ressources financières supplémentaires, les contributions volontaires des gouvernements, des organisations internationales, des particuliers, des entreprises et d'autres entités, selon les critères fixés en la matière par l'Assemblée des États parties.[22] Il importe évidemment de faire très attention à l'origine de ces contributions afin d'éviter que certaines ne proviennent des entreprises ou individus criminels et n'entraînent l'aliénation de l'indépendance de la Cour.

Protection, participation des victimes au procès et leur indemnisation

La justice administrée par la CPI inclut la protection et la participation aux procès des victimes et des témoins des crimes.[23] Le Statut accorde également à la Cour des pouvoirs et prévoit des mécanismes qui garantissent la réparation des dommages subis par les victimes.[24]

Nécessité de la mise en œuvre effective de ces dispositions pertinentes

Toutes ces dispositions relatives à la supranationalité, à la coopération des États, à l'indépendance, à l'impartialité, aux moyens, à la protection, participation et réparation des dommages subis par les victimes ne suffisent pas à elles

seules. Pour qu'elles produisent les effets escomptés, elles doivent être mises en œuvre de façon efficiente par les animateurs de la CPI. Parmi les qualités d'efficacité, nous voudrions souligner particulièrement celles de courage et de rigueur. En effet, pour mettre en œuvre tous les prescrits pertinents du Statut, il faut que ces animateurs soient, non seulement compétents, expérimentés et moralement intègres, mais aussi rigoureux et courageux. L'indépendance prévue dans le texte, par exemple, ne peut être traduite dans les faits que par ses bénéficiaires eux-mêmes. Il ne s'agit pas de se plaindre et d'attendre que cette indépendance soit octroyée par on ne sait quelle autre autorité ! Car cette indépendance est déjà accordée par le Statut qui traduit la volonté des États. Il s'agit de la vivre dans le concret et de l'imposer par sa conduite courageuse et rigoureuse, rejetant toute pression ou toute tentative d'aliénation. L'administration de la vraie justice exige ce courage. Car il est question de poursuivre des individus dont certains peuvent apparaître comme intouchables, pour établir les responsabilités pénales, sanctionner, faire exécuter les sentences prononcées, imposer les réparations des dommages subis par les victimes ou leur indemnisation.

Ainsi, par exemple, traitant de l'importante question de la responsabilité pénale, l'article 25 dispose que « quiconque commet un crime relevant de la compétence de la Cour est individuellement responsable et peut être puni conformément au présent statut ». Le terme « *quiconque* » est très pertinent. Il désigne tout individu, quels que soient son rang, sa nationalité, son genre, son état civil ou militaire…, qui commet un crime rentrant dans la compétence de la Cour. Les seules personnes exceptées sont les mineurs de moins de 18 ans, et les individus bénéficiant d'un des motifs d'exonération visés dans l'article 31 qui en fixe les conditions, à savoir la déficience mentale, l'état d'intoxication involontaire, la légitime défense, la contrainte et l'état de nécessité.[25] Les animateurs de la CPI n'ont pas à créer dans les faits des inégalités incompatibles avec l'objectif principal de cette haute instance qui est de lutter contre l'impunité en assurant la primauté du droit. L'article 27 du Statut n'accorde aucune pertinence à la qualité officielle des auteurs des crimes. Il porte, en effet, que le Statut de la Cour

> « s'applique à tous de manière égale, sans aucune distinction fondée sur la qualité officielle. En particulier, la qualité officielle de chef d'État ou de gouvernement, de membre d'un gouvernement ou d'un parlement, de représentant élu ou d'agent d'un État, n'exonère en aucun cas de la responsabilité pénale au regard du présent Statut, pas plus qu'elle ne constitue en tant que telle un motif de réduction de la peine. Les immunités ou règles de procédure spéciale qui peuvent s'attacher à la qualité officielle d'une personne, en vertu du droit interne ou du droit international, n'empêchent pas la Cour d'exercer sa compétence à l'égard de cette personne. »[26]

Il importe aussi de souligner qu'est pénalement responsable, non seulement l'auteur matériel du crime, mais aussi le commanditaire, l'incitateur, le donneur d'ordre, le complice par aide, assistance, encouragement, fourniture des moyens… C'est ce qui ressort de l'article 25-3 du même Statut. En ce qui concerne les chefs militaires et autres supérieurs hiérarchiques, leur responsabilité peut être engagée non seulement pour des crimes qu'ils auraient personnellement commis, mais aussi pour ceux perpétrés par leurs subordonnés s'ils savaient ou auraient dû savoir que ces derniers allaient commettre ces crimes ou les avaient commis, et n'ont rien entrepris pour empêcher cette commission ou en punir les auteurs. Telle est la substance de l'article 28 du Statut.

Comme on peut s'en rendre compte, et pour prendre l'illustration des poursuites engagées pour des crimes perpétrés en RDC, en Ouganda et en Côte D'Ivoire, l'application stricte de ces différentes dispositions permet d'atteindre toutes les personnes physiques ou morales impliquées directement ou indirectement dans la réalisation de ces crimes, quel que soit leur rang hiérarchique ou leur puissance économique, que ces personnes se trouvent à l'étranger ou à l'intérieur de ces pays au sein de leurs gouvernements, de leurs parlements, de leurs armées, de leurs services de sécurité, de leurs administrations territoriales…

Déferrement des affaires à la CPI et dénonciation du tri

Les affaires pendantes devant la CPI visent essentiellement des crimes perpétrés autour des luttes pour la conquête ou la conservation du pouvoir politique. La plupart d'entre elles y ont été déférées par les États africains eux-mêmes, reconnaissant, par là, que leurs institutions judiciaires n'étaient pas en mesure de mener efficacement des enquêtes et de juger les auteurs des crimes de guerre et des crimes contre l'humanité perpétrés sur leur sol. Parmi ces États figurent précisément l'Ouganda, la RDC et la Côte d'Ivoire.[27] À cet égard, d'aucuns accusent la CPI d'être sélective et de ne poursuivre que des opposants, en laissant de côté les crimes commis par des individus qui sont au pouvoir ou par les acteurs de leur orbite.

Affaires déférées par l'Ouganda

Probablement incapable de procéder à l'arrestation des responsables des rébellions auxquelles il fait face, le pouvoir de Kampala a dû attirer l'attention de la communauté internationale sur de graves crimes perpétrés par ces derniers. Aussi, en décembre 2003, a-t-il décidé de déférer le dossier de la LRA à la CPI qui a alors ouvert l'instruction dans l'affaire ICC-01/04-01/05, le Procureur c. Joseph Kony, Vincent Otti, Okot Odhiambo et Dominic Ongwen.

Sans être adepte de l'argument du *Tu quoque*, on ne peut manquer de se demander si, en saisissant la CPI, l'Ouganda se rappelait que ses propres acteurs avaient été accusés de graves crimes qu'ils auraient commis dans le cadre de la conquête du pouvoir par la force en 1986, et durant l'occupation de l'Est de la RDC entre 1999 et 2003, crimes restés à ce jour, impunis. S'agissant des crimes commis en RDC, en plus des témoignages contenus dans le dossier Katanga et jugés crédibles[28], la CPI peut utilement s'appuyer sur l'arrêt de la Cour internationale de justice du 19 décembre 2005 condamnant l'Ouganda pour des activités armées sur le territoire de la RDC.[29]

Au cours de l'audience de la chambre de première instance II sur la fixation de la peine, tenue le 6 mai 2014, le conseil de la défense de Germain Katanga, exposant les circonstances atténuantes pouvant jouer au bénéfice de son client, a souligné, entre autres, que les crimes massifs commis par les militaires ougandais sur la population civile Ngiti de la collectivité de Walendu-Bindi, notamment par des bombardements au moyen d'hélicoptères de combat, ont contribué à la naissance d'un mouvement d'auto-défense de cette population auquel a dû prendre part Germain Katanga. Curieusement, a-t-il relevé, le procureur ne s'est pas intéressé à ces officiers ougandais dont certains sont bien connus.[30]

Affaires déférées par la RDC

Par sa lettre du 3 mars 2004, le chef de l'État congolais a saisi la CPI de la situation en RDC.[31] La Cour a alors ouvert six dossiers respectivement dans les affaires 1) ICC-01/04-01/06, le Procureur c. Thomas Lubanga Dyilo ; 2) ICC-01/04-02/06, le Procureur c. Bosco Ntaganda ; 3) ICC-01/04-01/07, le Procureur c. Germain Katanga ; 4) ICC-01/04-02/12, le Procureur c. Mathieu Ngudjolo[32] ; 5) ICC-01/04-01/10, le Procureur c. Callixte Mbarushimana[33] ; 6) ICC-01/04-01/12, le Procureur c. Sylvestre Mudacumura.[34] Pour l'illustration de notre propos, nous allons nous limiter aux deux affaires qui ont été contradictoirement débattues et qui ont abouti à des jugements de condamnation, à savoir les affaires Lubanga et Katanga.

Affaire Thomas Lubanga

Thomas Lubanga était président de l'Union des Patriotes congolais (UPC) et commandant de sa branche armée « Force patriotique pour la libération du Congo » (FPLC), groupe politico-militaire né de la scission d'avec le RCD[35] qui s'est rebellé contre le gouvernement de Kinshasa qui l'accusait de vouloir créer un État indépendant de l'Ituri, avec l'appui d'abord de l'Ouganda, ensuite du Rwanda. Il avait été transféré à La Haye le 16 mars 2006.[36] Le 14

mars 2012, se fondant sur les preuves produites et examinées au procès et sur l'ensemble des procédures conformément à l'article 74-2 du Statut de la CPI, la chambre de première instance I a déclaré Thomas Lubanga coupable, en qualité de co-auteur, des crimes de guerre consistant en l'enrôlement et la conscription d'enfants de moins de 15 ans dans la FPLC, et au fait de les avoir fait participer activement à des hostilités, au sens des articles 8-2-e-vii et 25-3-a du Statut, de septembre 2002 au 13 août 2003.[37] Le 10 juillet 2012, il a été condamné à une peine totale de 14 ans d'emprisonnement.[38] Son jugement a été confirmé par la chambre d'appel.[39]

On ne peut que constater que Thomas Lubanga est le seul, à ce jour, à être poursuivi et condamné pour ce crime devant la CPI. Et pourtant, tout le monde sait que le phénomène d'utilisation d'enfants soldats a été importé en RDC, alors Zaïre, en 1996 par l'AFDL[40]. Ceux qui, en RDC, avaient procédé au recrutement, à l'entrainement et à l'utilisation d'enfants soldats en les faisant participer aux hostilités sont connus. Ils n'ont jamais fait l'objet des poursuites judiciaires et pour cause.

Affaire Germain Katanga

Présumé commandant de la Force de résistance patriotique en Ituri (FRPI), Germain Katanga a été transféré à la CPI, à La Haye, le 17 octobre 2007, pour y répondre des crimes qu'il aurait commis au cours de l'attaque lancée, le 24 février 2003, contre le village de Bogoro en Ituri.[41] Le 7 mars 2014, la chambre de première instance II, à la majorité, l'a reconnu et déclaré coupable, en tant que complice au sens de l'article 25-3-d du Statut, des crimes suivants :

- meurtre constitutif de crime contre l'humanité, visé à l'article 7-1-a du Statut; meurtre constitutif de crime de guerre, visé à l'article 8-2-c-i du Statut ; attaque contre une population civile en tant que telle ou contre des personnes civiles ne participant pas directement aux hostilités constitutive de crime de guerre, visé à l'article 8-2-e-i du Statut ;
- destruction des biens de l'ennemi constitutive de crime de guerre, visé à l'article 8-2-e-xii du Statut ; et pillage constitutif de crime de guerre, visé à l'article 8-2-e-v du Statut.[42]

L'audience sur la fixation de peine s'est tenue les 05 et 06 mai[43] et le 23 mai 2014 a été rendue la décision condamnant Germain Katanga à 12 ans de prison.[44] La procédure se poursuivra pour déterminer les réparations pour les victimes.

On peut légitimement faire observer que Katanga ayant été reconnu coupable de ces crimes en qualité de complice ayant apporté une contribution significative à la perpétration de ces crimes[45], il importe que les auteurs

principaux de ces derniers soient également poursuivis. Certains de ces auteurs principaux ont été désignés, durant le procès, par des témoins jugés crédibles, sur ce point, dont les témoins de l'accusation P-12 et de la défense D02-0236/D03-011, D02-0228, D02-0350, ainsi que par certaines preuves documentaires dont la pièce EVD-D03-00136.[46] Il est souhaitable que ces auteurs présumés, actuellement au pouvoir, soient également traduits devant la CPI pour répondre de leurs actes. Dans sa plaidoirie à l'audience sur la fixation de la peine, le conseil de la défense l'a martelé. [47] Germain Katanga, lui-même, est allé dans le même sens non sans s'interroger. Il dit :

> « Les juges, à la majorité, me reprochent, d'avoir été complice pour les crimes commis lors de l'attaque de Bogoro du 24 février 2003 parce que j'avais participé, à Beni, aux différentes réunions de planification des opérations militaires de la coalition gouvernement de Kinshasa (Émoi-FAC) et du RCD/K-ML (APC), dont l'objectif consistait à conquérir l'Ituri du contrôle de l'UPC. J'ai pu amener des armes et munitions et accueillir les troupes des FAC et APC ainsi que leurs commandants venus pour diriger les opérations. Qui étais-je pour empêcher le chef de l'État de remplir ses devoirs envers le pays ?... Si la majorité des juges m'ont reconnu coupable pour la complicité, qu'attend le Procureur pour traduire en justice l'auteur principal et les coauteurs ?... »[48]

Avant eux, le représentant légal des victimes, en conclusion de ses observations et se tournant vers madame le procureur, a émis, le souhait de voir celle-ci poursuivre les autres auteurs des crimes commis à Bogoro le 24 février 2003.[49]

Il est utile de rappeler qu'au mois de mars 2014, la Coalition nationale pour la Cour pénale internationale de la RDC, constituée de 350 ONG[50], a saisi l'occasion de la visite de madame le procureur de la CPI dans ce pays pour lui présenter un mémorandum dans lequel elle « soutient, qu'à l'absence manifeste de volonté politique dans le chef des institutions étatiques et des capacités judiciaires nécessaires à organiser la répression efficace des responsables des crimes internationaux, l'espoir de l'ensemble de la population, en particulier les victimes et les communautés affectées reste tout azimut vers la Cour pénale internationale ».[51] Elle y souhaite que le séjour de madame le procureur de la CPI

> « soit également mis à profit pour échanger avec les autorités de la République démocratique du Congo sur certaines questions fondamentales, notamment :…
>
> L'inexécution des mandats nationaux lancés contre le seigneur de guerre Laurent Nkunda Mihigo et certains leaders rebelles de M23.

> Nous pensons [écrit-elle] que, ces mandats ont été émis non pas dans la volonté de garantir la justice aux victimes et aux communautés affectées ; plutôt ils constituent une œuvre notoire de protection judiciaire des criminels, de manière à empêcher la Cour pénale internationale d'exercer sa juridiction sur ces criminels. Il reste vraisemblable que le retrait de ces mandats d'arrêts, permettrait à la Cour pénale internationale d'exercer sa compétence et changer les domiciles de tous ces bourreaux.[52]
>
> Somme toute, la Coalition nationale pour la Cour pénale internationale attend impatiemment voir être émis d'autres mandats d'arrêt contre les auteurs des crimes internationaux perpétrés dans les territoires de Shabunda, Fizi, Walungu, Mwenga, Masisi, Rutshuru, Walikale, Dungu, Pueto, Manono et dans la ville de Lubumbashi (récentes affaires Mukungubile et Katakatanga). »[53]

Se trouve ainsi dénoncée la protection de certains criminels ayant des accointances avec le pouvoir, et clairement exprimé le souhait de la société civile de voir tous les auteurs des crimes graves perpétrés en RDC répondre de leurs actes devant la CPI.

Affaires déférées par la Côte d'Ivoire

Le 18 avril 2003, alors qu'elle n'était pas encore partie au Statut de Rome, la Côte d'Ivoire a déclaré reconnaître la compétence de la Cour aux fins d'identifier, de poursuivre, de juger sans retard et sans exception les auteurs et complices des actes commis sur le territoire ivoirien depuis les évènements du 19 septembre 2002.[54] Cette acceptation a été confirmée par la présidence de ce pays le 14 décembre 2010[55] et le 3 mai 2011. Pour nous limiter aux lettres du 14 décembre 2010, le président de la République y écrit notamment : « … J'engage mon pays, la Côte d'Ivoire, à coopérer pleinement et sans délai avec la Cour pénale internationale, notamment en ce qui concerne tous les crimes commis depuis mars 2004 ».[56] Le 13 décembre 2012, par Décret n° 2012-1135, il a promulgué la loi n° 2012-1134 insérant au titre VI de la Constitution un article 8bis[57], et le 15 février 2013, la Côte d'Ivoire a ratifié le Statut de Rome.

À ce jour, trois dossiers sont ouverts dans le cadre de la situation en Côte d'Ivoire : les dossiers Laurent Gbagbo, Simone Gbagbo et Charles Blé Goudé. Nous allons nous limiter aux deux accusés qui ont été transférés à La Haye.

Affaire Laurent Gbagbo

Comme tout le monde le sait, monsieur Laurent Gbagbo était président de la Côte d'Ivoire de 2000 à 2010. À l'issue des élections organisées du 31 octobre au 28 novembre 2010, la Commission électorale indépendante

a, le 2 décembre 2010, proclamé vainqueur monsieur Alassane Ouattara. S'en sont suivis des évènements émaillés des crimes graves relevant de la compétence de la CPI.

Précisément, le 23 novembre 2011, la chambre préliminaire III a émis un mandat d'arrêt, délivré sous scellés, dans l'affaire *le Procureur c. Laurent Gbagbo*. Elle a levé les scellés le 30 novembre 2011, jour où les autorités ivoiriennes ont décidé de transférer le suspect à La Haye. Le 5 décembre 2011, ce dernier a comparu pour la première fois devant ladite chambre, audience au cours de la quelle il s'est vu signifier les charges retenues contre lui.

Du 19 au 28 février 2013 s'est tenue l'audience de confirmation des charges. Le 3 juin 2013, la chambre préliminaire a ajourné la procédure et demandé au procureur d'envisager d'apporter des éléments de preuve supplémentaires ou de procéder à de nouvelles enquêtes relativement aux charges portées contre Laurent Gbagbo. Le 12 juin 2014, elle a rendu, à la majorité, la juge Christine Van den Wyngaert ayant émis une opinion dissidente, sa décision confirmant quatre charges de crimes contre l'humanité (meurtre, viol, autres actes inhumains ou - à titre subsidiaire - tentative de meurtre, et persécution), et renvoyant le suspect en jugement devant une chambre de première instance.[58]

Cette décision a suscité beaucoup de réactions, de satisfaction de la part des pro-Ouattara, de mécontentement dans le camp pro-Gbagbo, certains observateurs n'hésitant pas à évoquer la critique d'une justice à sens unique, comme l'illustre cet échange entre messieurs Boisbouvier et Fardeau :

> Q- « Depuis deux ans, vous dénoncez en Côte d'Ivoire une justice à sens unique. Sont poursuivis plusieurs centaines de pro-Gbagbo et zéro pro-Ouattara. Est-ce que la décision de ce jeudi ne renforce pas ce déséquilibre ?
>
> R- Cette décision peut renforcer ce déséquilibre ou cette impression de déséquilibre. C'est pour cela que nous appelons immédiatement la Cour pénale internationale - le bureau du procureur en particulier - et les autorités ivoiriennes à tout faire pour que ceux qui, du côté de Ouattara se sont rendus responsables de crimes contre l'humanité ou de crimes de guerre, notamment ces 548 personnes qui auraient été exécutées de manière sommaire par des forces pro-Ouattara dans la période post électorale, que ces personnes responsables soient poursuivies et que la Cour pénale puisse instruire le dossier de ces personnes également. Ce n'est qu'à cette condition que le peuple ivoirien reconnaîtra que la justice est impartiale et que personne n'est au-dessus de la loi. Que ce soit du côté pro-Gbagbo ou du côté pro-Ouattara. Il y a urgence effectivement, après trois ans, à ce que la Cour pénale montre sa capacité à instruire des dossiers pro-Ouattara. »[59]

La presse africaine a également orienté ses commentaires dans le même sens. Ainsi, par exemple, le journal burkinabé Le Pays estime que « la décision de la CPI est une *victoire d'étape* pour le *régime Ouattara* » mais « trouve aussi qu'on ne peut pas absoudre à bons comptes une personnalité comme Wattao, l'un des dix commandants de zones de l'ex-rébellion ivoirienne, car ce dernier… peut être considéré comme *le symétrique de Blé Goudé*. A moins… d'avoir opté pour la politique du *deux poids deux mesures* ». De son côté, « prudemment, Guinée Conakry Info estime que les responsables de la CPI jouent peut-être le *destin* de cette institution. Tandis qu'ils sont jusqu'ici accusés d'avoir exclusivement poursuivi le camp de Gbagbo, ils devraient mettre l'occasion à profit pour faire démentir les soupçons de leur inféodation aux grands de ce monde. Pour cela, ils devraient garantir à Laurent Gbagbo un procès juste et équitable, et prendre leur *ultime décision sur la base exclusive de la vérité des faits* »…[60]

Affaire Charles Blé Goudé

Charles Blé Goudé était le chef de la jeunesse du Front populaire ivoirien (FPI) au moment des évènements. Il a fait l'objet d'un mandat d'arrêt délivré par la CPI le 21 décembre 2011 et sur lequel la chambre préliminaire I a levé les scellés le 30 septembre 2013.[61] Il a été remis à la CPI par les autorités de la Côte d'Ivoire le 22 mars 2014 et a comparu pour la première fois devant la Cour le 27 mars 2014. Il serait responsable, en tant que coauteur indirect, de quatre chefs de crimes contre l'humanité qui auraient été perpétrés dans le contexte des violences postélectorales survenues sur le territoire de la Côte d'Ivoire entre le 16 décembre 2010 et le 12 avril 2011, à savoir : meurtres, viols et autres formes de violences sexuelles, actes de persécution, et autres actes inhumains.[62]

A la suite de ces transfèrements, plusieurs voix se sont également levées pour dénoncer ce qu'elles appellent la justice à deux vitesses que semble, selon elles, administrer la CPI, et réclamer que celle-ci engage aussi des poursuites contre ceux qui sont au pouvoir. Parmi ces voix, celle de HRW qui soutient que

> « la CPI devrait rapidement enquêter sur les crimes commis par des individus appartenant au camp Ouattara et, sur la base des éléments de preuve, demander que des mandats d'arrêt soient délivrés… Ceci se révèle indispensable pour rétablir la légitimité de la CPI en Côte d'Ivoire et faire pression sur les autorités ivoiriennes afin qu'elles produisent des résultats crédibles et impartiaux. »[63]

Pour Pascal Affi N'Guessan, le transfert de Blé Goudé à La Haye est un acte de conflictualité ; le camp Gbagbo est victime de la justice des vainqueurs aussi bien au plan interne qu'au plan international, car, déclare-t-il, la rébellion

de septembre 2002 était lancée par des hommes actuellement au pouvoir qui devraient aussi répondre de crimes qu'ils auraient commis.[64] De même, selon BBC, « les avocats de Laurent Gbagbo et Blé Goudé ont accusé le président Ouattara de se servir de la CPI comme d'un moyen politique pour se débarrasser de ses ennemis. Ils ont également critiqué les procureurs pour avoir lancé des poursuites uniquement contre Gbagbo et ses alliés. »[65] De son côté, madame le procureur de la CPI, qui s'était dite satisfaite du transfert de Blé Goudé à La Haye, a annoncé que des enquêtes plus poussées sur les violences de 2010-2011 en Côte d'Ivoire se poursuivraient ; que ceux qui ont recours à la violence et commettent des crimes à grande échelle contre des civils pour obtenir le pouvoir doivent rendre des comptes ; qu'elle présenterait d'autres affaires devant les juges de la CPI sans crainte ni traitement de faveur, et quel que soit le bord ou l'appartenance politique des auteurs des crimes.[66]

Notre exhortation la plus ardente est que l'engagement de la CPI soit impartial, courageux, égal pour tous, afin qu'il contribue à dissiper le ressentiment de la justice des vainqueurs et à démontrer que l'intervention d'une vraie justice est la condition de la restauration d'une paix et d'une réconciliation véritable. Aussi est-il heureux de constater qu'exerçant sa fonction d'administration de la justice, cette Cour prend également en compte l'objectif du rétablissement de la paix et de la réconciliation. Elle tend à sanctionner les auteurs des crimes les plus graves pour mettre un terme à l'impunité, concourir à la prévention de ce type de criminalité, et rétablir la paix et la réconciliation des populations en conflit. La chambre de première instance II a bien souligné ces différentes fonctions pertinentes lors du prononcé de la peine contre Germain Katanga :

> « Pour déterminer la peine qu'elle doit infliger, [dit-elle], la chambre a pris en considération plusieurs facteurs qui, quoique fort différents, ont tous pour objectif de donner un sens à la sanction prononcée. Les articles 77 et 78 du Statut ne précisent pas quelle est la finalité des sanctions pénales infligées. Il demeure qu'aux termes du préambule…, 'les crimes les plus graves qui touchent l'ensemble de la communauté internationale ne sauraient rester impunis'… Et les États signataires sont 'déterminés à mettre un terme à l'impunité des auteurs des crimes les plus graves et à concourir ainsi à la prévention de nouveaux crimes'… Il s'agit donc de sanctionner les crimes qui 'menacent la paix, la sécurité et le bien-être du monde'… et de faire en sorte que la peine ait un effet réellement dissuasif. *En prononçant une peine, la chambre doit aussi répondre au légitime besoin de vérité et de justice qu'expriment les victimes et leurs proches.* Elle considère que la peine a deux fonctions importantes : le châtiment, d'une part, c'est-à-dire l'expression de la réprobation sociale qui entoure l'acte criminel et son auteur et qui est aussi une manière de reconnaître le préjudice et les souffrances causées aux victimes ; la dissuasion d'autre part, dont l'objectif est de détourner de leur projet d'éventuels

> candidats à la perpétration de crimes similaires. Le caractère sanctionnateur de la peine tend donc à tenir en échec tout désir d'assouvir une quelconque vengeance, et ce n'est pas tant la sévérité de la peine qui doit prévaloir que son caractère inéluctable… *Comme le prescrit la règle 145-1-a du Règlement de procédure et de preuve, en prononçant une peine proportionnée, la chambre doit encore veiller à ce que celle-ci contribue à la restauration de la paix et à la réconciliation des populations concernées*. La proportionnalité de la peine prononcée répond enfin au souci de favoriser la réinsertion du condamné, même si, en particulier en droit pénal international, cet objectif ne saurait être considéré comme prédominant, car la peine ne peut, à elle seule, assurer la réinsertion du coupable. »[67]

Paix, réconciliation et vraie justice : objectifs non antinomiques

Nous l'avons dit, à la fin des confrontations pour la conquête du pouvoir, se pose la préoccupante question de savoir comment procéder pour traiter le dossier de multiples crimes commis par les uns et les autres. Faut-il absolument faire intervenir la justice ? Faut-il « passer l'éponge » et privilégier la paix et la réconciliation ? Dans le cadre de la recherche de la solution à cette équation, sont mises sur pied des commissions dites *vérité et réconciliation,* inspirées du modèle sud-africain post apartheid, comme la CVR de la RDC[68] et la CDVR de la Côte d'Ivoire. L'analyse de la structure ivoirienne, dénommée « Commission dialogue, vérité et réconciliation », CDVR en sigle, suffira à démontrer que l'objectif de ce mécanisme n'est pas incompatible avec celui de la justice et que sa mise en œuvre n'échappe pas aux critiques.

Finalités louables et compatibles

Instituée par ordonnance du président de la République n° 2011-167 du 13 juillet 2011 pour un mandat initial de deux ans de fonctionnement, la CDVR a pour mission de conduire les Ivoiriens vers la réconciliation dans l'intérêt de la Nation entière et de créer les conditions d'une paix permanente en proposant des outils de veille et de prévention mettant la Côte d'Ivoire à l'abri de nouvelles secousses.

La CDVR entend relever ce défi en répondant aux quatre enjeux majeurs suivants :

- procéder à une recension précise des faits qui gangrènent la société ivoirienne depuis nombreuses années (les actes contestés du Gouvernement, des partis politiques, des associations ou groupes ethniques, etc.)
- œuvrer à faire éclater la vérité nécessaire à l'amélioration des pratiques en matière de respect des droits humains.
- s'atteler à promouvoir l'entente et la réconciliation nationale véritable.

– encourager, par son action, l'avènement d'une société démocratique, dans laquelle la violence et l'impunité sont exclues.[69]

Au point de vue de son fonctionnement, la CDVR est une autorité administrative d'utilité publique, placée sous l'autorité morale du président de la République et exerçant ses attributions en toute indépendance. Ses principes d'action sont : l'impartialité, la neutralité, la non-discrimination, l'objectivité, l'honnêteté, la transparence, la vérité, l'attention aux victimes, l'intérêt général. Elle accomplit sa mission en collaboration avec les autres institutions de la République et avec toutes celles qui concourent aux mêmes objectifs, dans le respect de leurs attributions.[70] On voit ainsi que les principes guidant l'action de la CDVR ne sont pas en contradiction avec ceux qui gouvernent l'administration de la Justice.

S'agissant de ses activités, la CDVR réalise des enquêtes devant mener à des réparations. Elle se veut, en effet, un lieu d'écoute et de reconnaissance des torts infligés aux victimes. Elle poursuit comme but, la recherche de la vérité et mène des enquêtes en toute impartialité en vue d'identifier les causes des événements, de décrire leurs occurrences et d'en évaluer les conséquences sur la vie nationale. Ces enquêtes, minutieusement effectuées sur le terrain, sont couronnées d'une phase des audiences en vue de déterminer, comme dans un procès pénal, les responsabilités et les préjudices subis par les victimes. Considérées comme représentant l'aspect cathartique du processus, ces audiences se déroulent en séances publiques au cours desquelles les coupables et leurs victimes se retrouvent dans le même espace et répondent aux questions de la Commission jouant le rôle de juge-arbitre. Elles favorisent ainsi l'éclatement de la vérité sur les violations graves des droits humains et sur les responsables des exactions perpétrées.

> « Entendre les victimes et les auteurs, obtenir la reconnaissance des faits par les auteurs des violations incriminées et le pardon consécutif sont les objectifs majeurs de cette phase du processus de réconciliation. La Commission sera donc l'auxiliaire de l'œuvre de rédemption de la Nation tout entière…. À l'issue du dialogue des audiences, la Commission peut obtenir des protagonistes qu'ils fassent la paix si le « perpétrateur » a reconnu sa faute et exprimé des regrets. Le pardon est la conséquence logique de cette entente. Cela dit, la personne qui a subi des préjudices ne peut consentir à pardonner que si les torts font l'objet de réparations appropriées.»[71] « … Ces réparations seront à la fois physiques, matérielles, morales et psychologiques. Elles seront associées à une opération de réhabilitation et de réinsertion qui prendra en compte aussi bien les auteurs des violations que leurs victimes. En effet, les "perpétrateurs" eux-mêmes seront réinsérés dans la société après avoir purgé la peine que leur aura infligée la justice. »[72]

Comme on peut s'en rendre compte, ce rôle peut parfaitement être joué par les organes judiciaires ordinaires, s'ils reçoivent des moyens nécessaires à cet effet. En tout cas, les actions de la CDVR et de la justice ne sont pas incompatibles.

Failles comparables

Ont été adressées à la CDVR des critiques qui montrent que celle-ci n'échappe pas aux écueils dont souffre la justice étatique ordinaire :

- il y a d'abord le reproche de manque d'efficacité allié à l'absence de moyens ;[73]
- il y a ensuite la critique d'impartialité au profit du camp des vainqueurs.[74]

Des critiques ont également été formulées à l'endroit de la Commission Vérité et réconciliation de la RDC, CVR, une des institutions de soutien à la démocratie issue de la résolution adoptée par la *commission paix et réconciliation* lors du dialogue inter congolais d'avril 2002. Elle a été entérinée par l'accord global et inclusif sur la transition en RDC conclu à Pretoria le 17 décembre 2002. Elle avait pour mission de rétablir la vérité et de promouvoir la paix, la justice, la réparation, le pardon et la réconciliation en vue de consolider l'unité nationale.[75]

> « Tout compte fait, peut-on lire, même si la CVR en RD Congo a réalisé quelques activités sans lesquelles d'autres crimes auraient pu être commis en plus, elle n'a pas osé s'investir dans le processus devant contribuer à la lutte contre l'impunité à l'instar des expériences de CVR notamment en Afrique du Sud… Le contexte de la création de la CVR en RD Congo ne lui a pas donné la chance de bien fonctionner de par sa composition dont certains acteurs proviennent des structures mises en cause dans les crimes graves et d'autres violations des droits de l'homme commis récemment sur les populations congolaises. Déjà une tare s'était installée dans cette composition basée sur les composantes et entités et qui, selon plusieurs sources concordantes, devrait bloquer que la vérité soit mise sur la table. Ipso facto, il était difficile de pouvoir s'assurer de la confiance des victimes et des témoins qui voyaient dans l'image de la CVR leurs bourreaux. L'approche de travail adoptée était finalement consécutive à cette observation. Au lieu d'aborder les questions essentielles pour une commission, c'est-à-dire que par la vérité l'on débouche aux idées et actes de réconciliation, le programme a été orienté dans le but, pourrait on dire, de retarder la connaissance de la vérité et de laisser les victimes sans réparation. Vue la composition du bureau au niveau national, il y a certes des blocages politiques pour faire émerger la vérité. »[76]

Il faut donc souligner que le mécanisme CVR peut être, en soi, pertinent. Cependant, il n'échappe pas à l'instrumentalisation.[77] Quoiqu'il en soit, CVR et Justice ne sont pas antinomiques.[78]

Conclusion

Pour mettre fin aux cycles de violences, de rébellions, de luttes pour le pouvoir accompagnées de la perpétration des crimes contre l'humanité et des crimes de guerre, il faut que soient rigoureusement respectés les règles garantissant les droits humains fondamentaux et les mécanismes civilisés d'alternance au pouvoir fixés dans les constitutions, et il faut que justice se fasse de façon égale pour tous, étant entendu qu'il ne peut y avoir opposition entre celle-ci et le processus de paix et de réconciliation.

Nécessité du respect des règles internationalement fixées

La compétition, si elle est de l'ordre de la nature, ne rime pas avec la barbarie ou l'arbitraire, car elle ne doit pas échapper au droit au sens premier du terme, droit entendu comme science et art du bien et du juste. C'est la soumission de toute compétition au droit qui différencie la nature humaine de celle animale. Même la guerre, qui implique l'emploi des armes, est et doit être soumis au droit.

Les forces en conflit, aussi bien étatiques que celles dites de libération, se doivent de respecter les dispositions pertinentes du droit international des droits de l'homme et du droit international humanitaire. En guise de rappel, le droit international des droits de l'homme est constitué de traités internationaux consacrant et protégeant les droits humains fondamentaux, notamment la Déclaration universelle des droits de l'homme de 1948, le Pacte international relatif aux droits civils et politiques (PIDCP), la Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, la Convention sur les droits de l'enfant et la Charte africaine des droits de l'homme et des peuples etc. Les gouvernements qui ont ratifié ces traités doivent respecter leurs obligations qui en découlent. Même si le PIDCP autorise un gouvernement à prendre des mesures dérogeant aux obligations du traité « dans le cas où un danger public exceptionnel menace l'existence de la Nation », il est des droits inviolables auxquels aucune disposition du Pacte n'autorise à déroger, même en temps de guerre. Tel est le cas du droit à la vie et de l'interdiction des actes de torture. De même, la Charte africaine des droits de l'homme et des peuples et la Convention des Nations unies contre la torture ne prévoient aucune dérogation.

Au droit international relatif aux droits de l'homme s'ajoute le droit international humanitaire que toutes les parties à une guerre civile, gouvernements et groupes rebelles, doivent impérativement respecter. Les uns et les autres sont notamment tenus de se conformer aux dispositions de l'article 3 commun aux quatre Conventions de Genève du 12 août 1949 et des Protocoles additionnels auxdites Conventions adoptés le 8 juin 1977 par la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés.[79]

Les protagonistes de ces conflits, appartenant au camp gouvernemental ou rebelle, qui commettent les faits prohibés par ces instruments internationaux, doivent en répondre pénalement et civilement. Laisser perdurer l'impunité équivaudrait à encourager la spirale de ces abominations et à cautionner l'action néfaste de ceux qui apportent leur appui logistique et financier pour tirer profit du chaos subséquent. La CPI, institution permanente et indépendante née de la volonté des États, a précisément pour mission de lutter contre l'impunité des crimes les plus graves ayant une portée internationale, caractérisés comme crime de génocide, crimes contre l'humanité, crimes de guerre et crime d'agression.[80]

Nécessité du respect des mécanismes civilisés d'alternance au pouvoir fixés dans les constitutions

Le mouvement remarqué de révisions des constitutions semble avoir comme motivation le souci d'assurer la pérennité au pouvoir des hommes en place. La dernière réforme de la constitution ougandaise en est une illustration éloquente. En effet, à l'initiative de l'exécutif, le parlement ougandais avait adopté un amendement de cette constitution, lequel avait consisté à supprimer la limite du nombre de mandats présidentiels et, – sans doute pour faire passer la pilule –, à réintroduire le multipartisme dans la vie politique de ce pays. Selon des observateurs, l'objectif poursuivi était de permettre au chef de l'État de se représenter aux élections présidentielles de 2006 et même de rester président à vie,[81] alors qu'en 2001, il avait déclaré que le mandat qu'il briguait à l'époque était le dernier.[82] L'opposition politique n'avait pas été dupe, car elle avait appelé au boycott du référendum pour l'adoption de la nouvelle constitution ainsi amendée, cependant que le pouvoir avait dû naturellement battre campagne pour le « oui » qui, on s'en doute bien, a gagné : quatre vingt huit pour cent des votants auraient dit « oui », la participation ayant été très faible, suite précisément à l'appel au boycott lancé par l'opposition.[83] Sans nullement l'approuver ni chercher à l'expliquer, on peut se demander quelle a été la réaction de la LRA à cette initiative antidémocratique maquillée en une ouverture au multipartisme, et ayant débouché sur la victoire de Museveni aux présidentielles de février 2006.

Durant ces derniers mois se déroulent aussi en RDC des débats sur l'éventualité de la modification de sa Constitution pour permettre au chef de l'État actuel de briguer un troisième mandat en 2016. Or, le point 4 de l'Exposé des motifs et l'article 220 de la Constitution, qualifié pertinemment d'article-verrou, ne permettent pas cette modification. En effet, ce point 4, motivant les dispositions relatives à la « révision constitutionnelle », ponctue :

> « Pour préserver les principes démocratiques contenus dans la présente Constitution contre les aléas de la vie politique et les révisions intempestives, les dispositions relatives à la forme républicaine de l'Etat, au principe du suffrage universel, à la forme représentative du Gouvernement, au nombre et à la durée des mandats du Président de la République, à l'indépendance du pouvoir judiciaire, au pluralisme politique et syndical ne peuvent faire l'objet d'aucune révision constitutionnelle. »

Et l'article 220 de disposer :

> « La forme républicaine de l'Etat, le principe du suffrage universel, la forme représentative du Gouvernement, le nombre et la durée des mandats du Président de la République, l'indépendance du pouvoir judiciaire, le pluralisme politique et syndical, ne peuvent faire l'objet d'aucune révision constitutionnelle.
>
> Est formellement interdite toute révision constitutionnelle ayant pour objet ou pour effet de réduire les droits et libertés de la personne ou de réduire les prérogatives des provinces et des entités territoriales décentralisées. »

Il convient de rappeler la prescription de l'article 70 qui est ainsi libellé :

> « Le Président de la République est élu au suffrage universel direct pour un mandat de cinq ans renouvelable une seule fois.
>
> À la fin de son mandat, le Président de la République reste en fonction jusqu'à l'installation effective du nouveau Président élu. »

Afin d'éviter la relance du cycle de rébellions et des crimes qui les accompagnent inexorablement, il faut que tous les acteurs politiques congolais respectent ces dispositions-verrous et acceptent la possibilité d'une alternance civilisée au pouvoir. Vouloir agir par la force ou par des subterfuges peut faire basculer le pays dans la violence, certains pouvant trouver appui sur l'article 64 de la même Constitution qui dispose :

> « Tout Congolais a le devoir de faire échec à tout individu ou groupe d'individus qui prend le pouvoir par la force ou qui l'exerce en violation des dispositions de la présente Constitution.
>
> Toute tentative de renversement du régime constitutionnel constitue une infraction imprescriptible contre la nation et l'Etat. Elle est punie conformément à la loi. »

Pour écarter ce risque, beaucoup de voix en appellent au respect de la Constitution. Il en est ainsi, par exemple, de monsieur Russ Feingold, l'émissaire américain pour la région des Grands Lacs, qui, questionné sur le débat autour d'une possible candidature du président actuel en 2016, a eu ces mots : « Il n'y a pas de débat. La constitution est claire : le président ne peut faire que deux mandats. Cela doit être respecté. La constitution ne doit pas être changée par quiconque est au pouvoir. Je pense que c'est une mauvaise pratique. C'est important que les élections locales, provinciales et présidentielle soient achevées d'ici 2016 dans le respect de la constitution. »… « Je pense que personne ne doit changer la constitution pour prolonger son temps au pouvoir. Ce n'est pas une idée. »[84] Le 04 mai 2014, le secrétaire d'État américain, John Kerry, en visite à Kinshasa, s'est également clairement prononcé en faveur du respect de la Constitution.[85]

En effet, pour la stabilité de nos pays, il convient de respecter les règles posées, au premier rang desquelles, la Constitution. Des ONG congolaises ont exprimé la même position dans une déclaration publique faite à l'issue d'un séminaire organisé à Kinshasa du 22 au 23 avril 2014 sur la question de la révision de la constitution.[86] De même, à l'occasion du 54è anniversaire de l'Indépendance, la Conférence épiscopale nationale du Congo a fermement pris position contre toute modification de la Constitution.[87]

La Constitution de la Côte d'Ivoire limite aussi le nombre de mandats présidentiels à deux. Son article 35 dispose, en effet : « Le Président de la République est élu pour cinq ans au suffrage universel direct. Il n'est rééligible qu'une fois… » Dès lors, si l'actuel chef de l'Etat, candidat à sa propre succession aux élections de cette année 2015 l'emporte, ce sera son dernier mandat à la tête de ce pays.

Il faut donc retenir que dans une République démocratique, c'est bien la Constitution qui organise les mécanismes civilisés d'alternance au pouvoir que tout le monde doit respecter. Celle-ci ou une loi doit également prévoir et organiser un statut d'anciens chefs d'Etat. On peut utilement s'inspirer du modèle des USA, de la France ou du Brésil, par exemple, où d'anciens chefs d'Etat mènent une existence paisible. Imaginez qu'aujourd'hui Barack Obama propose au congrès américain la révision de la Constitution pour qu'il brique un troisième mandat. Comment sera-t-il jugé aux USA ? Comme l'a dit ce dernier, l'Afrique a besoin non pas d'hommes forts, mais d'institutions fortes. Dans une République, nul n'est irremplaçable.

Le respect des règles appelle aussi l'administration d'une vraie justice.

Nécessité de l'intervention d'une vraie justice, égale pour tous, sans laquelle il ne peut y avoir de paix ni de réconciliation véritable

Il n'y a pas de paix sans justice. Il n'y a pas de réconciliation sans justice. Nous partageons la conviction qu'« après un conflit, la reconstruction d'un pays, si elle veut se fonder sur l'État de droit et le respect des droits humains, passe par le jugement de ceux qui ont perpétré des crimes graves. Accorder l'impunité pour des atrocités commises dans le passé donne à entendre que de tels crimes sont susceptibles d'être tolérés à l'avenir. La paix et la justice devraient être considérées comme des objectifs complémentaires, non pas contradictoires… Le respect pour les droits de l'homme et l'État de droit est essentiel pour établir une paix durable et un développement humain sur le long terme. S'il n'y a pas de justice, il se peut que les populations locales provoquent encore plus de violence en prenant elles-mêmes les choses en main. Cela s'est déjà vu en Ituri, dans le nord-est du Congo, où la culture de l'impunité n'a fait qu'alimenter le cycle des violences ethniques, poussant les groupes belligérants à croire qu'ils avaient raison de tuer pour venger les crimes commis contre eux. Dans un environnement aussi fragile, les questions de justice doivent être traitées avec délicatesse. Si le processus de justice n'est pas lancé, la paix restera fragile et risque d'être vouée à l'échec. »[88] Ceci vaut non seulement pour la RDC, mais aussi pour tous les pays africains secoués par des guerres de conquête ou de conservation de pouvoir.

Cette œuvre délicate et vitale de justice ne doit pas être laissée à un seul pays isolément, compte tenu, non seulement de l'incapacité des institutions judiciaires nationales à mener des enquêtes et à juger tous les responsables de graves crimes perpétrés au cours de la lutte pour le pouvoir, mais aussi de l'implication de certains dirigeants civils et militaires, présents dans les structures étatiques et risquant d'interférer dans le cours du judiciaire, ainsi que de la présence sur scène de plusieurs acteurs internationaux qui doivent aussi assumer leurs responsabilités pénale et civile. Il faut une forte volonté internationale d'imposer la paix et la réconciliation par la mise en œuvre d'une vraie justice, indépendante, équitable, impartiale, soucieuse d'établir sans complaisance toutes les responsabilités, et capable de prononcer et de faire exécuter des sanctions à l'égard de tous, sanctions pénales et réparations des préjudices subis par des victimes.

La CPI a tous les atouts nécessaires pour administrer une telle justice, en complémentarité avec les instances nationales, à condition que ses animateurs fassent preuve non seulement de compétence, mais aussi de courage pour mettre en application toutes les dispositions pertinentes prévues dans son Statut, consacrant notamment l'indépendance de la justice, l'égalité de tous devant elle, la participation et l'indemnisation des victimes, la coopération

des États. Ces derniers se doivent d'apporter leur concours à cette instance qu'ils ont créée pour lui permettre d'accomplir avec efficacité sa mission. Les uns et les autres doivent agir avec objectivité, en sachant que la responsabilité des vaincus n'est pas incompatible avec celle des vainqueurs. Les premiers comme les seconds doivent répondre des atrocités dont ils ont été auteurs, si les preuves de leur culpabilité sont rapportées. Le triomphe de la justice est la condition du rétablissement d'une paix réelle et du succès de la réconciliation.

Notes

1. Thème développé dans le cadre de la Conférence organisée à Dakar du 10 au 12 juillet 2014 à l'initiative de CODESRIA-SSRC/APN sur « *La justice pénale internationale, la réconciliation et la paix en Afrique: la CPI et au-delà.* »
2. Article 1er de la Constitution de la RDC (18 février 2006) : « La République Démocratique du Congo est, dans ses frontières du 30 juin 1960, un État de droit, indépendant, souverain, uni et indivisible, social, démocratique et laïc… » – Constitution de la Côte d'Ivoire (1er août 2000), article 29 : « L'État de Côte d'Ivoire est une République indépendante et souveraine… » ; article 30 : « La République de Côte d'Ivoire est une et indivisible, laïque, démocratique et sociale… » – Constitution of the Republic of Uganda (Commencement: 8 October 1995; As AT 15TH FEBRUARY 2006 : « 5. The Republic of Uganda. (1) Uganda is one Sovereign State and a Republic… ».
3. Statut de Rome de la Cour pénale internationale, Préambule.
4. Lire, à ce sujet, Jean-Pierre Fofé Djofia Malewa**,** *La Cour pénale internationale : institution nécessaire aux pays des grands lacs africains -La Justice pour la Paix et la Stabilité en R-D Congo, en Ouganda, au Rwanda et au Burundi*, L'Harmattan, Paris, 2006, 232 pages ; Le Service de Droit international Humanitaire, Croix Rouge de Belgique, Communauté francophone, « L'Afrique des Grands Lacs : OUGANDA », in *www.croix-rouge.be*, consulté le 14-09-2004 ; *http://www.diplomatie.gouv.fr/fr/dossiers-pays/ouganda/presentation-de-l-ouganda/*, consulté le 3-07-2014 ; Rapport du Rapporteur spécial chargé d'enquêter sur la situation des droits de l'homme en République du Zaïre (actuelle République Démocratique du Congo), en application de la Résolution 1997/58 de la Commission des droits de l'homme, 15-04-1997, §§ 93 à 98 Doc. Nations Unies, Assemblée Générale, Distr. GENERALE A/52/496, 17-10-1997, cinquante-deuxième session, Point 112 c) de l'ordre du jour ; Human Rights Watch (HRW), « Communiqués de Presse : Congo : L'ONU doit aborder l'implication des entreprises dans le conflit. », New York, 27-10-2003, in www.hrw.org, consulté le 25-08-2004 ; Colette Braeckman, « Guerre sans vainqueur en RDC », *Le monde Diplomatique*, Avril 2001, pp. 16-17, in *http://www.monde-diplomatique.fr/2001/04/BRAECKMAN/15007*, consulté le 20-08-2004 ; Mémorandum des Évêques de la RDC au Secrétaire Général des Nations Unies, 14-02-2004, §§

6 à 14, et 17 ; Arrêt de la Cour internationale de justice du 19-12-2005, Affaire *Activités armées sur le territoire du Congo (RDC c. Ouganda).*

5. Lire à ce sujet, Jacob A. Assougba, *Les acteurs internationaux dans la crise ivoirienne*, L'Harmattan-Côte D'Ivoire, mai 2014, 532 pages, spécialement les pp 53 à 58.

6. Rapport de HRW, « Transformer les discours en réalité : L'heure de réclamer des comptes pour les crimes internationaux graves perpétrés en Côte d'Ivoire », Abidjan 4-04-2013, 82 pages.
7. Eugène Nindorera, *Invité Afrique* de RFI, mardi 27-05-2014.
8. Eugène Nindorera, Invité Afrique de RFI, mardi 27-05-2014.
9. Articles 5, 6, 7, 8, 8 bis et 29 du Statut de la Cour pénale internationale ; Article 13 de la Constitution du Rwanda ; Article 37 de la loi organique (rwandaise) N° 8/96 du 30 août 1996 portant organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité ; Convention du 9 décembre 1948 sur la prévention et la répression du crime de génocide ; Convention du 26 novembre 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité.
10. Point de vue partagé par HRW dans sa dénonciation des crimes contre l'humanité perpétrés en juin 2004 à Bukavu : « Documents de présentation. Crimes de guerre à Bukavu, RDC », Document d'information de HRW, Juin 2004, in www.hrw.org, consulté le 25-08-2004.
11. Donatien Ngandu Mupompa/Le Potentiel, « La Procureure de la CPI, Fatou Bensouda, est catégorique : pas d'amnistie pour les crimes relevant de la Justice internationale ! », Kinshasa, 14/03/2014 / Politique, in http://www.digitalcongo.net/article/98705, consulté le 21-04-2014.
12. Article 4 de ladite loi. « Certaines conventions internationales, dont les quatre Conventions de Genève de 1949 ratifiées par la RDC, obligent les Etats à poursuivre et punir les auteurs des crimes concernés par ces conventions (les crimes de guerre). Accorder une amnistie pour ce genre de crimes serait donc en contradiction avec les obligations de l'Etat et le droit coutumier international qui est en train de s'installer sur cette question », Martien Schotsmans, « La justice transitionnelle pendant la période de la transition politique en RDC », in *L'Afrique des Grands Lacs***,** Annuaire 2006-2007, pp 201 à 208, spécialement p. 206, http://www.ua.ac.be/objs/00178902.pdf, consulté le 21-04-2014 ; Cassesse A., International Criminal Law, 2003, p 315 ; Henckaerts, J.-M., « Etude sur le droit international humanitaire coutumier », in *Revue Internationale de la Croix Rouge*, volume 87, 2005, p. 298.
13. Voir Statut de la CPI, 17 juillet 1998, Préambule, articles 1er, 4, 5 et 29.
14. CPI, États parties au Statut de Rome, in *http://www.icc-cpi.int/asp/statesparties.html*, consulté le 9-02-2015.
15. États africains parties à la CPI, avec, en regard, leur date d'adhésion : 1. Sénégal, 2-02-1999 ; 2. Ghana, 20-12- 1999; 3. Mali, 16-08-2000 ; 4. République-Unie de Tanzanie, 20-08-2000 ; 5. Lesotho, 6-09-2000; 6. Botswana, 8-09-2000 ; 7. Sierra Leone, 15-09-2000; 8. Gabon, 20-09-2000; 9. Afrique du Sud, 27-

11-2000 ; 10. Nigeria, 27-09-2001; 11. République centrafricaine, 3-10-2001; 12. Bénin, 22-01-2002 ; 13. Maurice, 5-03-2002; 14. Niger, 11-04-2002; 15. République démocratique du Congo, 11-04-2002 ; 16. Ouganda, 14-06-2002; 17. Namibie, 25-06-2002; 18. Gambie, 28-06-2002 ; 19. Malawi, 19-09-2002; 20. Djibouti, 5-11-2002; 21. Zambie, 13-11-2002; 22. Guinée, 14-07-2003 ; 23. Burkina Faso, 16-04-2004 ; 24. Congo, 3-05-2004 ; 25. Burundi, 21-09-2004; 26. Liberia, 22-09-2004; 27. Kenya, 15-03-2005 ; 28. Les Comores, 1-11-2006; 29. Tchad, 1-01-2007; 30. Madagascar, 14-03-2008 ; 31. Seychelles, 10-08-2010; 32. Tunisie, 24-06-2011; 33. Cap-Vert, 11-10-2011; 34. Côte d'Ivoire, 15-02-2013. Source : *http://www.icc-cpi.int*.

16. Voir articles 1er et 17-1-a) et b) ; 17-2 et 17-3 du Statut de la CPI.
17. Statut, Préambule et article 2.
18. Articles 40-1 et 2 et 41-2.a) du Statut.
19. Articles 34, 42-1, 42-5, 42-7 du Statut.
20. Article 54-1-a) du Statut.
21. Article 115 du Statut.
22. Article 116 du Statut.
23. Articles 43-6, 57-3-c), 68-3 du Statut.
24. Articles 57-3. e), 75-1, 75-2, 75-5, 77, 79-1, 79-2, 93-1-j, 93-1-j-k, 109-1, 109-2 du Statut.
25. Article 26 et 31 du Statut.
26. Article 27-1et 2 du Statut.
27. En effet, les 20 affaires pendantes devant la CPI rentrent dans le contexte de 8 situations dont quatre ont été déférées à la Cour par les États parties eux-mêmes, à savoir l'Ouganda, la République Démocratique du Congo, la République Centrafricaine et le Mali. Tandis que les situations au Soudan et en Libye, deux des États non parties au Statut de Rome, ont été déférées à la Cour par le Conseil de sécurité des Nations Unies dont les Etats africains sont membres à part entière. S'agissant de la situation au Kenya et en Côte d'Ivoire, certes le procureur de la CPI a été autorisé respectivement par les chambres préliminaires II et III à ouvrir une enquête *proprio motu*, mais cela ne s'est fait qu'avec l'accord et la collaboration des autorités de ces pays.
28. ICC-CPI, Situation en République Démocratique du Congo, Affaire Le Procureur c. Germain Katanga, *Jugement rendu en application de l'article 74 du Statut,* ICC-01/04-01/07-3436, 7 mars 2014, ci-après Jugement Katanga, notamment les §§ 180 à 197 (P-12) ; §§ 382, 383, 388, 389, 390, 396 (D02-0228) ; 409, 411(D02-0236/D03-011) ; 419 à 426 (D02-0350) ; 427 à 429, 435 à 515 (Contexte : implication des officiers ougandais).
29. La CPI a retenu cet Arrêt de la Cour internationale de Justice comme élément de preuve dans l'affaire Katanga et Ngudjolo. Voir EVD-OTP-00229 : CIJ, Affaire *Activités armées sur le territoire du Congo. Jugement Katanga, § 429.* Voir aussi, Cour internationale de Justice, Communiqué de presse publié par le Département de l'information, in *www.icj-cij.org*, consulté le 21-12-2005.
30. Voir CPI, situation en République démocratique du Congo, *Affaire le Procureur c. Germain Katanga*, ICC-01/04-01/07, Audience (publique) sur la fixation de

la peine, 06-05-2014, Transcriptions ICC-01/04-01/07-T-345-Red-FRA WT, de la p. 21 ligne 9 à la p. 23 ligne 5 ; et p. 43 lignes 6 à 16.

31. Voir pièce publique EVD-D03-00139, admise au dossier ICC-01/04-01/07, *Le Procureur c. Germain Katanga et Mathieu Ngudjolo* ; Transcriptions ICC-01/04-01/07-T-330-FRA, audience du 08-11-2011, p. 14, lignes 6-16 ; Jugement Katanga, § 15.
32. Acquitté en première instance, voir *Affaire le Procureur c. Mathieu Ngudjolo*, « Jugement rendu en application de l'article 74 du Statut », ICC-01/04-02/12-3 du 18-12-2012.
33. Charges non confirmées, Voir *Affaire le Procureur c. Callixte Mbarushimana,* « Décision relative à la confirmation des charges », ICC-01/04-01/10-465-Red-tFRA, 16-12-2011, version française, 22-02-2012.
34. Actuellement en fuite.
35. Rassemblement congolais pour la démocratie.
36. Audience de confirmation des charges : du 9 au 28-11-2006 ; Décision de confirmation des charges : le 29-01-2007 ; début du procès le 26-01-2009.
37. CPI, Situation en République Démocratique du Congo, *Affaire le Procureur c. Thomas Lubanga Dyilo*, Chambre de première instance I, *Jugement rendu en application de l'article 74 du Statut,* ICC-01/04-01/06-2842-tFRA, 14-03-2012, §1358.
38. *Idem*, *Décision relative à la peine, rendue en application de l'article 76 du Statut,* ICC-01/04-01/06-2901-tFRA, 10 juillet 2012, § 107.
39. *Idem*, Chambre d'appel, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red ; *Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"*, ICC-01/04-01/06-3122, 01-12-2014.
40. Alliance des forces démocratiques pour la libération du Congo.
41. Rappelons que le procès Katanga-Ngudjolo était joint. Le 21-11-2012, la chambre de première instance II a décidé de disjoindre les charges retenues contre les deux et de mettre en œuvre la norme 55 du Règlement de la Cour contre Katanga. Le 18-12-2012, elle a acquitté Ngudjolo et ordonné sa libération immédiate. Le procureur a interjeté appel contre ce jugement. Le 27 février 2015, la chambre d'appel, à la majorité de trois juges sur cinq, a confirmé ce jugement d'acquittement qui est donc devenu définitif. Voir CPI, Chambre d'Appel, Arrêt prononcé en audience publique le 27 février 2015, Transcription ICC-01/04-02/12-T-5-FRA ET WT, 34 pages ; ICC-01/04-02/12 A, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 117 pages ; Annex A, Joint dissenting opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, 25 pages.
42. Jugement Katanga, Dispositif. Cette décision avait fait l'objet d'un pourvoi en appel interjeté respectivement par le procureur et par la défense. Voir *Prosecution's Appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 du Statut*", ICC-01/04-01/07-3462, 09-04-2014 ; *Defence Notice of Appeal against the decision of conviction 'Jugement rendu en application de l'article 74 du*

Statut' rendered by Trial Chamber II, *7th March 2014*, ICC-01/04-01/07-3459, 09-04-2014. Le 25-06-2014, la défense de Katanga et le Procureur se sont tous deux désistés de leurs appels. Voir *Defence Notice of Discontinuance of Appeal against the 'Jugement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II on 7 April 2014*, ICC-01/04-01/07-3497, 25 juin 2014 ; *Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga*, ICC-01/04-01/07-3498, 25 juin 2014.

43. CPI, Chambre de première instance II, audience du 05-05-2014, Transcriptions ICC-01/04-01/07-T-344-Red-FRA WT; audience du 06-05-2014, Transcriptions ICC-01/04-01/07-T-345-Red-FRA WT.
44. CPI, Chambre de première instance II, audience du 23-05-2014 sur le prononcé de la peine, Transcriptions ICC-01/04-01/07-T-346-FRA ET WT ; Décision relative à la peine (article 76 du Statut), ICC-01/04-01/07-3484, 23-05-2014.
45. Jugement Katanga, Dispositif : complicité par contribution « de toute autre manière à la commission d'un crime par un groupe de personnes agissant de concert » (article 25-3-d du Statut).
46 Voir Jugement Katanga, Analyse de la crédibilité de certains témoins, notamment les §§ 111, 180 à 197 (P-12) ; 377 à 396 (D02-0228) ; §§ 397 à 411(D02-0236/D03-011) ; §§ 413 à 426 (D02-0350) ; sur le contexte : l'implication des officiers ougandais et de l'EMOI, §§ 427 à 515 ; §§ 588 à 590 ; § 633. EVD-D03-00136 : Lettre du Cabinet du Président de la RDC au Chef d'État-major inter armée (§ 588, NBP 1295).
47. Voir audience (publique) sur la fixation de la peine, 06-05-2014, Transcriptions ICC-01/04-01/07-T-345-Red-FRA WT, de la p. 23 ligne 24 à la p. 25 ligne 12 ; et de la p. 39 ligne 24 à la p. 40 ligne 7.
48. *Idem*, de la p. 49 ligne 10 à la p. 50 ligne 4. ÉMOI : État-major opérationnel intégré ; FAC : Forces armées congolaises ; RCD/K-ML : Rassemblement congolais pour la démocratie/Kisangani-Mouvement de libération ; APC : Armée du peuple congolais (branche armée du RCD/K-ML)
49. *Idem*, p. 10 lignes 2 à 7.
50. Organisations non gouvernementales.
51. Coalition Nationale pour la Cour pénale internationale de la République Démocratique du Congo (CN-CPI) - RDC, « Mémorandum à Madame Fatou Bensouda, Procureur général de la Cour pénale internationale, à l'occasion de sa mission en République Démocratique du Congo », établi à Kinshasa, RDC, le 12-03-2014, et signé, pour la CN-CPI/RDC, par le Coordonnateur National, Me André Marie KITO MASIMANGO, p. 2.
52. *Idem*, p. 3.
53. *Idem*, p. 3.
54. Voir « Déclaration de la reconnaissance de la compétence de la Cour pénale internationale », datée d'Abidjan le 18-04-2003, signée, pour le Gouvernement de la République de la Côte d'Ivoire, par le ministre d'Etat, ministre des Affaires étrangères, M. BAMBA Mamadou.

55. Lettres du Président de la Côte d'Ivoire n° 0039-PR-du 14-12-2010 à monsieur le Président de la CPI ; n° 0040-PR-du 14-12-2010 à monsieur le Procureur près la CPI ; n° 0041-PR-du 14-12-2010 à monsieur le Greffier en chef de la CPI.
56. Forte de ces déclarations, la chambre préliminaire III a, le 3-10-2011, autorisé le procureur de la CPI, à ouvrir une enquête *proprio motu* pour les crimes relevant de la compétence de la Cour, qui auraient été commis en Côte d'Ivoire depuis le 28-11-2010, ainsi que sur les crimes qui pourraient être commis dans le futur dans le contexte de cette situation. Le 22-02-2012, la même chambre a décidé d'élargir son autorisation d'enquêter sur la situation en Côte d'Ivoire pour inclure les crimes relevant de la compétence de la Cour qui auraient été commis entre le 19-09-2002 et le 28-11-2010.
57. Cet article 8bis est ainsi libellé : « La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le Traité signé le 17 juillet 1998. »
58. ICC-02/11-01/11-656-Red, 12-06-2014, « Decision on the confirmation of charges against Laurent Gbagbo » ; ICC-02/11-01/11-656-Anx, 12-06-2014, « Dissenting Opinion of Judge Christine Van den Wyngaert ».
59 RFI, Invité Afrique, Affaire Gbagbo: Jean-Marie Fardeau, directeur France de HRW - Christophe Boisbouvier, Diffusé le vendredi 13 juin 2014, in *http://www.rfi.fr/#emission/20140613-cpi-gbagbo-jean-marie-fardeau-human-rights-watch-hwr/?&_suid=140265568991302013864187958335*8, consulté le vendredi 13-06-2014.
60. RFI, Revue de presse Afrique, Diffusé le vendredi 13 juin 2014, A la Une : Gbagbo sera jugé, Norbert Navarro, in *http://www.rfi.fr/#emission/20140613-une-gbagbo-sera-juge/?&_suid=140265663669906269014233065111*, consulté le vendredi 13-06-2014.
61. ICC-02/11-02/11-1-tFRA 01-10-2013, « Mandat d'arrêt à l'encontre de Charles Blé Goudé ».
62. ICC-02/11-02/11-1-tFRA 01-10-2013, §§ 7 et 9.
63. Param-Preet Singh, de HRW, « Côte d'Ivoire : Des promesses de justice impartiale non tenues, La communauté internationale devrait faire pression pour des améliorations à cet égard », 4-04-2013, in *http://www.hrw.org/fr/news/2013/04/03/cote-d-ivoire-des-promesses-de-justice-impartiale-non-tenues.*
64. Pascal Affi N'Guessan, Invité Afrique, RFI 26-03-2014, Info Afrique Edition de 6H30, heure de Paris.
65. Source : http://www.bbc.co.uk/afrique/region/2014/03/140322_ivory_ble_goude.shtml, consulté le 11-04-2014. Voir aussi, France 24, Jeudi 13-03-2014 : Les pro-Gbagbo sont opposés au transfert de Blé Goudé à la CPI…
66. Voir Communiqué de presse : 22/03/2014, ICC-OTP-20140322-PR989, « Le Procureur de la CPI : la justice suit son cours en Côte d'Ivoire », in *www.icc-cpi.int,* consulté le 18-04-2014.
67. Voir situation en République démocratique du Congo, *Affaire le Procureur c. Germain Katanga*, ICC-01/04-01/07, Chambre de 1ère instance II, audience (publique) sur le prononcé de la peine, 23-05-2014, Transcriptions ICC-01/04-

01/07-T-346-FRA ET WT, de la p. 2 ligne 19 à la p. 3 ligne 19 (passages relevés en italique par nous) ; « Décision relative à la peine (article 76 du Statut) », ICC-01/04-01/07-3484, 23-05-2014, §§ 36 à 38.

68. Voir notamment, Philippe Biyoya Makutu, « Expériences africaines du recours à la Commission Vérité et réconciliation-Leçon à tirer pour la République Démocratique du Congo », Séminaire international sur la gestion de la transition en RDC, Kinshasa, 26-28 avril 2004, in http://democratie.francophonie.org/IMG/pdf/V.D.3.pdf, consulté le 21-04-2014.
69. Source : http://www.cdvr.ci/comprendre-la-cdvr/cdvr-en-bref.html, CDVR en bref, consulté le 16-04-2014.
70. *Ibidem*, Fonctionnement (de la CDVR).
71. *Ibidem*, Enquêtes.
72. *Ibidem*, Réparations.
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Prosecuting International Crimes in Africa: Lessons from Rwanda and Reflections on the Future[1]

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Abstract

In this article the former Chief Prosecutor of the International Criminal Tribunal for Rwanda reflects on his experiences to respond to the question: what options are available for Africa in dealing with mass atrocity crimes based on the ICTR experience? The article notes the pedigree of Africa in terms of international criminal justice and the contributions this allows it to bring to the broad questions of ensuring justice for mass atrocities and building peace and reconciliation after such incidences.

Résumé

Dans cet article l'ancien Procureur Général du Tribunal Pénal International pour le Rwanda réfléchit sur ses expériences pour répondre à la question: quelle sont les options disponibles pour l'Afrique afin de statuer sur les crimes d'atrocité de masse partant de l'expérience du TPIR ? Cet article note le pedigree de l'Afrique en termes de justice pénale internationale et les contributions que cela permet d'amener à la vaste question d'assurer la justice pour des atrocités de masse et la consolidation de la paix et de la réconciliation après de tels incidents.

Introduction

Africa is no stranger to international criminal justice. It has been the scene of some of the most egregious humanitarian tragedies of modern times: Sierra Leone, Rwanda, Sudan, the Congo, Central African Republic, etc. Some of the boldest initiatives in ensuring accountability for mass crimes have taken place in Africa albeit largely driven by the UN and the rest of the international community – the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for Rwanda (UNICTR) have been successful pioneers in

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this field. African states today constitute the largest regional group in the membership of the International Criminal Court (ICC) established under the Rome statute. At the same time, the trial dockets of the ICC are currently exclusively African situations.

What lessons are there for Africa from this 'central' position in international criminal justice particularly at a time when that system has shifted from the principle of primacy to one of complementarity under the Rome Statute which vests primary responsibility in states for ensuring accountability for international crimes?

This article contains some of my reflections on the lessons learned from the ICTR in an attempt to contribute to the debate about Africa and the prosecution of international crimes. What options are available for Africa in dealing with mass atrocity crimes based on our experience at the ICTR? Furthermore, my reflections in this article can be properly viewed in the context of the conference topic particularly on justice and reconciliation. Part of the objectives of the ICTR was to bring about reconciliation in Rwanda through justice as there is no peace without justice. Our experience at the ICTR and in Rwanda has exposed us to a range of tools that may be utilized in Africa in order to deal not only with post-conflict situations and mass atrocity crimes on the continent, but also to prevent the occurrence of such crimes in the first place.

In just two decades since the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the process of international criminal justice has today become an important element of international relations as well as a potent instrument for justice, peace, accountability and reconciliation in post-conflict situations. The establishment and work of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Cambodia Extraordinary Jurisdiction (the ECCC), the Special Tribunal for Lebanon (STL) and eventually the International Criminal Court (ICC) of the Rome Statute have been important catalysts for bridging the half century gap in international criminal justice between Nuremberg and the establishment of the ICTY.

Yet today international criminal justice stands at the crossroads between the impending closure of the ICTR and the other ad hoc and hybrid tribunals on the one hand and the emergence of the ICC on the other hand, an emergence which is not without tension and controversy.

It is thus fitting that an august institution such as CODESRIA has convened this eminent group of personalities to consider Africa's role and potential in the future of international criminal justice. Africa is no stranger to international criminal justice. The establishment of the ICTR in 1994 by

the UN Security Council in response to the mass murder of more than a million innocent people – Tutsis and moderate Hutus – in a hundred days as a result of a genocidal joint criminal enterprise between their government, the military, the ruling party and other sections of the establishment and the community was Africa's first experience in this respect.

Since then the tragedies of Sierra Leone, Kenya, Uganda, the DRC, Sudan, Libya, Central Africa Republic and Côte d'Ivoire have led to the establishment of the Special Court for Sierra Leone (SCSL) and self-referrals of various situations to the ICC, making Africa the biggest client of that tribunal.

The ICTR Mandate

Some two decades after its establishment, the ICTR stands today on the verge of closure, along with its counterpart ad hoc tribunals such as the ICTY, the ECCC and the Special Tribunal for Lebanon. The SCSL has already wound up its operations. How, if at all, has the ICTR, indeed the entire process, impacted on Rwanda, on Africa, and further afield, on the rest of the world? What are the lessons that can be drawn for Africa and the rest of the world from the operations of this tribunal and the broader process of international legal accountability over the past two decades?

Mindful of its relatively limited mandate of prosecuting not all perpetrators but only those who committed serious violations i.e. those who played a leading role in the Rwandan genocide, the ICTR indicted ninety-three such persons including the former Prime Minister of the interim government, cabinet ministers, senior military officers, government officials, media people, clergy and ordinary civilians selected on the basis of objective criteria developed by the Office of the Prosecutor (OTP). All these people had of course fled Rwanda and were dispersed worldwide. It took the painstaking efforts of the Tracking Team of the OTP with the cooperation of several governments and organizations and extensive transnational operations involving some fifty countries to track, arrest and transfer eighty-three of these fugitives from justice to Arusha for trial. This despite the challenges posed by the evasive strategies of the fugitives, their location in often inaccessible and ungoverned terrain as well as the lack of cooperation, if not the collusion, of some governments and institutions with the fugitives. Today, the ICTR has concluded the trials of all those arrested, with sixty-four convictions for genocide, crimes against humanity and war crimes. Fourteen of the accused have been acquitted. Three of the accused died before trial, two indictments were withdrawn – ten cases were referred to national jurisdictions (Rwanda and France) for trial including six fugitives with three other fugitives reserved for trial before the Residual

Mechanism established by UN Security Council by Resolution 966 in 2012 as the successor of the ICTR and the ICTY. At present, the ICTR is very much focused on completion of the appeals from the concluded trials and on the preparation of its archives and other legacy projects prior to closure in 2015.

Whilst the evaluation of the ICTR, indeed of all the ad hoc tribunals, is work in progress, it is fair to say that the tribunal has made its mark and had an impact on Rwanda, on Africa and on the world at large in the global struggle for justice and accountability. The long reach of the ICTR empowered by the authority of the Security Council acting under Chapter VII of the UN Charter has enabled the tribunal to bring to account leading figures including Prime Minister Jean Kambanda – who pleaded guilty to genocide – persons who might otherwise have escaped justice either because of the reluctance of states until a year ago to extradite to Rwanda or because of lack of jurisdiction by the courts of the state in which some of the fugitives were residing. It is also perhaps safe to assert that the arrest of eighty-three such leading figures removed them from the equation and facilitated the restoration and maintenance of peace and reconciliation in Rwanda.

The numbers may be relatively small given the large number of the thousands of perpetrators involved in the genocide; but what is lacking in numbers may perhaps be made up for by the very senior status of those tried by the tribunal.

These statistics at once also highlight both the strengths and the limitations of international criminal justice. Due to its costs and complexity, it can only try a few compared to the national systems which must bear primary responsibility for the investigation and prosecution of these crimes. On the other hand, there will always be persons whom the national legal systems will be unable or unwilling to prosecute due to their influence, status or authority or because they are physically out of the jurisdiction and so not within the reach of the national courts. But they are not out of reach of the international legal process. Therein lies the strength of international criminal justice: it can bring to account those out of the reach of the national systems. Thus, if the process of accountability for international crimes is to reach those persons of power and influence who can, as the Rwanda experience demonstrated, sit behind closed doors and direct killings in the streets and in the houses, we must retain the international criminal justice process as an option, even whilst acknowledging the primacy responsibility of the national systems in this respect.

The ICTR programme of referral of cases to national jurisdictions – under which two cases were sent to France and eight to Rwanda – has also

enabled the tribunal to contribute to the development of the Rwandan legal system – manifested in the abolition of the death penalty, the provision of greater fair trial rights in Rwandan law, improved centres of imprisonment and detention and other capacity building measures for the judiciary and law enforcement, investigative and prosecuting personnel. This has helped restore confidence in a legal system shattered by the genocide. Besides, it has encouraged several foreign jurisdictions in Europe, Canada and the US, following the tribunals' example, to extradite suspects to Rwanda for trial as the legal system is considered to provide fair trial both in law and in practice. In this way, it has helped to bridge some of the gaps in war impunity.

The outreach programme of the ICTR has, despite the geographical distance with Rwanda, made great efforts to keep the Rwandan population well informed about the process in Arusha and provided in the various ICTR information centres around the country a repository of information on the genocide and the ensuing process of legal accountability for the principal perpetrators.

The process of accountability is not only managed or driven by foreigners at the ICTR. Rwandan nationals have been recruited and are discharging responsibilities in the ICTR at various levels including as investigators, trial attorneys, appeals counsel, language and support officials, etc. This conscious partnership with Rwandan nationals not only assisted the tribunal access relevant evidence more easily but also contributed to the capacity building of the Rwandan legal system as some of these officials return to Rwanda to put their experience to the service of their homeland and to some extent bridged the gap between the tribunal and the Rwandan community.

Beyond Rwanda the work of the ICTR has raised greater awareness of international criminal justice in Africa, assisted in capacity building for African institutions in this area leading to *inter alia* the establishment of special war crimes offices in a number of countries. The tribunal also has a large body of Africans amongst its staff that can provide the necessary skills, expertise and experience in national efforts to entrench accountability and combat impunity.

Challenges do of course remain even at the ICTR's moment of closure. Nine top-level fugitives continue to be at large; hundreds of suspected *genocidaires* continue to live outside of Rwanda without being held accountable for their actions. It is necessary that states ensure the arrest of these nine indicted fugitives from justice and their transfer to the Mechanism or Rwanda as appropriate for trial, and that in respect of the other suspects that states live up to their legal responsibility to prosecute or extradite them to Rwanda for trial.

Wider afield globally, if the idea of international criminal justice has become acceptable today and a factor in international relations, it is due largely to the impact of the work of the network of ad hoc and hybrid tribunals of which the ICTR forms a component. Cumulatively, these tribunals have ensured the legal accountability of over 300 senior level perpetrators – heads of state, heads of government, government ministers, senior military officers and officials – who might never have faced the law without the intervention of these international courts; they have developed an extensive jurisprudence which covers both the substantive law as well as practice and procedure; above all they have developed, through their successes as well as their challenges, best practices in the investigation and prosecution of international crimes in the difficult areas of tracking, witness protection and management, state cooperation, management of evidence, trial administration, referrals of cases to national jurisdictions, and investigation and prosecution of sexual crimes which can facilitate the work of both national and other international courts. The ad-hocs have been able to demonstrate that despite numerous challenges, the process of international criminal justice is both necessary and feasible. It may be expensive; it may be time consuming – these factors can in any case be mitigated through appropriate measures. But it is necessary for justice and for peace. The work of the ad hoc special courts has provided the greatest catalyst to the eventual establishment of a permanent court under the Rome Statute.

Potential Lessons from the ICTR

What are the lessons that Africa can draw from the work of the UNICTR and of the other tribunals? What is the legacy of the ICTR for Africa? Whilst the UNICTR is truly a UN institution and not an African one, it is nonetheless closely connected to the continent – it is based and has been functioning in Africa; it is mandated to deal with a tragic situation that occurred in Africa; it has a substantial African presence amongst its staff and its operations have required it to interact with a significant number of African governments and institutions. Its links with Africa are many. There are, I believe, several lessons to draw from the ICTR.

Prevention and Protection

To begin with whilst the international community is broadly blamed for standing by, and 'witnessing' in the true sense of the word, the genocide in Rwanda in 1994, it is necessary to recognize that the perpetrators were Africans, as were the victims; and that neighbouring African states and African continental institutions also stood by unable or unwilling to take action to halt the genocide. Africa must share the blame with the rest of the

international community for 1994. From this recognition should follow the lesson that Africa must be prepared to manage and resolve its crises and be less dependent on external actors for conflict prevention and resolution. By empowering the AU to intervene amongst its member states to prevent or halt genocide or crimes against humanity, the Constitutive Act of the African Union appears to have absorbed this lesson and thus broken away from the OAU preoccupation with what it regarded as a sacrosanct principle of non-interference in the internal affairs of member states. In addition, since 1994 there have been a number of African-led efforts to resolve conflicts in the continent – in Sudan, in Somalia, in the DRC. Earlier the ECOMOG mission in Sierra Leone provided a good example of what a regional initiative could achieve. The fact however remains that Africa needs to enhance its resolve as well as its capacity to manage conflicts that generate mass atrocities, instead of remaining dependent on the rest of the world for our peace, our justice and our development. The responsibility to protect communities under threat or attack is as much incumbent on Africans and their governments as it is on the rest of the world. We must empower ourselves to effectively discharge that responsibility to our peoples.

Good Governance

Undoubtedly, Africa as a whole has made considerable progress in governance since the early years of independence with greater political pluralism, the demise of single party regimes, fewer military regimes, more constitutional changes of government, and better institutional arrangements for human rights protection nationally and under the Banjul Charter, the African Court of Justice and Human Rights, and other African conventions on democracy and good governance. Nonetheless, challenges still remain. The fault lines that marked Rwanda in the 1990s characterize many African states – religious and ethnic antagonistic divides, poor governance with large scale and systematic violations of human rights, impunity, lack of accountability, disrespect for the rule of law, unproductive and inequitable distribution or allocation of the national wealth, poverty, disease, dictatorship, marginalization of minorities and so on. This is very often the scenario for large-scale internal conflict.

The root cause of all the conflicts that resulted in the mass atrocities of the Rwandan kind in 1994 is bad governance. A major lesson for Africa provided by Rwanda, and the ICTR, is that we must invest in preventive measures to avoid conflict and the ensuing mass crime and that the most effective way to do so is to create in our societies an environment for genuine good governance based on respect for the rule of law, human rights and democratic principles. We need to create effective national accountability and integrity systems that

prevent impunity and promote justice; we need effective independent and impartial judicial processes with facilitation of access to them to ensure that justice is available to all; and we need more democratic, effective and just utilization of our national resources for the public good. Above all we need to approach the challenge of national peace, truth and reconciliation in each state not in an ad hoc manner that responds to crises, but with permanent, standing national institutions geared towards managing some of the fault lines in our communities in order to promote truth, justice and reconciliation in a continuous national dialogue. An environment of good government in its broadest sense is the strongest bulwark against conflict that engenders mass atrocities and international crimes.

Mass atrocity crime is a rare event, if occurring at all, in a society fully and deeply committed to the rule of law, human rights, equity, justice and fairness. Our primary strategy must be to devise and implement effective national preventive policies to guard us against these tragedies which tear apart our communities, sap our strength and lay to waste our human and natural resources. Legal and social justice can contribute significantly to the transformation of our states into communities of peace and of progress.

The work the ad hoc and hybrid tribunals, combined with efforts of some states, pressures from civil society and the establishment of the permanent ICC under the Rome Statute have all combined to usher in a new global era of accountability for egregious violations of human rights. The era of impunity is crumbling. Even those who promote impunity pay lip-service to the need for accountability. Protestations of state sovereignty will not be sufficient to stem the tide of accountability, just as claims of sovereign domestic jurisdiction of states could not stem the tide of universal concern and involvement in human rights within national frontiers.

The primary responsibility for the prosecution of international crimes today rests with the state, with the international process stepping in where the state of primary jurisdiction is unwilling or unable to discharge its responsibility. The option is no longer between impunity and accountability. The option is whether the state will provide this or whether an international process will take over that responsibility. That process can take different forms: ad hoc or hybrid courts mandated to deal with a specific situation (e.g. Cambodia, Lebanon, Rwanda, Yugoslavia, Sierra Leone); ICC jurisdiction for states party to the Rome Statute (e.g. Kenya, Uganda); Security Council referrals to the ICC for states non-party to the Rome Statute, (e.g. Sudan, Libya); the exercise of universal jurisdiction over the situation by a state other than the state of primary jurisdiction (e.g. Senegal in the Hissène Habré case).

African states, like the rest of the international community have the primary responsibility to investigate and prosecute international crimes which are committed within their territorial jurisdiction. Are they well equipped to do so? What can they learn from the legacy of the ICTR and others to empower themselves to discharge such a responsibility?

The experience of the ICTR in referring some of its cases to national jurisdictions for trial, principally Rwanda, has demonstrated that the majority of African jurisdictions are ill-equipped to carry out such prosecutions due to inadequate laws and legal systems, poor capacity and in some instances a lack of political will on the part of the national leadership. All the African states, including Rwanda, which were considered for referral of ICTR cases exhibited some or all of these features that made them unsuitable to receive and prosecute such cases.

It is imperative that we equip ourselves well for the task if we do not wish others to do it for us. We cannot protest at outside interference whilst we refrain from seriously investigating and prosecuting international crimes committed within our national jurisdictions. We must equip ourselves for the discharge of this responsibility. We can do so through a sustained process of law reform and capacity building of our legal system to empower it to rise to the task. The requisite political will is perhaps best encouraged by *inter alia* civil society pressure and the realization by leaders that accountability is inevitable and that it is best done by ourselves, if we are to avoid others doing it for us.

Law Reform

The starting point for law reform should be the domestication of international crimes to ensure that they are fully captured within our domestic laws in order to enable the courts to enforce them. Despite the primacy of such a point, it is surprising that many states – both within and outside of Africa – have yet to do this. ICTR efforts for instance to refer some of our cases to certain European jurisdictions foundered precisely because of this lacuna. Law reform should also include revision of the rules relating to practice, procedure and evidence in order to secure fair trial and due process rights in accordance with internationally accepted standards. Rwanda eventually qualified to receive cases from the ICTR for trial because it worked with the tribunal and carried out the necessary law reform and capacity building measures to convince ICTR judges that its legal system provided adequate guarantees and possibilities for fair trial.

Some significant decisions within the extensive jurisprudence of the ad hoc tribunals, if domesticated by local legislation, will in my view also enhance

national capacity for accountability. The principle of 'command' or 'superior' responsibility under which superiors are criminally liable for failure to prevent violations by their subordinates or for failure to punish subordinates for such violations has enabled the tribunal to bring to justice several senior military commanders (see *Prosecutor vs. Alfred Musema, Prosecutor vs. Idelfonse Muvunyi, Prosecutor vs. Theoneste Bagosora et al, Prosecutor vs Augustin Ndidiliyimana et al*)**.** The concept of Joint Criminal Enterprise (JCE) enabled the ICTR to hold the civilian leadership of the then ruling MRND party in Rwanda criminally liable for acts of rape and sexual violence committed by members of the party's militia the Interahamwe *(Prosecutor vs. Karemera et al)* as the natural and foreseeable consequence of the activities of the militia created and controlled by the party leadership. Whilst the prosecution of sexual violence at the domestic level remains a very complicated process – given the legal definition and requirements of proof – the ICTR in the case of *Prosecutor vs. Jean Paul Akayesu* broke new ground by determining that rape can constitute genocide, providing a new definition of rape which frees it from the technical complexities of the national definitions and facilitates proof of the elements of the crime by making the scientific analyses and reports so often prevalent in national prosecutions of such crimes unnecessary. Sexual violence continues to be a major feature of ongoing conflicts in the DRC, the Sudan and elsewhere and its prosecution, which needs to be prioritized, can benefit significantly from the precedents set by the *Akayesu* case.

Beyond the issue of domestication of international criminal jurisprudence, the tribunal's best practices and lessons learned provide an important lesson and legacy for national courts. 'The Compendium of Lessons Learnt in the Investigation and Prosecution of International Crimes', launched jointly by the Prosecutors of the ICTR, the ICTY, the SCSL, the STL and the ECCC, provides some useful guidance to national jurisdictions on some of the best ways of discharging what is now their primary responsibility. The office of the Prosecutor (OTP) of the ICTR has also launched a lessons manual on the investigation and prosecution of sexual and gender based violence in conflict, a best practices document which is planned also for use as a training manual. The OTP ICTR manual on referral of cases to national jurisdictions, based on the ICTR's experience in this area, will, it is hoped, provide some useful guidance in the empowerment of national jurisdictions to prosecute international crimes and to the effective realization of complementarity, a principle that is vital to the future of international criminal justice.

The Bench of the tribunals comprising judges drawn from all the major legal traditions of the world have had to rise beyond the confines of their own national legal systems, recognize that each system has something worthwhile

to contribute to justice, borrow the best from each tradition and weld these together into a unique and progressive international system of justice. At the ICTR for instance, the adversarial court process of the common law system combines with the evidentiary law of the civil law system. But our national legal systems in Africa continue to be locked in their colonial heritage of common law or civil law. We need to evolve our systems, just as the ICTR and other tribunals have done, to recognize, borrow and synthesize into one whole the best principles of the major legal traditions including our own customary law and thus enhance our national capacity to administer better justice.

Role of Traditional Mechanisms

A unique aspect of the legal accountability process for the 1994 Rwanda genocide has been the significant role played by a traditional African justice mechanism in the management of the cases in Rwanda. Confronted by a case load of hundreds of thousands of perpetrators whom neither the conventional national legal system nor the international tribunal could prosecute, Rwanda had to fall back on its traditions by reviving the Gacaca, a traditional justice and reconciliation mechanism to manage this docket. The work of the Gacaca, concluding 1,958,634 cases during its two decades mandate, clearly underscores the potential role for African traditional justice systems in the post-conflict quest for peace, justice and reconciliation. The Gacaca process, facilitated not only to expedite post-conflict justice, but because of its unique features, contributed significantly to Rwandan society's search for truth, healing, reconciliation and peace. As we seek to enhance the capacity of our national legal systems to discharge their frontline role in the accountability process, we should not lose sight of the unique role and advantages of such traditional institutions and ensure that they remain amongst the range of options available to the community.

The conventional judicial institutions are constantly under great stress and strain, overburdened with enormous workloads, excessively formalistic and technical rules of procedure and evidence, spiralling courts, and so forth to the point that the fundamental right of access to justice is under serious threat particularly for poor and disadvantaged persons and communities. Traditional and alternative dispute resolution procedures and institutions can help circumvent or minimize the cost, technicality and tardiness of conventional justice systems. More significantly however, the traditional mechanisms of justice have, in the context of post-conflict justice, a greater capacity, given their nature and procedures, for truth telling, discussing the causes of conflict, healing and reconciliation.

Capacity Building

The challenge is however not only about having appropriate laws, procedures and judicial attitudes. It is equally about institution building. Investigating and prosecuting international crimes is a specialized and challenging task. But the task can be accomplished. Too often the costs, time involved, and complexity of the system of international criminal justice are put forward as the argument against national systems embarking on this venture. In truth, the tribunals have been expensive and it has taken them considerable time to discharge their mandates. The cost and time have not been unreasonable however given the task and circumstances of their execution. The costs and processes of the tribunals themselves are under constant review and there has been considerable progress in the latter years in cost reduction and expediting trials. In any case, national systems do not have to replicate the structures and procedures of the international tribunals. Some of the structures and costs associated with the latter can be dispensed with in a national legal system. But efficient investigation and prosecution at the national level will nonetheless require well trained and equipped specialized sections in the judiciary, in the national prosecuting authority and in the investigating authority, the police. It will require use of new techniques such as electronic systems for storage and management of the voluminous information and evidence generated from conflict situations, effective witness protection systems to ensure the security of those who are prepared to contribute to the search for the truth; a competent and courageous Bar that is able to realize the right of its clients to an effective defence; and above all, an efficient judiciary that instils public confidence in its independence and impartiality. A few African states have already embarked on this process. Uganda has established a specialized War Crimes Prosecution Service. Kenya is contemplating following suit. But these examples remain few. And the initiatives are invariably ex post facto, a response to international conflict situations. It is necessary that these capacity building measures are taken in anticipation of need and are instituted as a normal part of the legal system rather than simply as a response to emergencies. The legal system needs to be prepared in all respects and at all times for the challenge of investigating and prosecuting international crimes as a routine measure.

Interstate and Regional Cooperation

Investigating and prosecuting international crimes at the national level can, even with the requisite political will, be a very challenging task particularly for developing jurisdictions with serious capacity issues. The challenge can nonetheless be mitigated considerably through a system of burden-sharing between states, particularly neighbouring ones. Mutual legal assistance

agreements to facilitate investigations through cross-border access to evidence and witnesses, management of trials, protection and relocation of witnesses, cross-country imprisonment of convicts, expansion of the jurisdiction of regional courts such as the African Court of Justice and of Human and Peoples' Rights, the EAC Court of Justice, the ECOWAS Court of Justice, the African Court of Justice and Human Rights with a penal jurisdiction over such crimes committed within the community can also considerably reduce the cost and challenges associated with such prosecutions. The principle of universal jurisdiction, although much derided as a tool for the administration of 'justice' by powerful states in the North against weak states in the South, provides African states with the opportunity to prosecute crimes committed in other African states where such a state's primary jurisdiction is unable or unwilling to discharge its responsibility. An AU International Crimes Treaty which obliges and vests jurisdiction in all member states to prosecute such crimes committed in other African states, and the domestication of such a treaty, can ensure no that havens exist for such perpetrators and contribute to combating impunity by burden-sharing. Such burden-sharing mechanisms can empower African states to effectively discharge their responsibility to protect their fellow Africans. They can also provide effective means of ensuring that the impunity gap which arises from the weakness of the national system in terms of will and capacity, and the limitation of the international system in terms of the few members it can prosecute, is effectively bridged by other African national or regional jurisdictions stepping into the struggle.

Conclusion

The international criminal justice system is now, I believe, a lasting feature of the international arena. I do not believe there is any going back to the days when the process of accountability for such international crimes rested solely with the nation state. The system of course has its limitations: major players in international relations such as the US, Russia, China and India remain outside its ambit; there are perceptions about the target selectivity of the system; there are limitations on the workload it can manage. Nonetheless it remains a necessary process for justice and accountability and for national and international peace. With the imminent closure of the ad hocs, the ICC and the Rome Statute today remains the focal point for international criminal justice. The Rome Statute and its implementation could undoubtedly benefit from some improvement. We must strive to make that system truly universal encompassing all the major states; we must strive to ensure that the law reaches all situations of mass atrocity and that the principle of complementarity is given concrete effect if the system is to work well.

Africa has committed itself to this international process of accountability – it is an important region in the ICC structure both in terms of membership of the Rome Statute as well as being the source of most of the caseload of the ICC; its confidence in the system has been demonstrated in the number of self-referrals to the court originating from Africa despite the tensions between the continent and the Court. Indeed only African states have self-referred cases to the ICC, a manifestation not only of their confidence but also their good faith in the implementation of their treaty obligations. Africa must remain firmly committed to the Rome Statute even whilst seeking improvements in that Statute system. That commitment and engagement supported by measures to improve good governance and measures to empower African states to discharge their primary responsibility of prosecuting international crimes can ensure that what is currently referred to as Africa's moment of economic advancement will also be a moment of accountability and not of impunity, a moment of justice and not injustice, for the African peoples. Africa must empower itself to prevent mass atrocities against its peoples. It must also empower itself to ensure, through its own mechanisms, legal accountability for such crimes.

Note

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The Case for a Modest Assessment of the International Criminal Justice Processes in Rwanda, Sierra Leone, and Some Lessons for Liberia

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Abstract

This article seeks to evaluate the role and contributions of the UN International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) to the task of dispensing justice to those most responsible for the commission of international crimes during the Rwandan and Sierra Leonean conflicts. The authors contrast those two situations to that of Liberia, where a Truth and Reconciliation Commission was set up in lieu of criminal accountability. The article argues that part of the unfair criticism of international criminal law is driven by the unrealistic expectation that ad hoc criminal courts such as the ICTR and the SCSL should not only dispense credible justice, but also help to restore peace and promote national reconciliation in deeply divided post-conflict societies. The article posits that even in best case scenarios, such courts can only mete out justice to individual perpetrators of horrific crimes in fair trials that comply with their statutes and international human rights law. An argument is therefore made for a return of these courts to their primary intended roles as criminal courts. Towards that end, the work of the ICTR and the SCSL are tested against eight factors relevant to assessing their achievements and limitations as criminal courts. The article shows that those special tribunals made important contributions to the process of justice for victims of atrocity crimes in Rwanda and Sierra Leone.

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Résumé

Cet article cherche à évaluer le rôle et les contributions du Tribunal Pénal International des Nations-Unies pour le Rwanda (TPIR) et du Tribunal Spécial pour la Sierra Léone (TSSL) pour remplir la tâche d'administration de la justice à ceux qui sont le plus responsable de perpétration de crimes internationaux durant les conflits rwandais et sierra léonais. Les auteurs contrastent ces deux situations à celle du Libéria, où une Commission Paix et Réconciliation fut mise en place plutôt que la responsabilité criminelle. Nous défendons l'idée qu'une partie des critiques injustes au droit pénal international est tirée par l'attente irréaliste que les tribunaux pénaux ad-hoc tels que le TPIR et le TSSL devraient non seulement administrer une justice crédible, mais aussi aider à restaurer la pais et promouvoir la réconciliation nationale dans les sociétés post-conflit profondément divisées. Nous soumettons l'idée que même dans les scénarios des meilleurs dossiers, de tels tribunaux ne peuvent rendre la justice qu'aux auteurs individuels de crimes atroces dans des procès équitables conformes à leurs statuts et au droit humanitaire international. Dans l'évaluation de leurs héritages, nous appelons en conséquence à un retour leurs rôles premiers attendus en tant que tribunaux pénaux. Dans ce but, nous développons et testons le travail du TPIR et du TSSL à la lumière de huit facteurs pertinents pour évaluer leurs réalisations et limites en tant que tribunaux spéciaux. Nous montrons que même si notre travail n'est pas une étude empirique, il apparaît que ces tribunaux spéciaux ont fait une contribution importante au processus de justice pour les victimes de crimes d'atrocité au Rwanda et en Sierra Léone.

Introduction

Although by no means unique, the late twentieth and early twenty-first centuries saw a spate of violent conflicts across Africa. These include the horrific genocide in Rwanda in 1994, the brutal civil wars in Liberia and Sierra Leone, and the ongoing conflicts in the Central African Republic (CAR), the Democratic Republic of Congo (DRC) and Uganda. In Rwanda and Sierra Leone, at the request of the national authorities, the 'international community'[1] as represented by the UN sought to establish ad hoc mechanisms through which to prosecute the leading perpetrators of atrocities. Similarly, following in the footsteps of Rwanda and Sierra Leone, the CAR, DRC and Uganda have invited international intervention in their own territories, but not to set up special ad hoc courts. Rather, they referred their own situations to the Prosecutor of the Hague-based permanent International Criminal Court (ICC) in the hope that she will undertake further investigations and prosecutions.

This article seeks to assess the role of the two ad hoc courts, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL or 'the Special Court'), and their normative impact on the national communities in whose name they were created to render credible justice. It contrasts these two situations to that of Liberia, where a truth commission was established in lieu of criminal accountability. A key lesson we derive from the Rwanda and Sierra Leone accountability experiments is that strong governmental commitment in the affected state is a necessary, if not sufficient, condition in the ongoing fight against impunity.

We proceed as follows. In Part II, in order to manage expectations, we set out the outer parameters of this study. Our argument is that the ad hoc criminal courts for Rwanda and Sierra Leone should be assessed principally on whether they have fulfilled their statutory mandates to hold fair trials. Any other benefits that accrue from their investigations and prosecutions are to be welcomed but should not be treated as a benchmark against which they are evaluated. Having made the case for more realistic grounds for the assessment of the legacy of these courts, we identify eight factors that affected the choice of and consequently the operations of each of the two mechanisms in Part III. In Part IV, we evaluate the ICTR against these criteria and highlight areas of its presumed success as well as highlight some of its core limitations. We do the same in Part V with respect to the SCSL and the Sierra Leone situation. Part VI examines the Liberia experience. Here, the assessment was necessarily brief, partly because that country opted to have a truth commission process as a deliberate policy choice of the parties to the conflict who wished to avoid any criminal prosecutions. This might have been the cost-benefit calculus that made the cessation of hostilities possible. Yet, the truth commission that was later established in Liberia strongly recommended criminal prosecutions on the basis that that it is only after such accountability that the prospects for long-term peace and stability will be strengthened. In a way, though that recommendation has not been taken up by the current government, the question of criminal accountability remains important for Liberia with civil society advocates continuing to call for the creation of a tribunal to prosecute those most responsible for the atrocities committed during the war.

Preliminary Issues and Methodology

As a preliminary matter, it is imperative to define the parameters of this assessment. The ICTR and SCSL differed dramatically in their scope, breadth, budget, funding mechanisms, location, international involvement and novelty. The task at hand is not to assess which flavor of international justice is preferable. Instead, the goal is to assess the strengths and weaknesses

of each mechanism so that an informed decision can be made wherever an ad hoc tribunal becomes necessary in the future. Such a mechanism may become necessary for many reasons, including a failure to act on the part of an unwilling or willing but unable national jurisdiction or, if the concerned state is a party to the Rome Statute, the ICC has not shown a preliminary interest in investigating or prosecuting.

That said, in international criminal law, before the simultaneous establishment of the two, for the first time ever in Sierra Leone, ad hoc international criminal tribunals and truth commissions were traditionally considered as alternatives to each other. The former is generally focused on retribution or deterrence while the latter aims at discerning the truth and creating an accurate historical record with the view to fostering reconciliation. Going beyond this conventional understanding of the general relationship of criminal tribunals to truth commissions, we argue that even amongst temporary international criminal courts which share many goals and similarity in features, it is plausible to conceive of each separate mechanism as a different tool. For one thing, the institutional design of each can vary considerably depending on the specific role envisaged for it and the mandate created by its founding instruments. For another, the given court's contribution to the wider post-conflict dispensation would depend on the presence of other transitional mechanisms and the extent to which those are anticipated to relate or complement its mandate.

It would seem that although as the Africa-based tribunal, the ICTR generally served as the basic blue print for the SCSL,[2] an analogy can probably be made to a hammer which was intended to be used in the fight against impunity in post-genocide Rwanda. This claim derives from the statement of the United Nations Security Council (UNSC) that part of the role of the tribunal was to give retributive justice for the genocide. The SCSL, which had a more limited jurisdictional mandate compared to the ICTR, could be conceptualized as a chisel that was intended to scrape away some of the impunity in the notoriously brutal Sierra Leonean conflict. This claim too can be supported by the resolutions of the Security Council in the lead up to the establishment of the SCSL in collaboration with the government of Sierra Leone. With these analogies in place, one would not ask 'which is a better tool: the hammer or the chisel?' for the simple reason that each tool has a special purpose for which it is suited and any number of other purposes for which it is wholly inappropriate. What's more, the utility and morality of the tasks for which a given tool are suited are independent of a tool's ability to accomplish those tasks. A hammer is equally well-suited to the tasks of building a school for orphans as it is for bludgeoning an innocent victim. The manner in which the tool is wielded, as well as its purpose, greatly changes the equation.

The tasks for which a particular tool is well-suited are necessarily limited. Thus, just as one would not ask whether a hammer is a better tool than a chisel, one would also not ask whether a hammer or a chisel is better at solving complex mathematical equations. The answer is obvious; neither is suited to the task nor are they meant to be used as such. Such grandiose outcomes as restoring peace and security in a post-conflict state are frequently cited as goals for these criminal courts. True, these are important predicates for the criminal justice process to take place. But this paper will only briefly touch on the presumed impact of international criminal justice on peace and security in those countries under consideration, since to our minds, these are arenas that essentially fall outside of their core mandates to prosecute particular crimes in fair trials comporting with the high standards contained in their statutes and customary international human rights law.

That said, whether particular courts can reasonably impact on peace and security assumes that it is, firstly, possible for courts to do so. Secondly, it assumes that these are within the capability of these particular courts. These and other related assumptions may be borne out by experience but in some ways seem problematic. After all, would we expect even the most mature and effective national criminal justice mechanism to decrease youth unemployment, increase agricultural yields or encourage sustainable economic development? While these ends may ultimately be beneficial to a post-conflict state, and can be both a symbol of and a byproduct of peace, stability and security, they are not within the idyllic ambit of even a perfect national criminal justice system. Further, it seems necessary to view our 'tools' in a realistic social, political and economic context. It is simply not worth asking what an international tribunal could do with US$10 trillion, as that is an unrealistic funding target. Similarly, it is almost guaranteed that *some* constituency, local or international, victim or perpetrator, government or military or civilian, will be displeased with the brand of justice achieved. There is no criminal justice system in the world that has 100 per cent buy-in from its people. An international mechanism is no exception. As international justice mechanisms operate between and among states, with national and international staff, and contemporaneously with other political, economic, and cultural activity and often in complex circumstances after or even during conflict, it appears likewise guaranteed that there will be Iconflict between competing areas of forward progress. Stability is not peace. Peace is not justice. Justice is not prosperity. Prosperity is not stability. However, each can reasonably be said to be bolstered by the presence of the others.

Worse, even in the best of scenarios where we have defined limited expectations, there is some internal tension among the ambitions our 'tools' are intended to achieve.[3] As some scholars have noted with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY), 'depending

on their interests, the [court] may be expected to speak to the desire for victim's justice or guard against the perception of victor's justice. Similarly, the [court] must also prosecute alleged war criminals while simultaneously protecting the accused defendants in the process'.[4] This tension exists not only between local and international stakeholders, but also between the desire for efficient trials and the requirement for fair trials, and between the reasonable impulse to keep costs in control and the necessities of pursuing justice in a post-conflict society.

Lastly, the goal of assessing the efficacy of the tribunals as legal institutions is distinct from the task of assessing the impact they have had on the peace, reconciliation and security in a given country. As Janine Clark has persuasively argued, an accurate assessment of whether an international justice mechanism has contributed to the restoration and maintenance of peace in a post-conflict society requires a thorough empirical study of on-the-ground conditions and the attitudes of the mechanisms' various constituencies.[5] This is not such a study, and we do not purport to evaluate the experiences of those affected by the conflicts in Rwanda, Sierra Leone, or Liberia, nor their individual or overarching perception of the justice delivered by these mechanisms. Justice 'is a matter of both actions and the perceptions that they create'.[6] A failing beyond the scope of a tribunal's mandate may greatly undermine even the best of criminal processes.[7] Moreover, delivering on some of a tribunal's goals (such as due process rights and humane sentencing) may run counter to other goals (such as reconciliation and local buy-in). Thus a thorough understanding of the justice achieved by the mechanisms would require an empirical study of those affected by the processes and a study of the actions undertaken by and in service to those processes. The latter category is where we focus our efforts.

Our aimed contribution to the literature is essentially three-fold. First, we seek to join a handful of scholarly works that are increasingly beginning to call for more realism in the expectations thrust upon international criminal courts, and even more broadly perhaps, the use of the criminal law tool and its potential and limitations to contribute to stabilizing conflict and post-conflict societies. Second, by developing preliminary factors to help in what appears to be the early literature on the assessment of the 'legacy' of these courts, we will hopefully help spur further scholarly conversations on what ought to be the criteria for the review of their primary contributions. Lastly, we seek to turn the scope on to the Africa-based tribunals even as we seek to mine their lessons and show the relevance of those experiences for other African situations. While each African conflict situation may be unique in its own way, we maintain that each African state facing questions of how best to operationalize criminal accountability for international crimes must not fail to learn from the lessons of history from other countries with similar experiences nearby. All the more

so considering that all those African states have often to operate in a world in which some countries are better positioned than others to drive the global accountability agenda.

Factors used in Assessing Impact

As discussed above, the methodology of this paper will be to normatively assess the ICTR and the SCSL on eight different criteria relevant to their creation, their work, and their effect on the local community. These are initial criteria aimed at identifying the legal impact of the tribunals, and in that sense, we do not aim to provide a comprehensive view of all frames or lens through which to view the courts, their legacies, and their impact. The factors below, while not definitive, are among the important ones for the purposes of analysing criminal courts in so far as questions about them tend to recur across many post-conflict situations where individual criminal accountability has come in issue on the continent. There is certainly great room for other scholars to consider the psychological, openly political, sociological or economic and other impacts of these mechanisms.

Local Involvement in the International Instrument

A primary factor to consider in assessing the international mechanisms is the degree of local involvement in the formation, organization, conduct, and decisions of the tribunal in question. This factor has both principled and practical implications.

The principle that war crimes and crimes against humanity should not go unpunished seems to be, at this point in history, widely accepted by all nations. In this sense, the desire to try perpetrators should be shared by both the putative international community and the state in question. The two are not in opposition, and often, the wishes of both the local and the international actors coincide with and complement each other. This helps to create a sense of a common goal to work towards. The desire and necessity of punishing perpetrators is just as much a local concern as it is an imposition of international high-mindedness from abroad.

From a practical standpoint, the evidence, witnesses, and often the accused, will be in the *locus commisi delicti* – the place where the crime was committed. A court, whether local, wholly international or internationalized, relies on the local community and its government to collect information and capture perpetrators. Thus, the degree to which the court is successful depends considerably on the cooperation of the local institutions. It is obvious that a court that attempts to function without witnesses, physical evidence, or a defendant will have a rough ride of it, indeed. As such, local involvement,

both at the level of the formal institutions of the state and outside of them in civil society and amongst individuals, has a very important practical impact on the conduct of the work of the penal tribunal.

Further, inasmuch as it can be argued that one goal of international criminal justice is to bolster the reconstruction of post-conflict states and regions, it is necessary to assess the degree to which the affected population endorses the work of the court. However, local *involvement* in the tribunal and local *approval* of the court's work are separate and distinct things.[8] The former can be assessed using benchmarks such as participation in terms of numbers of local prosecutors, judges and defence counsel and other staff. The latter can be affected by both the perceptions of the tribunal's work and the extent of local involvement and local input, but it is ultimately a separate issue altogether. For instance, an authoritative study of the ICTY found that members of the affected populations (including Serbs, Bosnians, and Croats) in Bosnia held a wide variety of views about the Tribunal.[9] This, in one way, may not be that surprising. Many locals interviewed for the study took issue with the length of specific sentences,[10] the pace of the trials,[11] and the use of plea bargains in lieu of trials.[12] Although the respondents may not have approved of all of the actions of the court, the local populace was certainly involved in – at least sufficiently to form opinions about – the work of the ICTY.

Competing National Proceedings

It has been a given, going back to the first such prosecutions after World War II, that it is not possible for international justice to act as a replacement for national justice. At best international prosecutions are supplements to domestic prosecutions. For this reason, all international and internationalized courts have had a limited mandate to prosecute a certain class of crimes or actors. A system for selecting individuals that will be brought to account in the international forum is therefore inevitable with the first such experience at Nuremberg explicitly limited to the 'major' Nazi personalities behind the war. However, depending on the scale of the conflict, the commission of atrocities will involve dozens, if not hundreds or thousands and sometimes tens of thousands of actual perpetrators. Crimes associated with those within the ambit of the international court's personal jurisdiction, as well as others not within it, must be dealt with by local authorities in one way or another. As such, the degree to which the local authorities seek other avenues of redress, and the character of those efforts, inform the perceptions that will be generated about the efficacy of the international court. In other words, the inevitable division of labour between the national jurisdiction and the international(ized) jurisdiction has an impact on the perception of either and often both of the entities in question.

Competing International Proceedings

Similarly, the efforts of other international organizations or third-party states to bring perpetrators to justice implicate the actual and presumed efficacy of an international criminal justice mechanism. For example, some countries might invoke universal jurisdiction, passive personality or other permissible grounds of jurisdiction to prosecute offenders who have fled to their territories, as a number of countries such as Belgium, Canada and France have done with respect to alleged *genocidaires* from Rwanda.[13] On the one hand, such national level efforts that complement the court's work will allow the tribunal to focus on fulfilling its mandate. On the other, efforts that overlap with the tribunal's work may raise questions of jurisdictional conflict and primacy or even be a reflection of a lack of broader support for the court.

Impunity and 'Victor's Justice'

A common concern since the establishment of the International Military Tribunals (IMTs) after World War II has been that the victor in a conflict will subject the vanquished to the victor's preferred justice. The choice to forego outright execution of the enemy leaders and instead subject them to criminal trials in a court of law was a step forward in 1945, even if the practical consequence were the same for the convicted. Pragmatically, it is unlikely in the context of a widespread violent conflict that atrocities and violations of international law are limited to one side. Yet, in 1946 this meant that the Allies could choose to conveniently ignore the crimes that their own forces committed in favor of prosecuting twenty-two Nazi leaders and their associates. Therefore, in this wider morally fraught context in which no victorious power will set up a court to prosecute itself instead of only its enemies, the firebombing of civilians in Dresden or the use of atomic weapons against the Japanese in Nagasaki and Hiroshima could be recast as unfortunate consequences of Axis aggression but not prosecutable war crimes or crimes against humanity. The hypocrisy that results is self-evident and deeply problematic.

In the modern context, the reality of the victor's power to decide what will happen to the loser remains. Much as in the past, the parties that ultimately come to control the government of a post-conflict nation are likely to have had *some* hand in the conflict. Yet, as Victor Peskin has argued, '[a] corollary to [the principle of the universality of human rights] is that all victims of human rights abuses deserve justice regardless of which side they belong to. […] There is no moral basis for immunizing victorious nations from scrutiny'.[14] In this vein, in modern African conflicts and other transitions, the concern will arise as to whether the international criminal justice mechanism created

to prosecute atrocities will privilege and effectively insulate the victors from criminal process, much like the Allies ensured at Nuremberg. On the other hand, and we pursue this admittedly controversial line of thought further below, it may be – even if this at first blush seems counter-intuitive – that victor's justice is not only practically inevitable but that in some cases it may also be practically desirable.

Breadth of Proceedings

If we mean to assess a court's success, we must necessarily examine what the Court set out to accomplish. Of course, in the international criminal law area, there is no shortage of ambitions for these courts. Some of these ambitions are more consistent with the central mission of the tribunal as a criminal court while others are a bit more distant from it. We might, to have a useful conversation, seek to separate out the primary from the secondary goals and justifiably limit our assessment to those that are primary responsibilities of a criminal court: to render fair trials in accordance with the law.[15] For instance, it would be no failure of justice if a Nigerian court fails to prosecute a common criminal in Lesotho; that is not the Nigerian court's role. Similarly, we should consider the success of an ad hoc court within the context of its core mission and core purpose.[16]

The most fundamental statement of a court's intended purpose is its mandate. In the international context, some specific statute or instrument, or a set of instruments, must describe the jurisdiction. This sets out the framework for how the court is to be run, what rules will apply, and most importantly, what kinds of crimes, committed where, when and by whom, the court is empowered to adjudicate. The ICTR and SCSL differ dramatically in this regard, as discussed below, as do those two Chapter VII courts from the permanent ICC.

A corollary to the court's explicit mandate is the number of trials the tribunal actually carries out. This has a nexus to the mandate in the sense that the manner in which the jurisdiction is framed can narrow or widen the field of prosecutorial charging decisions. The terms 'greatest responsibility'[17] and 'most responsible'[18] are now becoming terms of art, suggesting a move away from a 'persons responsible' standard that appeared to apply in the heyday of international criminal courts.[19] Not only does the form of personal jurisdiction relate directly to the expected throughput of the court, they serve to either cabin or widen the prosecutorial mandate and ultimately influence the exercise of discretion in a given direction. These, in turn, affect the breadth or quantity of justice that is served. Those in turn impact on the perception of the justice that was rendered.

Quality of Proceedings

It should go without saying that a properly constituted justice mechanism seeks to ensure the highest quality legal proceedings. This is especially so with international criminal justice mechanisms, where a supplementary legal entity is created often out of concern for the poor condition of the default national mechanism. The so-called 'international standards' that come into play in international criminal tribunals are therefore not necessarily always compatible with the standards in every local jurisdiction. They are not simply the subset of rules to which all international parties agree. Rather, they are often aspirational rules that aim to ensure a fair trial for the accused, just punishment, and a sufficient quantum of evidence to encourage faith in the process.

Given that international courts are set up with a goal of meeting international standards, they should be judged against that metric and not necessarily the standards of the local jurisdiction. Again, disagreement on these norms is not limited to the African context. Most American states, for instance, continue to provide for different rules on provision of grand juries or capital punishment even though most other countries or international criminal justice do not. It would be patently unfair to criticize an international court for failing to apply American standards of punishment over the objections of American legislators.

A high-quality proceeding is not simply one that delivers the desired outcome (and, indeed, an impartial court should not prefer a specific outcome). It is equally true that an undesirable outcome is not the indicia of a low-quality proceeding. In both cases, the degree to which the proceedings complied with international standards for fair trial are wholly independent of the outcome in an individual case for the simple reason that the parties, constituencies and observers often have differing views of which outcome is most desirable. Again, an empirical study of the perceptions of quality in the affected populations would yield valuable insight for future tribunals, but would not necessarily speak to the question of whether the proceedings did, in fact, comport with international fair trial norms.

Administering Cost

There is, literally, a cost to international justice. It therefore seems fair to assess the cost of a particular implementation thereof. Again, the SCSL and the ICTR differed dramatically in this respect. A few different ways can be used to consider the cost of an international court. First, and most obvious, is the total amount of money spent by all parties (the total cost of

the tribunal). Second is the cost per trial, per defendant, per situation, or otherwise reduced by a normalizing factor to facilitate comparison with other institutions. Third, we can consider the funding mechanism that provides money for the court's operation as it may greatly affect the way the tribunal does its work. Lastly, and least importantly perhaps, is the relative cost of courts vis-à-vis other national priorities. The latter issue may seem distant, but in many post-conflict contexts, the very existence of the criminal tribunals and international involvement appears to have invited parallel comparison – a cost-benefit analysis of whether the funds provided could have been better spent elsewhere. This is to be expected, considering that in many of those societies, international involvement comes about because of the failure of the national system in provisioning the relevant sectors of society adequately. Poverty and lack of resources may, in a world of finite resources, give rise to legitimate questions about what area must be given priority.

It is often said that the ICTR and ICTY were 'expensive',[20] and that the SCSL was set up as a cheaper alternative in the wake of 'tribunal fatigue'[21] within the international community. True as that may be, neither the ICTY and ICTR spent what could be deemed an internationally significant amount of money when compared to the amounts that nations spend on warplanes, or what some developed countries spend on snack food, elective surgery or movie tickets. On the other hand, one may rightly ask if the money spent on international criminal justice mechanisms would not have been better spent on food aid, capacity building, economic development or other beneficial endeavours. This seems a fair question, but one that confused the hammer for the super-computer. We submit that there is more than enough money to fund *both* international criminal justice and development efforts without seriously affecting the international community's bottom line. That being said, the existence of that money, the question of political will and the ability to convince states of the importance of these expenditures are separate questions beyond the scope of this article. Ultimately, it may be that in more ways than one, the work of international tribunals appear to follow the adage of project management 'fast, cheap and good: pick two'.

Jurisprudential Impact

One of the benefits of the push in the late twentieth and early twenty-first centuries to establish norms of international criminal law is that newly constituted tribunals will not need to reinvent the wheel. With that in mind, the degree to which a court contributed to the goal of establishing this groundwork is often seen as relevant to assessing its legacy and efficacy as a legal institution. It is acknowledged that not all parties will agree on

the accuracy or utility of any particular tribunal's contribution to the state of international criminal law.

Having identified the above factors, in what follows below, we apply each of the above criterium to the situations in Rwanda, Sierra Leone and Liberia.

Rwanda

Background to the Genocide

Rwanda was colonized by both Germany and Belgium, the latter of which introduced a formal system of racial classification by separating the Rwandese population into three groups: the Hutu (roughly 84 % of the population), the Tutsi (about 15 %) and the Twa (the remaining 1 %).[22] Broadly speaking, at the risk of oversimplification, the minority Tutsi population was favoured by the colonial authorities over the majority Hutu. The Tutsi remained in positions of leadership until the UN Trusteeship-mandated universal elections in 1956, at which time the Hutus ushered in a Hutu-majority government and an era of civil unrest between ethnic groups.[23] Violence occasionally followed, with several targeted attacks against the minority Tutsis. After each attack, some Tutsis would flee the country. Some would end up in neighbouring states as refugees. Rwandan Tutsi exiles in Uganda formed the Alliance Rwandaise pour l'Unité Nationale (ARUN) in 1979, and later renamed themselves the Rwandan Patriotic Front (RFP).[24]

An attack from Uganda by the RPF into Rwanda on 1 October 1990 began a three-year conflict between the RPF and the Rwandese Armed Forces led by then-President Juvenal Habyarimana. The war was nominally ended by the Arusha Accords, a 1993 power-sharing agreement between the RPF and the Rwandese Government which provided for, *inter alia*, a transitional government that included the rebels, demobilization and integration of the armies, and deployment of a UN peace-keeping force in Rwanda (what later came to be known as the United Nations Assistance Mission for Rwanda – UNAMIR).[25]

Efforts to establish the transitional government led to a meeting in Dar es Salaam on 6 April 1994 that included President Habyarimana, President Ntaryamira of Burundi, and other regional heads of state. The plane carrying Habyarimana and Ntaryamira crashed outside of the Kigali airport as it returned from the meeting around 8:30 p.m. on the night of 6 April 1994.[26] The government forces quickly blocked off entire areas of Kigali, and members of the Rwandan Army and the Presidential Guard began systematically killing moderates and other known prominent supporters of the Arusha Accords. Among these initial targets of the violence were Prime Minister Agathe

Uwilingiyimana (MDR), a Hutu moderate politician, the president of the Supreme Court and virtually the entire leadership of the *parti social démocratie* (PSD).[27] This resulted in a constitutional power vacuum that was quickly filled by an avowedly pro-Hutu interim government made of extremists and led by Jean Kambanda.

Using the army and special battalions, as well as militia groups called *Interahamwe* and *Impuzamugambi*, a cadre of dedicated Hutu Power proponents led a series of genocidal attacks on Tutsi and moderate Hutu civilians throughout the country. Although UNAMIR forces were present in the country, their mandate was not extended to the protection of civilians, despite repeated calls for such by the UN Force Commander General Rome Dallaire.[28] Instead, following the killing of ten Belgian paratroopers, the UN peacekeeping mission was downgraded.[29] No other countries intervened, from Africa or elsewhere, giving sufficient space for the genocidal bloodbath to occur.[30] Over a period of 100 days, between 7 April 1994 and 18 July 1994, between 500,000 and 1 million Tutsis and moderate Hutus were killed in Rwanda.[31] The killings continued until the RPF, led by General Paul Kagame, captured the capital, Kigali, on 18 July 1994. Kagame was to later become Rwanda's president.

Local Involvement

Rwanda moved for UN support to create a tribunal to prosecute those who perpetrated the genocide. Yet, due to its dissatisfaction with a number of issues as discussed further below, it was the only government that ultimately voted against it. The ICTR was established by a resolution of the UNSC, and thus did not rely on formal consent from Rwanda.[32] In the simplest sense, though this was not inevitable, the creation of the Tribunal did not have the same level of local involvement as did the SCSL. Relying on the Security Council's broad powers to 'maintain or restore international peace and security'[33] under Chapter VII of the UN Charter, the Tribunal, its mandate, and its governing statute were creations of the broader international community as represented by the UN.

Having voted against it in the Security Council, Rwanda's relationship with the Tribunal was predictably troubled from the start. Within a week of the beginning of the mass killings, the representative of the RPF informed the President of the Security Council that genocide was being committed in Rwanda and requested Security Council action.[34] A few months later, on 8 June 1994, the Security Council adopted Resolution 925, which noted 'with gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recalling in this context that genocide constitutes a crime punishable under international law'.[35] A panel of experts convened by the

Secretary-General at the behest of the Security Council recommended, *inter alia*, that the Security Council 'take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda… are brought to justice before an independent and impartial international criminal tribunal'.[36]

However, Rwanda's enthusiasm for the idea of an international tribunal faltered on the shoals of implementation. The Rwandese government, as a rotating member of the Security Council at the time, was an active participant in the negotiation of the Statute of the Tribunal. Throughout the negotiations, Rwanda indicated serious misgivings about the form the Tribunal was taking. Evidently, its concerns were not addressed, an ominous sign of what was to come later. Ultimately, Resolution 955 passed over the objections of the Rwandese government.[37]

Rwanda expressed seven primary points of concern over the form and substance of the Tribunal.[38] First, Rwanda objected to the limited temporal jurisdiction of the Tribunal because, in its view, the genocide that erupted in April of 1994 was the result of a long period of planning and 'pilot projects' that long predated the ICTR's limits.[39] Second, the Rwandese government believed that the Tribunal as initially constituted lacked sufficient trial judges to fulfil its mandate. Rwanda's delegate suggested that 'the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and the victims of the genocide'.[40] Third, the government was concerned that the Tribunal would expend its resources prosecuting crimes that were within the jurisdiction of national courts to the exclusion of the international crimes within its own jurisdiction.[41] Fourth, the government rejected some proposed judicial candidates who they believed had taken 'a very active part in the civil war in Rwanda'.[42] Fifth, the Rwandese Government felt that it was inappropriate that those convicted by the Tribunal should be imprisoned outside of Rwanda in accordance with the host country's laws.[43] Rwandan authorities argued that this would encourage countries inclined to free any convicted *genocidaires* to vie for the imprisonment assignments.[44] Sixth, the Rwandese delegation opposed the abolition of capital punishment in the Statute because of the possibility that those most responsible for the genocide would receive lighter treatment than those tried in Rwandan courts where capital punishment was legal.[45] Finally, the Rwandese government disagreed with the decision to locate the Tribunal outside the country rather than in Rwanda itself. The government rightly argued that locating the court in Rwanda would serve to 'fight against the impunity to which [the Rwandese people] have become accustomed … and to promote the harmonization of

international and national jurisprudence'.[46] In many ways, some of these initial objections reflect typical concerns about sovereignty and a desire to influence if not assert a measure of control over the eventual mechanism that was being considered in the name of The people of Rwanda. With the benefit of hindsight, it seems that some of those concerns lacked merit while others proved to have some merit.

Though there were periods of smooth cooperation, especially with specific organs such as with the ICTR Office of the Prosecutor and the Registry, the overall on-off relationship between the ICTR and the Rwandese government continued to be a challenge throughout the life of the Tribunal. This culminated in several high-profile conflicts, including standoffs over the ICTR's primacy in the extradition of Theoneste Bagosora and Foduald Karamira. Perhaps the most significant conflict, however, came in the case of Jean-Bosco Barayagwiza, who was accused of fomenting anti-Tutsi violence through his role in the Ministry of Foreign Affairs.[47] Finding that Barayagwiza's case had been marred by serious due process concerns, the Appeals Chamber dismissed the indictment with prejudice against the prosecution and ordered his unconditional release in November of 1999.[48] The Rwandese government responded by publicly declaring its intention to withhold cooperation with the Tribunal until the Appeals Chamber decision had been reversed. Eventually, the decision was reversed by the Appeals Chamber (citing 'new facts'), and the cooperation between Rwanda and the Tribunal resumed.[49] Through this refusal to cooperate, and the subsequent Appeals Chamber decision that aligned with the Rwandese government's position, '[t]he government showed that it could effectively hold witnesses hostage and virtually bring the wheels of justice to a halt'.[50] This tactic raises legitimate questions about the efficacy of the international regime especially given the state-centric nature of that system under which little if any action is possible without the support of the concerned state.[51] For this reason, without state cooperation, international criminal tribunals are unable to do any concrete work to achieve their mandates.[52]

After the active trials at the ICTR concluded, the Rwandese Minister of Justice confirmed that the national feelings of disassociation had continued through the end of the Tribunal's work. Minister Tharcisse Karugarama told the UN General Assembly that 'international justice is in a crisis of credibility with regard to fostering national reconciliation in post-conflict situations', that international courts are 'viewed as foreign, detached and contribute very little to National reconciliation process', and that the objective of fostering national reconciliation and restoring peace in Rwanda had not been achieved.[53]

With that history in mind, it seems clear that the ICTR did not excel in the area of local involvement. There was no formal role for the government in

the work of the ICTR such as appointing key staff, as there was at the SCSL.[54] Another problem is that the Tribunal missed opportunities to connect with Rwandans, with limited outreach to the country especially in the early years. The political and logistical conflicts between the Tribunal and Rwandese national institutions caused considerable difficulty during the court's tenure, and undermined each party's confidence in the other as a partner in achieving justice. As Minister Karugarama's statements at the UN indicate, the feeling that the Tribunal was not sufficiently focused on local needs, expressed by the Rwandese delegation during the negotiation of Resolution 955, continues to hold sway in official Rwandese circles. If this is the official position, it would seem unlikely that the ICTR would fare any better in assessments among the local population in the country.

On a related note, it is difficult to secure a statistical breakdown of the Tribunal's staff composition. But, the apparent absence of meaningful participation by Rwandans in the court's processes did not help bridge the physical and emotional gaps between the Tribunal and the national authorities. Based on one of these author's experience working in the judicial chambers of the tribunal as a legal officer, it was rather noticeable that there were hardly any Rwandese prosecutors in the ICTR, let alone judges or attorneys serving in other capacities. True, a handful were recruited at various stages of the process. But the numbers were so negligible that it smacked of tokenism. The reality is that the bulk of the prosecutors were from elsewhere, reflecting the UN-origins of the Tribunal. Of the Rwandans there, few were senior trial attorneys leading teams or holding other senior positions. This implied that, whether deliberately or inadvertently, there was very little space created for or left in the Tribunal for nationals of the country most affected by the genocide. This was unfortunate for many reasons, not least that there was a failure to take advantage of their expertise and experiences with genocide to leave a legacy that could be useful to the national justice system (assuming those individuals returned home to serve after the work of the ICTR concluded). The involvement of professionals with connections to the country might have served to increase local buy-in by carving out a role as informal ambassadors to disseminate information about the trials back in their home country. It seemed, in any event, that the bulk of those from Rwanda walking the hallways in Arusha were attorneys or investigators on the defence side, interpreters or witness management officers. Those were important roles, but they were hardly enough.

Competing National Proceedings

While the ICTR was tasked with trying those most responsible for the 1994 genocide, the Rwandese national authorities were responsible for prosecuting

the vast majority of perpetrators in the national courts. This informal division of labour, between the tribunal and the domestic justice system, is a common and indeed inevitable feature of international criminal law. Some of the suspects and accused would of course have fallen within the jurisdiction of the ICTR. The remaining suspects would likely not have risen to the level of international humanitarian law violations, and where they did, might not have been sufficiently high level to attract the ICTR's interest. This scenario is of course not unique to Rwanda; rather, all post-conflict societies can expect that the overwhelming majority of individual perpetrators would not be part of any international or internationalized prosecutions. The scope of such tribunals has, from Nuremberg to Arusha to Freetown to The Hague, been limited to higher ranking offenders.[55]

Thus, at the end of the day, the national institutions are given the more difficult task of ensuring justice is meted out to the bulk of the perpetrators. In Rwanda, after some experimentation, two principal methods were used to prosecute alleged suspects. First, the national judiciary established specialized tribunals of first instance to deal with the accused *genocidaires*. The national legal framework has been substantially modified since such trials started in 1996, including substantial moves toward an Anglo-American system of precedential decisions[56] and abolition of the death penalty in 2007. The national judiciary has handled roughly 15,000 cases over seventeen years at a cost of US$ 17,000,000.[57] Second, and more significantly, was the establishment of *gacaca* courts that acted at the local level independent of the formal courts. These community courts were created with the express purpose of incorporating local, traditional understandings of justice into a modern justice framework. In this sense, the *gacaca* courts were an alternative both to formal criminal justice proceedings and non-retributive reconciliation methods such as truth and reconciliation commissions.[58]

Gacaca courts met weekly in each of the roughly 9,000 cellules and 1,500 sectors within Rwanda.[59] First, people in the community were encouraged to describe their experiences during the genocide as a way of collecting evidence against possible accused persons. Then, a trial phase has the accused questioned by judges and community members about their actions in 1994. Judgements were then rendered by a panel of judges drawn from the same broader community as the accused. Through this process, Rwanda has been able to handle nearly two million cases in ten years at a cost of roughly US$ 52,000,000.[60]

We hesitate to judge community trials like *gacaca*, which were effectively conceived as a way to address the unprecedented crisis situation that Rwanda faced at the time, against formal justice processes with all their due process

guarantees under the Rwandan constitution and international human rights law. Part of the reason is that regular criminal trials, let alone genocide trials, are hardly comparable to informal local community gatherings on the grass to talk about who did what to whom during a traumatic event; it is an apples-to-seahorses comparison. Second, that system by its very nature operates outside of the formal court system. It consequently would not likely comply nor purport to comply with the stringent demands we might expect of a formal criminal justice system. Yet, precisely because the choice to pursue *gacaca* effectively circumvents the government's obligations to comport itself with its constitutional, African and international human rights guarantees to its citizens, several observations are inevitable. All the more so given that the traditional gacaca approach has – as might be expected – both positive and negative elements that are worthy of consideration in future post-conflict scenarios.

On the one hand, the visibility, local sensitivity and efficiency of these proceedings can be framed as effective counterweights to the perceived isolation, slow pace and expense of the ICTR. On the other hand, this efficiency, and to some degree the emphasis on local community concerns, seem to apparently come at the expense of fair trial standards for individuals alleged to have been involved with the genocide. *Gacaca* courts are not courts of law per se, and their status as community courts creates the possibility of undue influence, double jeopardy, and even reversal of the burden of proof.[61] Further, decisions of the *gacaca* courts could only be appealed to the sector's appellate *gacaca* court, and thus decisions rendered in local communities were not reviewable by the national judiciary.[62]

Competing International Proceedings

As a creation of the UN Security Council, the ICTR relied mainly on the strength of the international community to support its core mission. Although that mission included the trial of those most responsible for the 1994 genocide, several domestic judiciaries conducted trials of Rwandan suspects that were likely within the ambit of the Tribunal. These domestic proceedings came about and garnered more political support as more countries internalized the anti-genocide norm at the national level. It could not have been timelier given David Scheffers's 'tribunal fatigue'[63] in the Security Council following years of expensive trials at the ICTR and the ICTY. Inasmuch as the work of the ICTR relied on the support of domestic authorities to dispose of cases involving middle to high ranking offenders, the decision to try these perpetrators outside of the Tribunal system, and the ICTR's acquiescence to such arrangements, indicates that 'tribunal fatigue' was an operative concern.[64]

Several countries tried suspected Rwandan *genocidaires* in their national systems during the operation of the ICTR. These cases mainly proceeded under the theory of universal jurisdiction, whereby states that do not have a nexus to the conflict, the victim or the accused could nonetheless try grave violations of international law.[65] National courts that tried suspects whose crimes were directly within the jurisdictional ambit of the ICTR have included Canada,[66] Germany,[67] Great Britain,[68] Belgium,[69] Norway,[70] and France.[71] It is notable here that, despite allegations of harbouring several high level Rwandese fugitives from justice by countries such as Zaire, DRC and Zambia, no African states have ever asserted universal jurisdiction to pursue prosecutions of the alleged *genocidaires* within their midst.[72] Save for a few instances, it is not entirely clear that these same individuals tried in foreign national courts would have been tried by the ICTR, especially in the latter stages of the court's life when the Completion Strategy appeared to have taken hold. Still, it can be concluded that the prosecutions by the mostly European countries mentioned may have played a useful role in the operation of the ICTR. The difficulty is that, where there were high level perpetrators involved, a separate question arises as to the motivations for the prosecutions. They were not always benign. For example, in some of the cases involving France, the Kagame regime has argued more sinister motives might have being behind the push for domestic trials instead of voluntary transfer of all their accused to the Tribunal.[73]

Impunity and 'Victor's Justice'

Like the Nuremberg and Tokyo Tribunals, the ICTR has had a mixed record with regard to both impunity and victor's justice. Focusing on positive contributions, the list of the accused before the Tribunal shows that a wide variety of actions were considered by the Prosecutor to have contributed to the genocide. Thus, the Tribunal has investigated and punished senior military officials, cabinet members of the civilian government, politicians, religious leaders and media figures on genocide or genocide-related charges.[74] This view of the Tribunal's mandate to try those most responsible shows an acute understanding that organized violence on this scale does not arise solely through physical force.[75] Accordingly, the Tribunal removed the cloak of impunity, exposing most of the ring-leaders in the public and the private spheres to some measure of accountability. Conversely, as always, there is another side to the story. Much of the subsequent violence in the Great Lakes Region, including in the DRC and the CAR, have some connection to the Rwandan conflict. It can be argued that to the degree that the ICTR was unable to prevent participation in these neighbouring conflicts by those who came within its jurisdiction is a strike against its war on impunity.[76] Yet,

such an argument would need more to avoid being simplistic. For one thing, even though there seems to be a broad connection, it is not entirely clear, based on the publicly available evidence, that the same leaders from Rwanda are the ones heading the activities of the militia and other fighters in those neighbouring states. In this vein, and in any event, there is of course ICC involvement in prosecuting crimes from that region.[77]

But perhaps the biggest critique of the ICTR seems to be the claims by some human rights groups and academics that it has only dispensed 'victor's justice'.[78] This argument, made most forcefully by Human Rights Watch, echoes the experience of Nuremberg and apparently attempts to over correct for it. It is predicated on the simplest and perhaps noblest of ideas that justice has to be dispensed equally and to all sides involved in a given conflict. Notably, none of those tried at the ICTR came from the Rwandan Patriotic Front (RPF) camp.[79] Of course, the leader of the RPF, Paul Kagame, became the head of the post-genocide government of Rwanda, and remains in that post today. Allegedly, the attempts by then-Prosecutor Carla Del Ponte to bring charges against RPF leaders and commanders in 2002 preceded a political standoff that ended in the bifurcation of the Office of the Prosecutor at the ICTR and the ICTY.[80] Although the then Secretary General Kofi Annan stated that the creation of separate prosecutor's offices was intended to increase efficiency and mitigate administrative concerns, '[t]he timing of the plan, in the face of intense Rwandan pressure, leaves the Security Council open to the charge that it sacrificed Del Ponte to appease Rwanda's anger and, perhaps, to stop the tribunal from issuing RPF indictments'.[81]

With due respect, this appears to be a rather tenuous argument. For one thing, it buys into Del Ponte's broader claim that she was removed from her post because she crossed the red line that the Kagame Government had drawn for her. Yet, it should be apparent that Madam Del Ponte was aggrieved, and having lost her job, may have been seeking an explanation to make sense of her situation. She is not exactly the most neutral person to make this claim. Furthermore, since Peskin's article was written, more information has emerged in the public domain suggesting that the non-renewal of Del Ponte's contract may have been, at least in part, for less sinister reasons.[82] This undermines the former prosecutor's arguments and has led William Schabas, a leading scholar, to clarify that the decision may have had to do more with other factors than her desire to seek indictments against the RPF leadership for alleged crimes committed in 1994.[83]

In fact, going even further, there may well be explanations for a decision to not indict the RPF personnel that are less dramatic and perhaps even benign. According to the first Prosecutor of the ICTY and the ICTR, Richard

Goldstone, the decision not to indict RPF crimes can be rationalized as a matter of prosecutorial policy.[84] This position was based on his professional assessment as an independent prosecutor. Thus, in Goldstone's view, the 'Hutu crimes' ranked as a nine or ten while the 'Tutsi crimes' ranked much lower. He, like many other national and international prosecutors, was faced with a difficult choice of which of many incidents to focus on in light of pragmatic constraints. 'We didn't have enough resources to investigate all the nines and tens [a]nd the RPF, who acted in revenge, were at ones and twos and maybe even fours and fives.'[85] Looked at in this way, the fact that the indictments did not include any RPF members could reasonably be construed as a function of the relative gravity of the crimes at issue, not a political or retributive decision, as Del Ponte and her supporters are inclined to suggest.[86] Ultimately, for whatever reason, whether political, security or simply practical, the ICTR never filed any formal charges against alleged perpetrators of crimes committed by the RPF.

The ICTR Prosecutor has identified at least one incident in which several Hutu clergymen were killed under circumstances suggesting the perpetration of war crimes, but Rwanda moved to prosecute those individuals in its domestic justice system. The Prosecutor of the ICTR, in light of that decision, stepped back and let the natural forum pursue the few perpetrators involved. As he reported to the Security Council, in June 2008, he was clear to the Prosecutor General of Rwanda that 'any such prosecutions in and by Rwanda should be effective, expeditious, fair and open to the public'. Furthermore, his office undertook to 'monitor those proceedings', and if they were not satisfactory, he would invoke the primacy of the ICTR over those crimes.[87]

Between June and October 2008, Rwanda carried out the trial of four senior military officers and, as the ICTR did not have issues with the trial, the Prosecutor declared the matter closed from his perspective.[88] That trial has predictably been subject to criticism from both NGOs and scholars.[89] All to say, even though there was seemingly credible evidence supporting investigation of those crimes,[90] the ICTR's decision not to pursue them will continue to be a contentious point. The goal here is not to resolve that debate. Rather, it is sufficient for our purposes to note that Kagame's twenty year reign as president has also given some credence to the charge that the ICTR did not dispense blind justice during its tenure.

In the end, despite its alleged merits given the principle of equality of all persons (including victims) before the law, it seems rather simplistic to reduce a years- long socio-economic-military conflict to 'sides', and worse, to equate the criminal responsibility of the victims of the genocide to those who tried to wipe them out. At least at a moral level, the argument comes off as deeply

problematic if not downright offensive. From a legal point of view, the argument masks the fact that advocates are, by insisting on prosecuting those on the other side, effectively proposing to substitute their own views as to who should be prosecuted for those of the ICTR Prosecutor who is statutorily charged with that immense responsibility. Yet, even worse, as Goldstone's statements suggest, some of them have failed to account for the fact that charging decisions are made to reflect a number of different assessments including the likelihood of success in securing a conviction. That different prosecutors holding the same office might have taken a different approach, and exercised discretion differently, is beside the point. It is whether the decision taken can be justified as based on proper rather than improper criteria. Furthermore, supporters of the selectivity argument must bear the burden to satisfactorily answer an important practical question. That is, whether they would have been willing to forego the prosecutions of the worst of the architects and planners of the genocide hauled before the ICTR just for the sake of securing the presumed benefits of equality of prosecutions of both sides to the Rwandan tragedy. Here, we assume for the sake of argument, that any attempt to prosecute in the ICTR a top RPF leader might practically have made it difficult if not impossible for the Tribunal to secure Rwanda's cooperation.

Finally, we note that some leniency for the sitting power in a post-conflict society may be justified as a boon to stability and security. In a country recovering from a debilitating conflict, the prior political and social infrastructure is no longer in place. The social order is stressed and often under some tension. In such a context, while there may be legal merit in doling out punishment without regard to post-conflict standing, realpolitik may argue for preserving what power structures remain as the basis for establishing long-term social peace and stability.

Breadth of Proceedings

The UNSC's stated goal in establishing the ICTR was to prosecute 'persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994'.[91] Accordingly, the ICTR's jurisdiction is limited temporally, geographically and substantively. The *ratione materiae* (subject-matter jurisdiction) of the Tribunal is limited to prosecuting the crimes of genocide,[92] crimes against humanity,[93] and violations of Common Article 3 and Additional Protocol II of the Geneva Conventions.[94] The *ratione temporis* (temporal jurisdiction) of the Tribunal is confined to crimes committed in the calendar year 1994. The

Tribunal's *ratione personae* (personal jurisdiction) and *ratione loci* (territorial jurisdiction) are limited to 1) crimes committed by Rwandans in Rwanda and neighbouring states and 2) crimes committed by non-Rwandans in Rwanda.

These jurisdictional limitations created a highly focused mandate for the Tribunal. Notably, the mass killings broadly associated with the genocide in Rwanda did not begin until 6 April 1994, and were brought to an end in July 1994. As such, the court's temporal jurisdiction extends before and after the bulk of the overt criminal acts associated with the genocide, and is sufficient to capture *some* planning and preparation beforehand as well as some violence that accompanied the handover of power. The court's *ratione personae* allowed the Tribunal to bring charges against Rwandans who committed atrocities while fleeing Rwanda and the RPF takeover, limited to the aforementioned *ratione temporis*. In so structuring the Tribunal's mandate, the UNSC was able to avoid having the ICTR become responsible for litigating offences that might have been precursors of the genocide.[95] Similarly, had the mandate been left open-ended, as was the case for the ICTY, it might have been possible to prosecute crimes that occurred subsequently in the neighbouring states by individuals associated with either side of the Rwandan conflict.

In pursuit of its mandate, the ICTR indicted a total of ninety-three persons, of which forty-seven have been convicted or pleaded guilty, sixteen are pending appeal, twelve were acquitted, ten were transferred to national jurisdictions, and nine remain at large.[96] By way of comparison, the ICTY (which has much broader temporal jurisdiction) indicted a total of 161 persons, and the SCSL indicted just twenty-two. All said, the Tribunal was broad in its assessment of whom to hold accountable for the genocide, and conducted a fair amount of business for an international tribunal.

Seen from a domestic perspective, a criminal institution that managed to try few than 100 defendants in fifteen years would not be considered a resounding success if numbers of those prosecuted are our only calculus. But the quality, not just the quantity, of justice also matters.[97] In any case, as one of the first international courts since the end of World War II, the ICTR had to lay a substantial amount of groundwork. Although this was a time-consuming and often frustrating process, it was ultimately a necessary one.

Quality of Proceedings

The ICTR expended great effort to ensure that its proceedings generally adhered to the highest international standards, and in that respect is to be commended. The Statute of the Tribunal was revised several times to accommodate changes to court procedure. The Rules of Procedure and

Evidence, which were amended every year of the Tribunal's operation,[98] would be recognizable to a lawyer in any national jurisdiction. The RPE and the Statute also incorporate elements of both civil and common law traditions, further harmonizing disparate notions of justice across the globe.

Further, the fact that twelve cases before the Tribunal resulted in acquittal shows that this adherence to international norms was not simply expensive and time-consuming window dressing. No system is perfect, and not every decision is justifiable in retrospect, but the ICTR deserves credit for pushing vigorously for fair trials that simultaneously respected the rights of the accused and international norms. That is not to say that there were not many, and in some cases, unacceptable delays between the indictment, arraignment, trial, issuance of judgement and finalization of some of its most important cases. Some of these undue delays led to serious and legitimate questions about whether justice had been served. [99]

This adherence to international norms is not, however, an unalloyed good. In terms of peace and security, there is understandably a sense that 'those most responsible' were treated better than those not sufficiently responsible to merit international attention. For instance, the availability of capital punishment in Rwandan proceedings prior to 2007 ultimately means that some national defendants were treated 'more harshly' than ICTR defendants, and thus the international community's insistence on fair trials ultimately benefited the most guilty. It is arguable that when the UN is involved, we cannot – or should not – have it any other way.

Administering Cost

All of these international standards come, literally, at a cost. One frequent critique of the ICTR (and the ICTY) is that they were quite expensive.[100] All told, the Tribunal is expected to cost roughly US$1.75 billion over its lifetime, with a peak annual spending of US$150 million in 2008.[101] On an individualized basis, the ICTR spent approximately US$23.3 million per accused.[102]

Notably, the proceedings at the ICTR did not cost substantially more on a per-day basis than federal criminal trials in the United States.[103] However, the trials themselves lasted considerably longer than the average criminal trial, and thus the cost per *trial* is far greater than the average domestic proceeding (even in expensive jurisdictions).

Some of this expense is surely a product of the need to establish international precedent following the forty-five year hibernation of

international criminal law, the complexity of the subject matter, the need to translate witness testimony from Kinyarwanda to the working languages of the Tribunal, and to elicit testimony from witnesses about events that may have taken place ten years in the past. It is equally true that some expense could have been avoided through better pre-trial management, limitations on witnesses, more frequent use of judicial notice, and more thorough sharing of evidence across cases. Furthermore, the decision to locate the Tribunal in Arusha created geographic distance between the *locus commisi delicti* and the seat of the court. It is clear that this ultimately made the process of gathering evidence and securing witness testimony much more expensive as it required arrangements, safe houses and dedicated aircraft for witness travel.

Of course, the ICTR, the ICTY and the Residual Mechanism for those two courts are funded by the UN directly. The organization that created the court and gave it a mandate was also responsible for providing the resources necessary to accomplish those goals. This is not to say that the Tribunal did not experience budgetary pressures from New York, but only to say that the Tribunal had a substantially more stable funding base compared to others that came after it such as the SCSL.[104]

Jurisprudential Impact

The ICTR (and the ICTY), through individual proceedings and the appellate structure, did yeoman's legal work. Inasmuch as the only (and oft-cited) precedents were the Nuremberg and Tokyo Tribunals, the case law and normalization of fairly radical notions of international responsibility developed and normalized by the Tribunals is a real victory.

Several important contributions of the ICTR are worth noting, although a complete catalogue of its effects would be beyond the scope of this article. First and foremost, the ICTR (and the ICTY) played an integral role in giving effect to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[105] and in 'confirming that genocide is an international crime, recognized as such in convention and custom, for which individual perpetrators may be held liable'.[106] To that end, the ICTR delivered the first ever conviction for genocide before an international tribunal in the case of Prosecutor v. Jean Paul Akayesu.[107] The Akayesu case also created the important precedent that sexual violence and rape can be acts of genocide when committed with the requisite specialized intent.[108] This impact of the Akayesu case continues to reverberate today, including with the advancement of that crime as a supplemental element to close a normative gap in the genocide convention in Africa's proposed regional criminal court.

Second, the indictment and guilty plea of former Rwandese Prime Minister Jean Kambanda contributed to an emerging understanding that traditional notions of sovereign immunity were falling by the wayside in the modern era. Official capacity of an individual has no effect on his criminal responsibility, at least as it relates to core crimes such as genocide, war crimes and crimes against humanity.[109]

Third, the ICTR contributed greatly to a working understanding of Common Article 3 and Additional Protocol II to the Geneva Conventions of 1949 as standards for armed conflict. Common Article 3 and Additional Protocol II both relate to *internal* armed conflict, and thus contain no implementation or enforcement provisions.[110] The explicit reference to these instruments in the ICTR Statute, and subsequent case law outlining the elements of each crime covered by the agreements, has helped to transform them into operating instruments of international criminal law.[111]

Lastly, the work of the both the Trial and Appeals Chambers has been cited on numerous occasions by other international criminal and national courts. In a certain respect, this is an accident of history; as one of the first tribunals, the ICTR had a better shot at laying the groundwork of modern genocide law. In the same way the ICTY had formed some kind of basis for the ICTR, so too did the ICTR affect the model of subsequent courts such as the SCSL.[112] However, that historical fact does not diminish the overall importance of the Tribunal to international justice.

Sierra Leone

Brief History of the Conflict

Sierra Leone was one of four British colonies in West Africa until it gained political independence in April 1961. After what seemed an auspicious start for democracy with the first transfer of power to an elected opposition party in an independent African state in 1967,[113] the country quickly degenerated into instability with a spate of military coups and counter-coups.[114] Ultimately, the civilian All People's Congress (APC) party formed a stable government around 1970. Unfortunately, the APC government stifled democracy by transforming itself into a despotic one-party regime and sustaining its stranglehold on the country through massive corruption, nepotism, plunder of public assets and exacerbation of ethnic and regional cleavages.[115] By the 1990s, bad governance and economic decay, among other factors, had created sufficient malaise for the outbreak of conflict in the country.[116]

In March 1991, a mix of approximately sixty armed men attacked the village of Bomaru in eastern Sierra Leone.[117] The attack turned out to be the

first salvo of the Revolutionary United Front (RUF) rebels apparently led by Foday Sankoh, a formerly low-ranking corporal in the Sierra Leone Army (SLA), whose ostensible goal was to overthrow the government of then-President Joseph Momoh. In a few weeks, the rebels quickly increased the intensity and frequency of their attacks, allegedly with logistical, financial, material and even combat support from Liberian fighters donated by Charles Taylor of the National Patriotic Front of Liberia (NPFL).[118] The ill-equipped SLA, which had more experience putting down peaceful pro-democracy student demonstrations than fighting a war, proved unable to contain the unrelenting and devastating guerrilla attacks. In a few months, most of eastern Sierra Leone had fallen under rebel control. The war soon spread to other parts of the country.

President Momoh lacked a coherent strategy to deal with the war and was ousted from power in April 1992. Two successive military regimes failed to end the war. Under pressure from Sierra Leoneans clamouring to participate in their country's governance through the ballot box, democratic elections were finally held in 1996. Sierra Leone People's Party candidate Ahmad Tejan Kabbah, who had run on a platform of restoring peace, won the elections. President Kabbah immediately entered into negotiations with the RUF and concluded a peace accord in Abidjan, Côte d'Ivoire. Despite this step toward the cessation of hostilities, the conflict resumed and yet another military coup took place. Kabbah fled to neighbouring Guinea where he set up a government in exile in Conakry.

With strong international backing, especially from the regional Economic Community of West African States (ECOWAS), Kabbah was reinstated in 1998. Around mid-1999, his government negotiated the Lomé Peace Agreement with the RUF in another attempt to end the conflict. The Lomé Agreement included an amnesty provision, Article IX, granting Sankoh, and all other combatants and collaborators, 'absolute and free pardon and reprieve' in respect of all their actions between the start of the war and the conclusion of the accords.[119] Despite this agreement, hostilities continued in the country until disarmament began in earnest in 2001. President Kabbah formally declared the war over in January 2002.

Local Involvement

Whereas the ICTR and the ICTY were established by the UN Security Council under its Chapter VII power, albeit with some limited input from the affected countries, the SCSL is a product of a bilateral treaty between Sierra Leone and the UN.[120] Thus, by its very nature as a consensual instrument, the SCSL incorporated more local concerns from its inception than the ICTR.

The agreement establishing the Special Court was the culmination of a process that began with a letter from Sierra Leonean President Ahmad Kabbah to the UNSC via the then Secretary General Kofi Annan requesting the international community's assistance in prosecuting those leaders who had planned and directed the brutal conflict in Sierra Leone.[121] President Kabbah maintained that international support was necessary to successfully prosecute those responsible for war-time atrocities due to the lack of legal, logistical and financial resources within the country.[122]

Through Resolution 1315, the UNSC formally endorsed President Kabbah's request to establish a Special Court, although it did not take the same definitive action as in Rwanda or the former Yugoslavia. Rather than creating another fully international tribunal with a mandate to try 'those persons responsible', the Security Council instead directed Secretary General Kofi Annan to negotiate an agreement with the Sierra Leonean government to establish an *independent* tribunal to try those bearing 'greatest responsibility'.[123] The subsequent agreement between the UN and the government of Sierra Leone signaled that the Special Court would be a different animal than the previous ad hoc tribunals. Coming as it did after the international community had had experiences with the Chapter VII model, it also attempted to address some of the perceived deficiencies of the ICTY and ICTR.[124]

Perhaps the most important accession to local concerns was the decision to locate the Special Court in Freetown, the capital of Sierra Leone. Unlike the ICTR and ICTY before it, the Special Court did its work in the *locus commisi delicti*. While both of the international Tribunals have been criticized for delivering justice from afar,[125] the SCSL specifically undertook to be present in the affected communities.

In addition to its advantageous location, the SCSL also actively undertook to engage with the populace of Sierra Leone from the very beginning. As part of this effort, the Office of the Prosecutor and the Registry set up day-long 'town hall' meetings in towns and cities around the country to discuss the work of the Special Court. In the first four months of the Special Court's existence, it is reported that the then Prosecutor David Crane visited every district and every major town in Sierra Leone.[126] Calling himself 'their prosecutor', Crane described the role of these meetings as one where he 'would go out and listen to the people of Sierra Leone tell me what happened in their country'.[127] One may rightly question whether the Outreach Office and the people 'up country' took the same lessons away from their meetings.[128] However, the substantial efforts to reach out to the local population and to keep them abreast of the SCSL's work shows some concern for local engagement and perhaps even local acceptance and local endorsement of its work.

The SCSL was also created with the participation of local jurists in mind. The Agreement establishing the tribunal provides that at least one-third of the Trial Chambers judges, two-fifths of the Appeals Chambers judges and the Deputy Prosecutor would be from Sierra Leone, and that the Government of Sierra Leone would participate in the SCSL's Management Committee.[129] Additionally, the Secretary General, who was responsible for appointing the key international staff, was to do so on the basis of recommendations of States, particularly member states of the Economic Community of West African States (ECOWAS).[130] The hope was that this would make the SCSL more relevant in the minds of Sierra Leoneans. But beyond the various positions reserved for Sierra Leone to appoint, there have been some questions about the extent of substantive local lawyer participation in the court's processes. The failure to meaningfully involve and/or to integrate them into the tribunal's processes is anecdotally reported to have created some friction between the tribunal and the local bar, when the national lawyers realized that there would be limited opportunities for them to serve in the tribunal.[131] Yet, international criminal law literature has been touting that one of the alleged benefits of the SCSL model was precisely that it enabled nationals and internationals to work side by side in service to a common cause.[132] It is unclear how much of this theory came out in practice.

Nevertheless, the Special Court took at least four steps to involve the local community from its inception. First, the SCSL was located in Freetown. Second, it was given jurisdiction over some violations of Sierra Leonean law, thus bringing it home in a symbolic sense, even if in practice those offences were never used to bring charges due to the prosecutorial decision not to so do.[133] Third, the SCSL undertook a serious outreach effort to inform the affected population about its mandate and work.[134] Here, in contrast to its predecessors, it benefited from its location in Freetown. This, however, is not to say that it did not face challenges in expanding its footprint in a country with limited road and other infrastructure.[135] Fourth, a certain number of places within the SCSL's hierarchy were reserved specifically for Sierra Leoneans by the Statute, thus ensuring a floor for the level of local involvement. This contrasts favourably with the ICTR model. Yet, due to the Kabbah's government choice not to use its appointments to put Sierra Leoneans in some of the key tribunal positions (especially that of Deputy Prosecutor), the extent of local involvement proved to be less than many would have predicted and gave rise to some disappointment in the local bar.

Competing National Proceedings

As is evident by a review of the Special Court's mandate, the SCSL was not empowered to right all wrongs that may have been committed in the country during the decade-long conflict. Rather, the SCSL was limited to prosecuting

serious violations of international law, war crimes, crimes against humanity and a select set of national laws which occurred during the latter half of the conflict. The remainder of the work of helping to restore respect for the rule of law, healing open wounds, stabilizing the peace and building the local legal capacity with the Sierra Leonean authorities. Of course, some of those goals were, presumably, for political and optical reasons, mentioned in the Security Council Resolution preceding the creation of the Tribunal. They were frequently the result of discussions. This generated high expectations, in Sierra Leone and elsewhere, that could simply not be fulfilled. Espousing wider expectations for the SCSL was not unique, and in fact, is a common feature of UN involvement in the Yugoslavia and Rwanda contexts – a phenomenon that has led some scholars such as Marjan Damaska to call for a downgrading of expectations.[136] The argument is that such unrealistic expectations are not only unfair impositions on a criminal court, but that they also tend to inevitably lead to high disappointments.

The government of Sierra Leone took two important steps to address the conflict. First, Sierra Leone created a Truth and Reconciliation Commission (TRC) that operated in tandem with, and independent of, the SCSL. The TRC was established pursuant to Article VI of the Lomé Peace Accord[137] with the goals of creating 'an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone [from 1991 to 1999], to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered'.[138] Although the agreement included a blanket amnesty provision,[139] the TRC itself was not empowered to grant any pardons or extend amnesty to any combatants.[140]

While the Special Court and the TRC had complementary mandates, there were some operational conflicts. In particular, 'some individuals were hesitant to testify before the TRC out of a fear, real or perceived, that they could be prosecuted' based on their testimony.[141] This problem was highlighted by the case of Hinga Norman, a former deputy minister in the custody of the SCSL who wished to testify publicly before the TRC. The Special Court ultimately found that Norman could testify, but that the proceedings must be closed in order to prevent diminution of the SCSL's process.[142] In its final report, the TRC issued several recommendations for future joint processes, including the establishment of 'the basic rights of individuals in relation to each body in different circumstances. In particular, the right of detainees and prisoners, in the custody of a justice body, to participate in the truth and reconciliation process should be enshrined in law'.[143]

In addition to the parallel reconciliation process, national courts also tried thirty-one members of an RUF splinter group, known as the West Side Boys, for conspiracy to commit murder. The prosecution initially filed thirty-one counts against a total of twenty-seven accused. Charges against sixteen of the accused were dismissed after the High Court found that there was no case for them to answer.[144] Of the remaining eleven defendants, seven were convicted on six counts of conspiracy to commit murder and sentenced to ten years imprisonment for each count, to run concurrently.[145]

Given the prosecution's inability to provide sufficient evidence against a majority of the accused, the West Side Boys case suggests that the national authorities were not up to the task of prosecuting crimes related to the conflict. The case can also be understood as a statement on the state of the judiciary. One of the principal justifications that the government used when it sought international support to establish the SCSL was that the local justice system lacked the capacity to prosecute.[146] But, it seemed that the members of the local bar who met with the UN felt that there was sufficient capacity to prosecute.[147] Thus by holding the government to proof of the charges that it had brought, the local judiciary vindicated that view. Leaving practicalities aside, the question arises as to whether the government would have been able to prosecute more offenders, assuming it was willing to do so, in light of the amnesty clause contained in the Lomé Accord which granted amnesty to all combatants in the conflict.[148]

Competing International Proceedings

There is anecdotal evidence suggesting that one or two jurisdictions carried out investigations of Sierra Leoneans who had arrived in their territories. They were alleged to have been involved in international crimes, although presumably because the evidence was weak no trials ever materialized. In the end, in contrast to the Rwanda situation, there were no significant trials of combatants or leaders outside of the SCSL and the Sierra Leonean national judiciary. The only international action against a party connected loosely to that country's conflict was the trial of Chuckie Taylor, the son of former Liberian President Charles Taylor, on torture charges in the US. The younger Taylor is a US citizen by dint of his being born there, and the criminal conduct with which he was charged was related to his actions as head of the Anti-Terrorism Unit in Liberia. Although his father was charged with crimes against humanity and war crimes by the SCSL, no explicit connection between Sierra Leone and Chuckie Taylor was made by the US Justice Department.[149] It is hard to establish why definitively, but part of the reason for this appears to be that the younger Taylor might not have been implicated in the violence in Sierra Leone. Another might be that there was already strong evidence of his involvement in crimes in Liberia.

Impunity and 'Victor's Justice'

The conflict which gave rise to the SCSL was a complex one which defies easy description for its motivations. Among other factors, it was tied to bad governance and the apparent desire by a few men to exploit the country's diamond wealth for personal gain.[150] The list of accused before the Special Court reflects this complexity to some degree. Of the twelve defendants tried by the Special Court for crimes related to the conflict, five were drawn from the Revolutionary United Front,[151] four were members of the Armed Forces Revolutionary Council,[152] and three were members of the Civil Defence Forces.[153] In a broad sense, the SCSL indicted combatants from 'all sides' of the conflict, if we leave aside the alleged responsibility of West African peacekeepers who received an exemption from its jurisdiction.[154]

To mention this diversity is not to say that the number of prosecutions or the identity of the individual defendants is necessarily correct. Charles Jalloh, for instance, has argued that there was an over-inclusiveness with respect to those that were actually prosecuted.[155] Yet, the argument can be made that the diversity in the list of defendants was a good step towards showing that no party to a conflict is above the law. In this sense, the practice at the Special Court arguably stands in contrast to that at the ICTR, where only one 'side' of the underlying conflict was indicted, and where, consequently, allegations of 'victor's justice' ran rampant throughout the Tribunal's tenure. Conversely, in Sierra Leone, the allegation has now surfaced in a new form about 'White man's' justice. On the other hand, as mentioned earlier in relation to the selectivity argument vis-à-vis non-prosecution of any Tutsis before the ICTR, there is perhaps a price to be paid for equality of prosecutions. That price suggests a moral and legal equivalence to the individual criminal responsibility between those who fomented war (such as the RUF) for selfish reasons and those that tried to stop it in acts of patriotism for selfless reasons, but in the process, committed some crimes. It might have also undermined the long term peace in Sierra Leone given the controversy that has since arisen from the CDF Trial and the perception that it led to among many Sierra Leoneans.[156]

The Special Court's arguable achievements in breaking the trend of victor's justice after mass atrocity do not necessarily carry over into the realm of impunity. One of the consequences of the Tribunal's narrow mandate is that relatively few people were tried. This is the problem of under-inclusiveness.[157] The bulk of the combatants were left for the national judiciary to deal with, and assuming amnesty issues did not bar such prosecutions for international crimes before the domestic courts. These authorities simply lacked the resources to effectively try a significant portion of the country's population. As a result, people who were famous for their exploits during the conflict

remain among the population. Some of them arguably fell within the 'greatest responsibility' jurisdiction of the SCSL, but because the Special Court never prosecuted them and the neglect of the Sierra Leonean authorities, they are not within the reach of the national judiciary.[158]

Breadth of Proceedings

Much like its predecessors, the *ratione materiae* (subject-matter jurisdiction) of the SCSL extended to crimes against humanity,[159] war crimes,[160] and other serious violations of international law.[161] However, the SCSL's jurisdiction was distinct from those of the International Tribunals in two important respects. First, the Special Court did not have jurisdiction over the crime of genocide. The international crimes are limited to those listed above. Second, as a hybrid tribunal, the SCSL was also granted jurisdiction over certain domestic Sierra Leonean crimes, including the abuse of girls and wanton destruction of property.[162] Thus, the Special Court's role within the international and national judicial structure was markedly different than that of the ICTR and the ICTY. Of course, whereas the tribunal used the international crimes in its cases, no Sierra Leonean crimes were used. On the other hand, we could not find evidence that the government used those same crimes from its national laws or international crimes to prosecute war related cases in its own courts.

Further, unlike the ICTR, the Special Court's *ratione temporis* (temporal jurisdiction) extended well before the end of hostilities. This was a function of the fact that the conflict was ongoing. Thus, the SCSL's jurisdiction includes all crimes committed after 30 November 1996, nearly four years before the signing of the Agreement and six years before the Statute entered into force. Although the Sierra Leonean government had wanted the jurisdiction to extend to the beginning of the war in March 1991, the UN disagreed largely for financial reasons.[163] Readers will recall that the ICTR's mandate was limited to crimes committed during the calendar year of 1994, limiting the Tribunal's ability to address predicate crimes that culminated in the genocide. This innovation at the Special Court can be seen as either an attempt to address that deficiency, as a delegation of authority already held by the Sierra Leonean judiciary, or both.

Lastly, the SCSL's *ratione personae* (personal jurisdiction) and *ratione loci* (territorial jurisdiction) differ from those of the ICTR. While the ICTR had jurisdiction over both Rwandans and certain foreigners, the SCSL is empowered to try 'persons who bear the greatest responsibility' without specific reference to nationality.[164] However, this broader personal jurisdiction is limited by a requirement that the crimes at issue must have taken place 'in the territory of Sierra Leone'.[165] This differs from the ICTR's mandate

granting jurisdiction over crimes committed by Rwandans 'in neighbouring States'.[166] There was no provision for the prosecution of crimes that might have been committed by the same combatants involved in cross border attacks in Liberia and Guinea, a common occurrence during the war.

It may at first glance seem that the SCSL had a fairly broad mandate, at least over crimes that took place within Sierra Leone. However, the ultimate limiting factor was the term 'greatest responsibility'.[167] In normal parlance, this standard may be synonymous with the 'most responsible' mandate of the ICTR. In practice, however, the term 'greatest responsibility' operated as a limitation on the number and breadth of trials before the SCSL. A fair amount of energy at the court was devoted to discerning an operative meaning of 'greatest responsibility'.[168]

In the end, the Special Court tried only twelve defendants on charges related to the conflict.[169] One of those defendants, however, was the head of a neighbouring state at the time he committed the charged crimes. This simple fact complicates the act of assessing the breadth of proceedings before the SCSL. On the one hand, relatively few trials were conducted. In this sense, the Special Court Prosecutor was either fulfilling his narrow mandate or using too restrictive an interpretation of 'greatest responsibility' that unnecessarily limited the SCSL's reach. On the other hand, the indictment, trial and ultimate conviction of Charles Taylor suggests that the SCSL attempted to move beyond national borders to bring one of the biggest of big fish defendants to justice. In this sense, it can be argued that the limited number of prosecutions might not have undermined their *breadth.*

Quality of Proceedings

Like the ICTR and the ICTY before it, the SCSL took great pains to bring international standards of justice to bear. The Rules of Procedure and Evidence were amended fourteen times between 2003 and 2012 as court practice evolved.[170] This could be taken as an indication of adherence to that commitment. At the same time, there are legitimate questions that have been raised about the double role of judges as implementers and drafters of the rules that guide their processes in these tribunals. Nevertheless, besides the ICC, all other ad hoc tribunals going back to Nuremberg provided for judicial drafting of the rules of court. Arguably, this promotes efficiency in the process as the tribunals learn by doing and improve their procedures over time in light of the practical challenges faced during the trials.

The structure and processes of the Special Court were apparently designed to incorporate local concerns from its inception, in contrast to the situation in the ICTR. In particular, the guarantee of a certain number of court

appointments for Sierra Leoneans and for international lawyers[171] helped to ensure both that the court's proceedings adhered to international standards and took local viewpoints into account. Yet, as noted earlier, save for a small number of appointments to the judiciary the remainder of those positions were occupied by non-Sierra Leoneans. For example, the first two national appointments to the position of Deputy Prosecutor selected a Sri-Lankan (Desmond de Silva) and later on an Australian (Christopher Staker). It was only towards the end of the Tribunal's life, when for all intents and purposes the work was done, that the government proposed a Sierra Leonean (Joseph Kamara) for the position.

National law was also to be used in the Tribunal. The sources of law applicable to the Special Court includes 'general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards'.[172] On one level, of course, this provision can be seen as a step towards making Sierra Leonean law relevant to the work of the SCSL – above and beyond the (unused) national crimes included in the subject matter jurisdiction. Another reading of this provision is that, even though it provided for the use of principles of law from all national legal systems, it mentioned Sierra Leone as a source with a qualifier (as appropriate), thereby limiting the potential use of such laws at the Special Court. The implication was that the use of such principles was to occur only if there was no clash between such laws and the applicable instruments (the SCSL Statute and UN-Sierra Leone Agreement) and customary international law.

A similar rule provided for examination of Sierra Leonean practice in respect of determination of penalties before the Tribunal. But these too were subordinated to the international and appeared not to have been taken seriously in the Court's judgements. Ultimately, it seems cogent to argue that although lip service was paid towards Sierra Leonean laws, the practice differed dramatically. Nevertheless, as one of us has argued elsewhere, if the alternative to the creation of the SCSL was prosecution by the standards of the then extant Sierra Leonean national justice system, the SCSL 'would probably be deemed exemplary'.[173]

Two main concerns undermine the generally positive assessment of the quality of the SCSL's work. First, the overly conservative interpretation of the Special Court's mandate by the Prosecutor, and eventually the Chambers, resulted in far fewer (and therefore more selective) prosecutions than many Sierra Leoneans would have hoped for. Second, the rights of the accused

before the tribunal may have been negatively affected by the very limited funds available for their defence counsel, and the long period of pre-trial detention.

With respect to the Special Court's mandate, recall that the SCSL was tasked with prosecuting those who bore the 'greatest responsibility' for the serious violations of international law and select provisions of national law, 'including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone'.[174] However, the term 'greatest responsibility' was not explicitly defined by any of the court's constitutive documents, nor was there agreement among the contracting parties as to its precise definition.[175] Not even the various organs of the SCSL agreed on an operative definition. The Trial Chamber hearing the CDF case held that the phrase was both a jurisdictional limitation and a guidepost for prosecutorial discretion.[176] An accurate assessment of whether there are reasonable grounds to support a finding that a particular accused bore 'greatest responsibility' should be, in the CDF Trial Chamber's view, conducted by the Confirming Judge at the pre-trial stage. 'Whether or not *in actuality* The Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial'.[177] The Armed Forces Revolutionary Council (AFRC) Trial Chamber, on the other hand, found that the phrase was meant solely to 'streamline the focus of prosecutorial strategy'.[178] The judges rejected the idea that the phrase created a limit on personal jurisdiction that would require them to dismiss a case if the threshold were not met.[179] Accordingly, the AFRC Chamber did not think itself competent to review the Prosecutor's decision to bring an indictment against a particular person because the Office of the Prosecutor is an independent organ charged with making such assessments.[180] Ultimately, the Appeals Chamber came down on the side of the AFRC Trial Chamber, finding that the phrase 'greatest responsibility' was meant to guide the use of prosecutorial discretion, and not as a jurisdictional limitation. The Appeals Chamber concluded:

It is evident that it is the Prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him. It is the Chambers that have the competence to try such persons who the Prosecutor has consequently brought before it as persons who bear the greatest responsibility.[181]

As a result of this deference to prosecutorial discretion, the raison d'être of the SCSL was essentially delegated to one of the Court's organs without judicial oversight.[182] Under serious political and fiscal constraints, the Prosecutor's interpretation of the mandate to try those bearing 'greatest responsibility' limited the list of suspects from 30,000 to about twenty.[183] When combined

with the Court's desire to avoid the imposition of 'victor's justice', this narrow interpretation of the mandate left 'an unusually bottom-heavy' indictment list.[184] A number of combatants whose war-time conduct was especially brutal were not indicted,[185] nor were prominent international businessmen who benefited from the illicit diamond trade.[186]

The second significant issue for the Court's proceedings came as a result of funding constraints (discussed in more detail in Part VI below). The SCSL Statute incorporates language from the International Covenant on Civil and Politic Rights[187] guaranteeing certain rights to the accused, including the rights to be presumed innocent, to a fair and public hearing before an impartial tribunal, to counsel, to adequate time and facilities to prepare their defence, and to cross-examine witnesses.[188] In order to fulfil these guarantees, the SCSL undertook the innovative and unprecedented creation of a Defense Office.[189] As an organ of the Court, however, the Defense Office was under competing mandates to ensure the rights of the defendants and to keep costs down.[190] Ultimately, the 'SCSL was, in practice, so constrained by the general lack of funding, that its treatment of the accused and defense rights gave the unfortunate impression of being setup with the sole purpose to convict'.[191]

Administering Cost

Unlike the ICTR and the ICTY before it, the SCSL relied on voluntary contributions of states to support its work. The prior, fully international tribunals received their funding from assessed UN dues.[192] All in, the SCSL was expected to spend US$257,000,000 over its lifetime, with an annual peak of US$36,000,000 in 2007.[193] On an individual basis, the SCSL will have spent roughly US$285,000,000 per completed trial.[194] In absolute terms, then, the SCSL was markedly cheaper than the ICTR (which cost roughly US$1.75 billion). However, in relative terms, the SCSL's lower price tag was not a result of its efficiency; the per-defendant costs are substantially the same for either court.[195]

No doubt a function of what David Scheffer has called 'tribunal fatigue' at the Security Council,[196] the SCSL was created with a voluntary funding mechanism whereby member states, IGOs and NGOs would contribute funds, equipment, service and expert personnel on their own accord.[197] In recognition of this unique funding structure, the 'important contributors' to the SCSL would also be given a position on the Management Committee, which was charged with assisting 'the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Special Court, including questions of efficiency, and to perform other functions as agreed by interested States'.[198] In theory, then,

the SCSL would be directly accountable to the states and groups who chose to support the Court's work, rather than the UN bureaucracy as a whole.[199] Former SCSL Prosecutor Stephen Rapp described this voluntary funding arrangement as a 'compact model' wherein the '[t]hose involved with the court would essentially put together a plan and go to world capitals saying, "This is what we want to do. If you think it is important, contribute your tax money to this cause. […] If you provide us with contributions to meet [our] budget, you will see this quantity of justice"'.[200]

In practice, this voluntary funding mechanism meant that 'the success of the Court depended upon the level of funding that it could generate from U.N. members'.[201] The initial plan was that the SCSL would run for three years,[202] and thus the scope of the fund-raising task that the SCSL would undertake over the next decade was not well understood at the outset. The implication that the Special Court's work would only last three years 'created high and unrealistic expectations as to what it could accomplish in the time it had'.[203] Further, the reliance on third-party funding resulted in disconnection between the SCSL and its founding entities.[204]

The end result of implementing this voluntary funding mechanism was a general reduction in the efficacy and, to some extent, the perceived legitimacy of the SCSL. The lack of funding, *inter alia*, affected the Prosecutor's interpretation of the mandate to try those bearing 'greatest responsibility' as encompassing only twenty defendants;[205] the ability of the Outreach Office to bring the Court's message to the affected population;[206] the defence and fair trial rights of the accused;[207] and the ability of the Court's staff to devote their energies to the work of justice rather than fundraising.[208]

The funding mechanism also adversely affected the perception of the Special Court, at least to some degree. In place of the charge of 'victor's justice' levelled at previous tribunals, the SCSL was subject to charges of 'donors' justice', wherein the concerns of the donors in securing a 'return' on their 'investment' and/or securing an efficient outcome were apparently considered paramount to the concerns of substantive justice.[209]

Jurisprudential Impact

The Special Court has made significant contributions to the state of international criminal law, despite having completed relatively few trials.

Perhaps the SCSL's most important contribution was its successful indictment, arrest, trial and conviction of a head of state, Charles Taylor of Liberia.[210] Taylor was indicted by the Special Court on eleven counts of crimes against humanity, war crimes, and other serious violations of international law.[211] The Prosecutor alleged that Taylor planned, instigated and/or ordered

the commission of crimes within the SCSL's jurisdiction, invoking command responsibility and joint criminal enterprise bases. The Taylor defence team sought to quash the indictment based on Taylor's head of state immunity, traditionally recognized in international law.[212] The Trial Chamber, relying on Article 6(2) of the SCSL Statute, practice at the IMTs, ICTs and ICC, and various *amici* briefs, found that Taylor was not immune from prosecution.[213] First, Taylor was no longer head of state at the time of his indictment, and hence personal immunity (*ratione personae*) was inapplicable.[214] Second, and more importantly, the functional immunities (*ratione materiae*) which protect activities of officials acting in their official capacity on behalf of their state, did not apply to cases before 'certain international criminal courts'.[215] The Appeals Chamber determined that the SCSL was, in fact, an international court because of its establishment by international treaty, the language of Security Council Resolution 1315, the similarity of its mandate to those of the ICTY, ICTR and ICC.[216] After this important ruling, the SCSL proceeded with Taylor's prosecution largely as it would with any other defendant (location of the trial aside). The SCSL's decision helped 'consolidate an emerging trend […] that establishes an exception to personal immunities accruing to incumbent heads of state as far as the jurisdiction of an international criminal tribunal is concerned'.[217]

Another important contribution is the SCSL's jurisprudence on child recruitment.[218] The use of underage soldiers has been a sadly consistent part of modern asymmetrical warfare. In the CDF Case, the SCSL held individual defendants liable for the recruitment and use of child soldiers as a crime under international law. Among those indictees affiliated with the CDF was Sam Hinga Norman, who had commanded the Kamajors (a militia of traditional hunters) in support of the Government's action against rebel factions. Part of the indictment against Norman alleged that he had systematically forced children under the age of fifteen into combat. Norman argued that, even if proven, this did not amount to a recognized crime under customary international law during the relevant time frame, and if it had become a rule of international law, it did so only after the treaty establishing the ICC was signed in 1998.[219] As such, Norman contended that the indictment violated the principle of *nullum crimen sin lege* (no crime without law). The Appeals Chamber, in another important jurisdictional ruling, found that prior international agreements, including the Additional Protocols to the Geneva Convention of 1977, the Convention on the Rights of the Child of 1989, the Fourth Geneva Convention of 1949 and the African Charter on the Rights and Welfare of the Child, all contained sufficient indicia of state practice and *opinio juris* to support the assertion that child recruitment crystallized into a

rule of customary international law prior to 1996.[220] This decision marks a first in international law.

The SCSL also made significant contributions to another disturbing facet of modern conflict, namely that of sexual violence targeting women. The species of this violence found in Sierra Leone was formulated as the crime against humanity of 'forced marriage'.[221] During the Sierra Leonean conflict (and others) women were forced to 'marry' combatants and were 'raped repeatedly; made to cook, clean, and care for their captor-husbands; beaten, branded, and cut; and many became pregnant and were forced to bear and then rear the children'.[222] Defendants in both the RUF and AFRC cases were charged with independent counts of forced marriage. As with the interpretation of the Court's mandate (discussed in Part V above), the Trial Chambers came to opposite conclusions in the face of challenges by the defendants. The RUF Trial Chamber upheld the charge.[223] The AFRC Trial Chamber, on the other hand, found that the purported crime of 'forced marriage' was subsumed by the other charges of 'sexual slavery', and hence were redundant.[224]

It fell to the Appeals Chamber to resolve the deadlock. The judges of that chamber sided with the RUF Trial Chamber, holding that forced marriage is a separate crime against humanity:

[B]ased on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishable factors. First, forced marriage involves a perpetrator compelling a person by threat of force […] into a conjugal association with another [.] Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between 'husband' and 'wife', which could lead to disciplinary consequences for breach of this exclusive relationship. These distinctions imply that forced marriage is not predominantly a sexual crime.[225]

Although not all commentators will accept the Appeals Chamber's reasoning regarding the existence of this crime at international law prior to the commission of the acts,[226] the Special Court's work in this area has nonetheless provided a bases for future prosecutions on these grounds.

Another significant contribution of the SCSL came in its treatment of the amnesty provisions of the treaty that signaled the cessation of hostilities in Sierra Leone.[227] That treaty, the Lomé Accord, granted blanket immunity to 'absolute and free pardon and reprieve to all combatants and collaborators with respect to anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement'.[228] This provision was quite

understandably cited by defendants before the SCSL, who felt that the Special Court's personality as a creation of a treaty involving a signatory to the Lomé Accord prevented it from abrogating the amnesty granted by Sierra Leone. The Statue of the SCSL, for its part, specifically prohibits application amnesty to any of the international crimes within its jurisdiction.[229] The Appeals Chamber upheld application of this prohibition on amnesty, finding that:

> Where jurisdiction is universal [as with grave international crimes] a State [such as Sierra Leone] cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. […] A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.[230]

This decision has made it 'very clear that in international peace negotiations, amnesties are off the table for genocide, war crimes, and crimes against humanity'.[231]

Liberia

Before we turn to Liberia, two preliminary comments are in order. First, that country's conflict was intimately linked to the Sierra Leone war. Often, the same rebel groups and fighters were involved in carrying out war time atrocities in each of the countries. Second, in terms of sheer scale, it is reported that the war in Liberia resulted in the deaths of many more people than in Sierra Leone. Third, in the same way civil society in Sierra Leone advocated for justice for victims of the war through criminal prosecutions, Liberians have also argued that criminal accountability ought to be meted out for both pragmatic and principled reasons. Without any accountability, the prospects for old wounds to remain open instead of healed remains strong, sowing the seeds for future violence. Finally, although one can see how rebels and Liberian government fighters could seek amnesty for themselves, it is difficult to accept the failure of Liberian authorities to consider seriously the country's truth commission recommendations that war time atrocities be prosecuted. Given all these factors, and owing to the fact that we need to understand better what might make accountability possible in one African country but not in another, the Liberian case study has been included.

Brief History of the Conflict

Liberia's history is to some extent unique. It was established in 1847 by freed American slaves who 'returned' to Africa with the help of the US government and the assistance of the American Colonization Society.[232] These colonizers

saw a future of self-determination in Africa that was denied to them in the land of their enslavement. Many in America, including those in favour of abolition, were troubled by what, exactly, was to be done with the freed slaves once the bonds of servitude were severed. Thus 'returning' to Africa became a perceived net positive for both the formerly enslaved and the race-sensitive American government.

Needless to say, the land that was chosen by the colonialists was not uninhabited. Rather, there were large and distinct native populations on the land at the time of the Americans' arrival. The freed American slaves unfortunately used their experience of the Western labour and economic structures, which once used them as human grist, against the native populations. The resultant history of the nation of Liberia is one in which these Americo-Liberians, which comprised less than 5 per cent of the population and their descendants controlled the nation's social, political and economic life to the exclusion of the indigenous populations.[233]

The last of these Americo-Liberian leaders, William Richard Tolbert, Jr., was deposed in a 1980 coup lead by a young Master Sergeant in the Liberian Army, Samuel Doe.[234] Doe ruled Liberia in a rather ruthless and corrupt fashion throughout the 1980s.[235] Several different factions sought to end Doe's rule through military means, and enlisted the assistance of Libya's Muamar Gaddaffi in training for a military confrontation with the entrenched regime. 'The most prominent of these characters was Charles Taylor, leader of the National Patriotic Front of Liberia (NPFL).'[236] From December 1989 to July 1990, Taylor led rebel forces from Nimba County (near the border with Côte d'Ivoire) to the capital, Monrovia.[237] Signaling the ethnic character of the conflict, Taylor's march to Monrovia was characterized by 'destruction, arson, burning, looting and the killing of members of ethnic groups associated with Doe, or opposed to his NPFL'.[238]

The Economic Community of West African States (ECOWAS) organized a monitoring group (ECOMOG) to monitor the tentative peace secured by arms in Monrovia. The monitoring group was quickly drawn into conflict through attempts to enforce peace between the warring factions.[239] This international involvement led Taylor to form something of a partnership with Foday Sankoh, the leader of the Revolutionary United Forces (RUF), then engaged in the conflict in neighbouring Sierra Leone. The RUF and NPFL forces supported one another's actions in their respective theatres of conflict although there is compelling evidence that they had met and made common cause with each other during their days in Libya or not long afterwards.[240] In response to this cross-border partnership, the government of Sierra Leone created the United Liberation Movement for Democracy

(ULIMO), composed of Liberian members of the Sierra Leonean armed forces, to fight against the RUF. These operations eventually drew ULIMO into the conflict in Liberia proper.[241]

In 1996, ECOWAS brokered a ceasefire between the parties, which preceded fresh presidential elections in 1997. Taylor won those elections by a large margin, although it was obvious that the elections took place in a context of fear in which it was clear to the population what failure to vote for the NPFL candidate would mean.[242] 'Between 1997 and 2000, Taylor's regime continued the history of oppression, intimidation, torture, execution of political opponents, arbitrary detentions and extra-judicial killings characteristic of previous governments.'[243] Two important factions were created to oppose Taylor's government in Monrovia. First, Liberians United for Reconciliation and Democracy (LURD), a predominantly Krahn group, formed in the Sierra Leonean capital Freetown in 2000. Second, an offshoot group of LURD associated with ULIMO-J from the First Civil War formed the Movement for Democracy in Liberia (MODEL) in 2003. LURD began to advance on Monrovia from bases in Guinea; MODEL operated out of bases in Côte d'Ivoire with the assistance of Ivorian President Laurent Gbagbo.[244]

In the summer of 2003, Taylor found himself in a precarious situation. LURD and MODEL had fought their way from their respective borders to the outskirts of Monrovia. Taylor had been indicted by the SCSL in March of that year. That indictment was unveiled as he attended ceasefire talks in Ghana. With pressure mounting, both militarily and politically, Taylor returned to Liberia and subsequently agreed to leave the capital in return for an offer of asylum in Nigeria.[245] The Comprehensive Peace Agreement (CPA) between the various combatants brought formal hostilities to a close in August 2003 and the creation of a transitional government.[246] Most notably for our purposes, the CPA provided for the creation of a Truth and Reconciliation Commission (TRC)[247] and did not provide any specific authority for either criminal prosecutions or international involvement.

No International or Internationalized Proceedings to Consider

The entirety of the proceedings related to the adjudication of the atrocities committed during the First and Second Civil Wars in Liberia (1989–1996 and 2000–03, respectively) were conducted by the national Truth and Reconciliation Commission. For that simple reason, we are unable to consider in this paper several of the metrics we have previously applied to the ICTR and SCSL. In particular, local involvement, competing prosecutions, breadth of the proceedings, quality of the proceedings, cost of administration and

jurisprudential impact are simply inapplicable to the situation in Liberia. Without diminishing the work of the Liberian TRC, formal criminal trials of either a national or international character were not part of the reconciliation process in that country. Yet, there have been and continues to be calls for prosecutions of war criminals responsible for atrocities in Liberia.[248]

Benefits of National Action

Acknowledging the inapplicability of criminal justice metrics is not to say that the TRC had no effect on the end goals of promoting peace and security. The Truth and Reconciliation process in Liberia yielded at least three significant benefits that were also served (or purportedly served) by the criminal justice processes discussed above.

First, the TRC's final report is a voluminous and authoritative account of the history, challenges, and internal tensions that led to the conflicts in 1990 and 2003. Among other things, the TRC report contains analysis of the historical antecedents to the conflict,[249] the effect of the conflict on women,[250] the role of children in the wars,[251] and economic crimes, exploitation and abuse before during and after the conflict.[252] To the degree that the ICTR and SCSL were intended to act or de facto acted as the official historians of their respective conflicts, the TRC's final report shows that this function need not be inextricably linked to criminal prosecution.

Second, whatever its ultimate drawbacks, the TRC process was a domestic institution geared toward using local perceptions, context and sensitivities in assessing the brutal conflicts from which the country had recently emerged. To the degree that the ICTR, and (to a lesser degree) the SCSL were viewed as foreign institutions imposing inapplicable justice from afar, the Liberian effort to deal with the legacy of conflicts internally with only limited international assistance is laudable.

Third, the TRC explicitly recommended that its work be followed by criminal prosecutions of particular individuals in a newly-constituted Extraordinary Criminal Court for Liberia that would be empowered 'to try all persons recommended by the TRC for the commission of gross human rights violations including violations of international humanitarian law, international human rights law, war crimes and economic crimes including but not limited to, killing, gang rape, multiple rape, forced recruitment, sexual slavery, forced labor, exposure to deprivation, missing, etc.'.[253] The Commission recommended that 116 individuals from the NPFL, ULIMO-J, ULIMO-K, MODEL, LURD and other groups be prosecuted in this mechanism,[254] and even provided a draft statute for such a court.[255] Drawing lessons from the SCSL, this draft statute provides for appointment of judges

by the President of Liberia and the UN Secretary General, reserves a certain number of judicial appointments for women, and precluded appointment of those who participated in (or are perceived to have participated in) the conflicts.[256] This is to say that, despite the CPA's preference for resort to a TRC process rather than criminal trials, the Commission did not see its work as providing a full measure of justice to the victims of the conflict. Rather, it saw criminal prosecutions in cooperation with the international community as an advisable and necessary next step.

One may rightly ask: what has become of this recommendation since the issuance of the final TRC Report in December 2009? Unfortunately, no such Extraordinary Court has been established to adjudicate the atrocities outlined in the TRC report. Ozonnia Ojielo, the former Chief of Operations and Officer in Charge of the Sierra Leone Truth and Reconciliation Commission, and a consultant to the Liberia TRC, has offered several reasons for the lack of criminal prosecutions.[257] In general, the country's dismal civil, judicial and economic capacities, in the wake of nearly twenty years of civil strife, conspire against widespread formal prosecutions. From a criminal justice standpoint, many of the nation's jurists fled and the actual physical infrastructure of the justice system was destroyed during the conflict. In essence, there are few courts in which to hold prosecutions and few judges or lawyers to staff them. From a civil standpoint, the lack of strong governmental control outside of the capital, the history of organized oppression and persistent ethnic tensions undermine the national government's ability to engage in potentially divisive criminal prosecutions. Lastly, in light of the country's tenuous economic situation, the government has declared criminal prosecutions to be of a lesser priority than simply reconstituting Liberia as a functional state.

This economic concern is essentially a recasting of the familiar criticism of the expense of administering the ICTR and SCSL from a prospective position. In the cases of the ICTR and SCSL, the decision to expend great sums of money prosecuting relatively few defendants was criticized afterward as being a misallocation of resources away from projects and programmes that could provide more benefit to the post-conflict society. In the case of Liberia, the need to rebuild the country through exactly those types of projects and programmes had been used as a reason for not undertaking the expenditure of resources on criminal prosecutions in the first place. In either event, the limited resources available to the national and international authorities have created the perception of an either/or competition between criminal proceedings and other laudable public projects.

Impunity and "Victor's Justice"

The Liberian situation differs from the situation in Rwanda, and to a much lesser degree that of Sierra Leone, inasmuch as there was no clear 'victor' in the conflict. The CPA represents a political settlement between the warring factions that forestalled ultimate military conquest, and thus precluded the possibility that post-conflict mechanism would focus on the vanquished.

In and of itself, this political compromise does not necessarily mean that some or 'all sides' of the conflict could not be subjected to an equal measure of justice in proportion to their wartime atrocities. In practice, however, the post-conflict governments contained members of all of the warring factions, and thus as a pragmatic political matter no group was incentivized to seek prosecutions against another group (lest they themselves be subjected to similar calls).[258] Thus despite the TRC's recommendation that criminal prosecutions to adjudicate conduct during the conflict, the political reality is such that these recommendations are unlikely to be seriously considered. None of those in power, including President Ellen Johnson Sirleaf, is keen to prosecute. This may not be surprising given that she and many other prominent individuals were named in the TRC Report for giving early support to those who fomented the war, such as Taylor.

This political impasse highlights a somewhat perverse aspect of the much-maligned notion of 'victor's justice'. From Nuremberg to Kigali, the charge that one side of a conflict enjoyed impunity for their conduct necessarily acknowledges that the other side did not enjoy such impunity. If a modicum of justice is better than no justice at all (which is not a given), the fact that there is a victorious side interested in pursuing its own interests, and capable of doing so, does mean that at least some justice will be meted out. Where no party enjoys such a position of authority, and no one has decisively won the war, it appears unreasonable to expect that leaders will fall on their swords out of a shared sense of legal rectitude.

Lessons From Earlier Situations

The situation in Liberia, which in many ways parallels that in Sierra Leone, differs from those discussed above inasmuch as no ad hoc, internationalized, hybrid or other international court has been created to deal with the reputable claims of mass atrocities in the country's fourteen years of civil war.[259] What lessons learned from the experience at the ICTR and the SCSL can be brought to bear in post-war Liberia?

First, the slow pace, high cost and exhausted political will at the ad hoc tribunals, as well as the subsequent entry into force of the ICC's Rome

Statute, make the establishment of a dedicated special ad hoc criminal tribunal for Liberia a very unlikely possibility.[260] In this regard, even if there were the domestic political will in the Sirleaf government to call for criminal accountability supported by the international community, it is unclear whether it would obtain UN support which for the most part is focused on advancing developmental and peacebuilding goals in Liberia. What might give better results is a bilateral approach, say with the support of the US or the AU, to create such a special court for Liberia. Such a position would accord with US interest in advancing ad hoc courts as alternatives to full-fledged international tribunals as it proposed with respect to Sudan and more recently the Democratic Republic of Congo. In terms of the AU, the creation of a special chamber in the national courts of Senegal to prosecute former Chadian president Hissène Habré might serve as a blue print for a similar effort in relation to Liberia. Yet, given the limitations of funding, such an undertaking would likely require the financial support of African states as well as other, more affluent ones further afield.

Second, it is true that the broader international community did, in fact, agree to establish the permanent ICC in the years after the creation of the ad hocs. The Rome Statute provides the ICC with jurisdiction over four crimes: genocide,[261] crimes against humanity,[262] war crimes[263] and aggression.[264] 'The crimes committed in Liberia include at least two (crimes against humanity and war crimes), and possibly a third (genocide), of the four within the ICC's jurisdiction.'[265] Further, Liberia is a party to the Rome Statute, signing in 1998 and ratifying in September 2004. However, the temporal jurisdiction of the ICC is limited to those crimes committed after the entry into force of the Rome Statute, namely on 1 July 2002. Many, if not most, of the atrocities in Liberia were committed prior to the entry into force, and accordingly, the ICC Prosecutor would be limited to seeking justice for a fraction of those who were affected by the war.

Third, the experience with the SCSL could be duplicated in neighbouring Liberia. This hybrid model that uses elements of both international and domestic justice systems was also employed in East Timor, Kosovo and Cambodia following the establishment of the ICTs in the early 1990s. However, part of the theory of creating a hybrid tribunal is to allow the international system to piggyback to a certain degree on the national institutions. As such, creation of a hybrid court or a special chamber in the national courts of Liberia 'would require that there be at least an effectively functional and adequately resourced judicial system' beyond what currently exists in the country.[266] As we have seen with the SCSL (above in Part V), the resources necessary to create such a hybrid tribunal, as well as to do some necessary capacity-building at

the national level, do not come easily whether due to lack of political will or otherwise.

Conclusion

Throughout this paper, we have argued that the form and structure of a criminal justice mechanism must be assessed on its merits relative to a specific situation. Simply put, it should be self-evident there is no one-size-fits-all approach to post-conflict criminal justice. The nature of a mechanism necessarily depend on the nature of each situation, the scope of the conflict, the character of the crimes at issue, as well as the extent of political will amongst those in government. Add to this the existence of a robust civil society interest in seeing some justice done.

In the main, by way of summary, we have assessed two post-conflict criminal justice mechanisms, those of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, on eight metrics: local involvement, competing national proceedings, competing international proceedings, impunity and victor's justice, breadth of the proceedings, quality of the proceedings, the cost of administering the mechanism and their jurisprudential impact. Notably, these are factors geared toward assessing the impact of the tribunals as legal entities, and therefore do not address their impact on economic development, public perceptions of justice, or many other laudable and necessary goals in a post-conflict society. Our goal has not been to compare those mechanisms with other presumed alternatives such as truth and reconciliation commissions. That said, as we conceded above, a thorough understanding of the impact of these criminal justice mechanisms on the maintenance of peace would likely require a ground-level empirical study.

The ICTR had several commendable aspects and several where it fell short of its high aspirations. In a positive light, the ICTR was a transformational approach to addressing post-conflict justice. International criminal law, functionally dormant since the end of World War II, was given a renewed lease on life, focused on bringing international fair trial standards to bear on some of the worst atrocities of the twentieth century. Unlike the International Military Tribunals in Germany and Tokyo, the ICTR indicted a variety of players whose actions were essential to the conduct of the genocide, to include military leaders, civilian leaders, politicians, local officials and media personalities. This broad view of the Tribunal's mandate serves as a beneficial guidepost for future efforts. The quality of the proceedings before the Tribunal was also largely consistent with international standards, arguably to the detriment of the court's pace and efficiency.

Several aspects of the ICTR, however, are perceived as less positive. First and foremost, the Tribunal had a strained relationship with the Rwandan government from its inception, which had a discernibly negative impact on the Tribunal's work. The Rwandan government was seemingly not fully invested after it lost a chance to influence the form the Tribunal took, and perceptions of the court's work in Rwanda have generally been that it is a foreign, remote, ponderously slow and expensive institution. To that end, Rwanda conducted many, many times more trials in their national courts and the specially-constituted gacaca courts than did the Tribunal. Perhaps a big strike against the ICTR is the charge of 'victor's justice'. The civil war that culminated in the 1994 genocide had been ongoing since at least 1990, and there is considerable evidence that the RPF committed atrocities during the conduct of the war against the genocidal Hutu regime. However, no RPF officials or soldiers were indicted by the Tribunal. On the other hand, domestic prosecutions of some of those alleged to be involved in key incidents were carried out by the Rwandese authorities. In the end, although this concern of the alleged victor's justice, much discussed in the literature, does not in our minds undermine its ultimate legacy, we may have to accept that there are additional pragmatic reasons why as such it might not have taken place. This is not unlike the type of one-sided justice that was dished out by the Nuremberg and Tokyo trials. It remains a matter on which history may well be the better judge.

Like the ICTR, the SCSL has a generally positive legacy. From a positive standpoint, the SCSL took the local challenges faced by the ICTR and ICTY seriously. As such, the Special Court took at least four significant steps toward involving the local community from its inception. First, the Court was located in Freetown, the locus criminis. Second, the Court was given jurisdiction over some violations of Sierra Leonean law, thus bringing it more in line with the local judiciary. Third, the Special Court undertook a serious outreach effort to inform the affected population. Fourth, a certain number of places within the Court's hierarchy were reserved specifically for Sierra Leoneans by the Statute, thus ensuring a floor for the level of local involvement. As a product of a treaty between the UN and the government of Sierra Leone, the hybrid international and national character of the Special Court addressed the sense of foreign justice common among the affected population in Rwanda (even if it did not eliminate such criticism entirely). The Special Court also took pains to indict parties from all sides of the conflict, and thus took a conscious step to avoid or diminish a charge of 'victor's justice'. The indictment, arrest and successful prosecution of the head of a neighbouring state, Charles Taylor of Liberia, and the resultant diminution of immunities, is another feather in the SCSL's cap. Lastly, and despite some tense exchanges, the experience in Sierra Leone provided a working example of how a national truth and reconciliation

commission could work in tandem with international (or internationalized) criminal proceedings. It also offered lessons on pitfalls to avoid wherever two such institutions are simultaneously used in the future, as they were in Sierra Leone.

From a more critical standpoint, the SCSL was created with a narrow (and apparently vague) mandate to try those 'bearing greatest responsibility' for the crimes at issue. The effort to define and implement that restriction took up a considerable amount of the Court's energy and ultimately resulted in a scant few trials actually taking place at the SCSL. As such, the breadth of the proceedings suffered. The situation in Sierra Leone also demonstrated one of the problems in relying on local authorities to prosecute the bulk of the crimes committed during a conflict. This assumption, which undergirds the Rome Statute system, may be a false one premised on the affected state having the capacity and political will to prosecute. That, as we have seen, is not always the case. Despite the generally positive outcome of the Sierra Leone TRC findings, and unlike the experience in Rwanda, there remain many perpetrators of atrocities who have seen neither the inside of the SCSL or a national court.

In closing, we highlight that neither court has received positive reviews for their cost efficiency. One may rightly question, as we do, whether the measure of justice should be done in dollars and cents. Notwithstanding, the ICTR's expenditure of US$1.75 billion and the SCSL's expected cost of US$257 million (with roughly equivalent per-defendant expenses) will likely be considered a chilling example in future negotiations over international justice.

Notes

1. For a deeper discussion on the loaded meaning of the term 'international community', *see* Edward Kwakwa, 2008, 'The international community, international law and the United States: three in one, two against one, or one and the same', in Michael Byers and George Nolte eds, *United States Hegemony and the Foundations of International Law*, New York: Oxford University Press.
2. *See* Letter Dated March 6, 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/246, Annex I, Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone.
3. Mirjan R. Damaska, 2008, 'What is the point of international criminal justice?', *Chicago-Kent Law Review* 83, p. 329.
4. Kimi L. King and James D. Meernik, 2011, 'Assessing the impact of the ICTY: balancing international and local interests while doing justice', in Bert Stewart et al., eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, pp. 7, 12 (hereinafter '*The Legacy of the ICTY*').

5. Janine Natalya Clark, 2011, 'The impact question: the ICTY and the restoration and maintenance of peace', in *the Legacy of the ICTY*, n4, pp. 55–81.
6. Erin Staub, 2006, 'Reconciliation after genocide, mass killing or intractable conflict: understanding the roots of violence, psychological recovery and steps toward a general theory', *Political Psychology* 27, pp. 867, 884.
7. For instance, Professor Clark interviewed subjects in Bosnia-Herzegovina who felt that proper justice would require 'economic opportunities and creation of jobs'. Clark, op. cit. n5 at 70. Nothing in the mandate of either the ICTR or SCSL would allow them to undertake large-scale employment or economic development initiatives, and thus would never be capable of delivering 'justice' within the above meaning by themselves.
8. *See* Clark, op. cit. n5 (arguing that only empirical studies can validate the high-minded claims of ICJ proponents).
9. Diane F. Orenlichter, 2010, *That Someone Guilty Be Punished*, New York: Open Society.
10. *Ibid.*, pp. 51–57.
11. *Ibid.*, pp. 72–79.
12. *Ibid.*, pp. 57–65.
13. Charles Jalloh, 2010, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', *Criminal Law Forum* 21, p. 1.
14. Victor Peskin, 2005, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda', *Journal of Human Rights* 4, pp. 213, 214.
15. Damaska, op. cit, n3.
16. This is not to say, however, that we have to accept the wisdom of the decision that set the court's goals. Rather, it is to say that a court explicitly established to try thirty particular defendants cannot be held accountable for failing to prosecute 100 more.
17. SCSL Statute, Article 1-1.
18. See e.g., Xabier Agirre Aranburu, 2009, 'Prosecuting the most responsible for international crimes: dilemmas of definition and prosecutorial discretion', in *Protección Internacional de Derechos Humanos y Estado de Derecho*, Bogotá, Grupo Editorial Ibanez.
19. Charles Jalloh, 2013 'Prosecuting those bearing "greatest responsibility": the lessons of the Special Court of Sierra Leone', *Marquette University Law Review* 96, p. 863.
20. David Wippman, 2006, 'The Costs of International Justice', *American Journal of International Law* 100, p. 861.
21. David Scheffer, 1998, 'Challenges Confronting International Justice Issues', *New England International and Comparative Law Annual* 4, p. 1.
22. *Prosecutor v. Jean-Paul Akayesu*, Case no. ICTR-96-4-T, Judgment, para. 83 (2 October 1998).
23. *Ibid.* at paras 86–89.

24. *Ibid.* at para. 93.
25. *Ibid.*, Text of Accord, available at https://peaceaccords.nd.edu/site_media/media/accords/Rwanda_Peace_Accord.pdf, accessed 27 July 2014.
26. *Ibid.* at para. 106.
27. *Ibid.* at para. 107.
28. Romeo Dallaire, 2004, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, Da Capo Press.
29. *Prosecutor v. Theoneste Bagosora*, Case No. ICTR-96-4-A, Judgment (14 December 2011).
30. Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, U.N. Doc S/1999/1257 (15 December 1999); Organization of African Unity, International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, *Rwanda: the preventable genocide*, IPEP, 2000.
31. *Ibid.* at para. 111.
32. S.C. Res. 955, U.N. Doc. S/RES/955 (8 November 1994).
33. UN Charter, Article 39.
34. Letter Dated 15 December 199 from Members of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda Addressed to the Secretary-General, U.N. Doc. S/1999/1257, Annex I at 68 (16 December 1999).
35. S.C. Res. 925, U.N. Doc. S/RES/925 (8 June 1994).
36. Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), para. 150, U.N. Doc. S/1994/1125 (4 October 1994).
37. U.N. Doc. S/PV.3453 (8 November 1994). The Chinese Government abstained from the vote, noting that it may be 'an incautious act' to proceed without the assent of Rwanda.
38. For more detailed analysis, see Payam Akhavan, 1996, 'The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment', *American Journal of International Law* 90 (3), pp. 505–8.
39. U.N. Doc. S/PV.3453, at 14.
40. *Ibid.* at 15.
41. *Ibid.*
42. *Ibid.*
43. This concern may have been borne out by the experience with Georges Ruggiu, the only non-Rwandan convicted by the ICTR. Ruggiu, an Italian-Belgian journalist for Radio Television Libre des Milles Collines, received a twelve-year sentence in June 2000 after pleading guilty to direct and public incitement to genocide and persecution. In February 2008, Ruggiu was transferred to Italy to serve the remainder of his sentence. On 21 April 2009, he was released early by the Italian authorities despite the mandate in Article 27 of the ICTR statute giving the President sole authority to grant early release. *See* The Hague Justice Portal, Convicted journalist released early in violation of ICTR Statute,

available at http://www.haguejusticeportal.net/index.php?id=10688, accessed 27 July 2014.

44. *Ibid.*
45. *Ibid.* at 16.
46. *Ibid.*
47. *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-T, Amended Indictment (14 April 2000).
48. *Jean-Bosco Barayagwiza v. Prosecutor*, Decision (3 November, 1999), available at http://unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf, accessed 27 July 2014.
49. *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (31 March 2000), available at http://www.unictr.org/Portals/0/Case%5CEnglish%5CBarayagwiza%5Cdecisions%5Cdcs20000331.pdf, accessed 27 July 2014.
50 Peskin, op. cit. n14 at 225.
51. Prosecutor Carla Del Ponte told the Appeals Chamber that 'her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be 'involved in any manner'. Decision, op. cit. n.49 at para. 24; *see also* Transcript of the hearing on 22 February 2000, pp. 26–28; Decision, op. cit. n.49. Declaration by Judge Rafael Nieto-Navia at paras 11, 16 (rejecting Del Ponte's accusations of political bias as well as what he perceived as the Rwandan desire to see every indictee convicted).
52. The first president of the ICTY, Antonio Cassesse, famously described that court as 'a giant without arms and legs'. Cassesse declared that the ICTY needed 'artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force states to cooperate with it'. Antonio Cassese, 1998, 'On current trends towards criminal prosecution and punishment of breaches of international humanitarian law', *European Journal of International Law* 9, p. 1.
53. Statement by Hon. Tharcisse Karugarama, at the United Nations General Assembly, Thematic Debate on the Role of International Criminal Justice in Reconciliation (9 April 2013) available at http://rwandaun.org/site/2013/04/10/statement-by-honourable-tharcisse-karugarama-minister-of-justice-and-attorney-general-of-rwanda/, accessed 27 July 2014.
54. *See* Part V, op. cit.
55. Jalloh, 'Prosecuting those bearing "Greatest Responsibility"', op. cit. n.19.
56. Nicholas A. Jones, 2010, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha*, Abingdon: Routledge, pp. 91–93.
57. Karugarama, op. cit. n. 53.
58. The modern incarnation of *Gacaca* differs significantly from the pre-colonial form from which it takes its name. Notably, the prior incarnation dealt mainly with minor civil disputes and did not impose sentences of Imprisonment.

The modern analogue deals with 'the crime of crimes' and routinely gives out prison sentences. Amaka Megwalu and Neophytos Loizides, 2010 'Dilemmas of Justice and Reconciliation: Rwandans and Gacaca Courts', *African Journal of International and Comparative Law* 18, pp. 4–5.

59. *Ibid.* at 3.
60. Karugarama, op. cit. n.53.
61. Anne N. Kubai, 2007, 'Between Justice and Reconciliation: The Survivors of Rwanda', *African Security Review* 16 (1), p. 60.
62. Jones, op. cit. n.56 at 94.
63. Scheffer, op. cit. n.21.
64. *See* e.g., Report on the completion strategy of the International Criminal Tribunal for Rwanda, U.N. Doc S/2008/322 (12 May 2008) (describing efforts to move cases to competent national jurisdictions); Erik Mose, 2008, 'The ICTR's Completion Strategy – Challenges and Possible Solutions', *Journal of International Criminal Justice* 6 (4), p. 667.
65. Note that, many other countries, including the US and Canada also sought removal of those individuals allegedly involved in genocide from their jurisdictions pursuant to the exclusion clauses of the Refugee Convention. *See* e.g., Joseph Rikhof, 2006, 'Complicity in International Criminal Law and Canadian Refugee Law', *Journal of International Criminal Justice* 4, p. 702.
66. *R. v. Munyaneza* [2009] QCCS 2201; Fannie LaFontaine, 2010, 'Canada's Crimes against Humanity and War Crimes Act on Trial', *Journal of International Criminal Justice* 8, p. 269.
67. Onesphore Rwabukombe, Oberlandesgericht Frankfurt am Main – Judgement of 18 February 2014 - reference number 5 - 3 StU 4/10 - 4 - 3/10.
68 Vincent Bajinya, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Ugirashebuja. *See Brown vs. Government of Rwanda*, [2009] EWHC 770 (Admin).
69. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera: *see* (Unreported, Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capital, President Maes, Judges Louveaux and Massart, 8 June 2001), available at http://www.asf.be/AssisesRwanda2/fr/, accessed 27 July 2014; *see also* Mathias Bushishi, http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/1073/action/show/controller/Profile.html, accessed 27 July 2014; Etienne Nzabonimana, http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/327/action/show/controller/Profile.html, accessed 27 July 2014; Samuel Ndashyikirwa, http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/328/action/show/controller/Profile.html, accessed 27 July 2014.
70. *Prosecutor vs. Sadi Bugingo*, TOSLO-2012-106377, Oslo District Court (15 February 2013), available at http://www.asser.nl/upload/documents/20130226T095633-Oslo%20District%20Court%20judgment%2014-02-2013%20Norwegian.pdf, accessed 27 July 2014.
71. Wenceslas Munyeshyaka, Rectification, Cass. Crim., No. 96-82491, (10 February 1998), available at http://www.asser.nl/upload/documents/20120612T111630-

Cour_de_Cassation_Chambre_criminelle_du_10_f%C3%A9vrier_1998.pdf.

72. Fatou Bensouda, 2013, 'International criminal justice in Africa – the state of play', in Southern African Litigation Centre, *International Criminal Justice and Africa*, pp. 24–26 ('Save for the hybrid SCSL and Rwanda, African states have not for the most part been active in prosecuting international crimes domestically – despite ample opportunities to do so').
73. *See* Karugarama, op. cit. n.53; H. E. President Paul Kagame, Statement to UN General Assembly 68th Session (25 September 2013), available at http://gadebate.un.org/68/rwanda.
74 *See* e.g., Trial Materials, Theoneste Bagosora v. Prosecutor, ICTR-96-7 (http://unictr.org/tabid/128/Default.aspx?id=10&mnid=4); Trial Materials, *Jean Kambanda v. Prosecutor*, ICTR-97-23 (http://unictr.org/tabid/128/Default.aspx?id=24&mnid=4); Trial Materials, *Jean-Bosco Uwinkindi v. Prosecutor*, ICTR-01-75 (http://unictr.org/tabid/128/Default.aspx?id=75&mnid=7); Trial Materials, *Ferdinand Nahimana v. Prosecutor*, ICTR-99-52 (http://unictr.org/tabid/128/Default.aspx?id=29&mnid=4).
75. Hassan B. Jallow, 2005, 'Prosecutorial discretion and International Criminal Justice', *Journal of International Criminal Justice* 3, p. 145 (arguing that 'The primary targets for prosecution inevitably are therefore the political, administrative and military leadership at the time, which planned and oversaw the execution of the genocide. Any level of participation by any such persons is thus sufficient to bring them within the category of those to be prosecuted').
76. At present, the ICTR has nine accused for which indictments have been issued who remain at large. *See* 'Accused at Large', http://unictr.org/Cases/tabid/77/Default.aspx?id=12&mnid=12, accessed 27 July 2014.
77. The Prosecutor of the ICC has brought cases against Thomas Lubanga Dyilo, Germain Katanga, Bosco Ntaganda, Callixte Mbarushimana, Sylvestre Mudacumura, and Mathieu Ngudjolo Chui for crimes committed or allegedly committed in the Democratic Republic of Congo, for instance. See http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx, accessed 27 July 2014.
78. *See* e.g., 'Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes', Human Rights Watch (26 May 2009), http://www.hrw.org/node/83536, accessed 27 July 2014; Lars Waldorf, 2010, 'A mere pretense of justice': complementarity, sham trials, and victor's justice at the Rwanda tribunal', *Fordham University International Law Journal* 33 (4), pp. 1221–77.
79. UN Commission of Experts, Final Report, U.N. Doc. S/1994/1405 (9 December 1994); Peskin, op. cit. n14 at 216.
80. See, in this regard, Carla Del Ponte, 2009, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity. A Memoir*, Other Press, pp. 231–39.
81 Peskin, op. cit. n.14 at 226. For further criticisms by academics, see Filip Reyntjens, 2013, *Political Governance in Post-Genocide Rwanda*, Cambridge

University Press, p. 244; Luc Cote, 'The exercise of prosecutorial discretion in international criminal law', *Journal of International Criminal Justi*ce 3, pp. 176–77.

82. United States Department of State, Diplomatic Cable, ICTY: President Meron urges USG to oppose Del Ponte renewal, 17 July 2003, 03THEHAGUE1827_a.
83. William A. Schabas, 'Selecting cases at the ICTR', in Charles Jalloh and Alhagi Marong, eds, 2014, *Promoting Accountability for Gross Human Rights Violations in Africa Under International Law: Essays in Honour of Prosecutor Hassan B. Jallow*, Leiden: Brill Publishing.
84. *Ibid.* at 222.
85. *Ibid.*
86. Goldstone also stated, in the context of the ICTY, that he would issue indictments against Bosniak Muslims 'for the sake of saying … what an even-handed chap I am.' *Ibid.*
87. UN Doc. S/PV.5904 (4 June 2008).
88. See, U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (4 June 2009).
89. See Human Rights Watch, 'Rwanda: tribunal risks supporting 'victor's justice': tribunal should vigorously pursue crimes of Rwandan Patriotic Front' (1 June 2009), available at http://www.hrw.org/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice, accessed 27 July 2014.
90. *See* e.g., UN Commission of Experts, Final Report, U.N. Doc. S/1994/1405 (9 December 1994).
91. ICTR Statute, Article 1.
92. ICTR Statute, Article 2.
93. ICTR Statute, Article 3.
94. ICTR Statute, Article 4.
95. At the same time, the limited mandate created the somewhat perverse situation where significant international attention was focused on acts committed in basically 100 days in one small geographic area while, at the same time, serious violations of international law were ongoing in neighbouring countries. The Tribunal was simply not empowered to bring peace to the entire region; the Prosecutor was as unable to bring charges related to fresh atrocities in DRC as anyone else.
96. UN ICTR, Status of Cases, http://unictr.org/Cases/tabid/204/Default.aspx, accessed 27 July 2014.
97. Charles Jalloh, 2011, 'Special Court for Sierra Leone: Achieving Justice?', *Michigan Journal of International Law* 32, p. 395.
98. See, Rules of Procedure and Evidence, http://unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx, accessed 27 July 2014.
99. In a partially dissenting opinion in the Government II case, for instance, Judge Emil Short found that 'the Accused have been incarcerated without judgment for more than 12 years' and concluded that 'the right to trial without undue delay has been violated'. Judge Short suggested a reduction in sentence for the

convicted defendants would be appropriate as a result. *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Judgment and Sentence, p. 548 (30 September 2011). On appeal, Judge Patrick Robinson found that the nearly three years it took to prepare the trial judgement also breached the right to trial without undue delay. *Mugenzi & Mugiraneza v. Prosecutor*, Case No. ICTR-99-50-A, Judgement, p. 262 (4 February 2003).

100. As noted in the introductory section, 'expensive' is a relative term.
101. S. Ford, 2011, 'How leadership in international criminal law is shifting from the United States to Europe and Asia: an analysis of spending on and contributions to international criminal courts', *Saint Louis University Law Journal* 55, p. 973.
102. The ICTR completed 47 cases, had 16 on appeal and 12 acquittals as of July 2014, a total of 75, *see* http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx.
103. Eric Posner, 2009, *The Perils of Global Legalism*, Chicago: University of Chicago Press.
104. See, Part V, op. cit.
105. 78 U.N.T.S. 227 (9 December 1948).
106. M. Cherif Bassiouni, 2008, *International Criminal Law 3rd. Edition*, Leiden: Brill, p. 112.
107. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (2 September 1998).
108. *Ibid.* at para. 731–33.
109. *See* ICTR Statute, Article 6 (2); Bassiouni, op. cit. n.106 at 113. This is also a feature of the ICTY, ICC and SCSL Statutes.
110. Bassiouni, op. cit. n.106 at 114.
111. See *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (15 May 2003). Larissa van den Herik, 2005, *Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden: Brill; George Mugwanya, 2007, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, Cameron; Erik Mose, 2005, 'Main achievements of the ICTR', *Journal of International Criminal Justice* 3, p. 920.
112. UN Security Council, Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915 (4 October 2000) (addressing relationship between new SCSL and existing ad hoc tribunals); SCSL Statute, Article 14 (inheriting Rules of Procedure and Evidence from ICTR mutatis mutandi), Article 19 (looking to ICTR for guidance on sentencing), Article 20 (looking to ICTR and ICTY appellate decisions).
113. J.R. Cartwright, 1970, *Politics in Sierra Leone: 1947–1967*, Toronto: University of Toronto Press, p. 4.
114. Sierra Leone Truth and Reconciliation Commission, Report of the Commission Executive Summary, Vol. 2, Chapter 1, available at http://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapter-1?category_id=12, accessed 27 July 2014.

115. *Ibid.*
116. *Ibid.*
117. See, L. Gberie, 2006, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*, Bloomington: Indiana University Press; D. Keen, 2006, *Conflict and Collusion in Sierra Leone*, Basingstoke: Palgrave McMillan.
118. Taylor started a guerrilla war in Liberia in 1989 similar to that led by Sankoh in Sierra Leone. He served as Liberia's President from 1997 to 2003.
119. Peace Agreement between the Government of Sierra Leone and the Revolutionary Armed Front of Sierra Leone (18 May 1999), available at http://www.sierraleonetrc.org/downloads/legalresources/lomepeaceaccord.pdf, accessed 27 July 2014. Hereinafter 'Lomé Accords'.
120. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 U.N.T.S. 127 (16 January 2002). Hereinafter 'SCSL Agreement'.
121. President of the Republic of Sierra Leone, Annex to the Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (10 August 2000).
122. *Ibid.*
123. S.C. Res. 1315, U.N. Doc. S/RES/1315 (14 August 2000).
124. Antonio Cassesse, 'Independent Expert Report on the Special Court for Sierra Leone' (12 December 2006), available at http://www.rscsl.org/Documents/Cassese%20Report.pdf; Alison Smith, 2014, 'The expectations and role of international and national civil society and the SCSL', in Charles Jalloh, ed., *The Sierra Leone Special Court and Its Legacy*, New York: Cambridge University Press, p. 46. Hereinafter '*Sierra Leone Special Court Legacy*'.
125. *See* e.g., Ralph Zacklin, 2004, 'The failings of ad hoc international tribunals', *International Criminal Justice*, 2, pp. 541–44 (arguing that there was a perception among the victims that the ICTY was too remote and that there was little appreciation of its work at the grass roots level); Karugarama, op. cit. n.53 (arguing that the Tribunals were 'viewed as foreign, detached and contribute very little to National reconciliation process').
126. David M. Crane, 2005, 'Dancing with the devil: prosecuting West Africa's warlords: building initial prosecutorial strategy for an international tribunal after third world armed conflicts', *Case Western Reserve University Journal of International Law* 37, p. 1.
127. *Ibid.*
128. *See* e.g., Lydia A. Nkansah, 2014, 'Justice within the arrangement of the Special Court for Sierra Leone versus local perception of justice: a contradiction or harmonious?', *African Journal of International and Comparative Law* 22, p. 115 (reviewing a field study of attitudes amongst ordinary Sierra Leoneans about the Special Court).
129. SCSL Agreement, op. cit. n.120, Articles 2,3,7.
130. *Ibid.*, Article 2.
131. Smith, op. cit. n.124.

132. Antonio Cassese, 2004, 'The role of internationalized courts and tribunals in the fight against international criminality', in Cesare P.R. Romano, Andre Nollkaemper, and Jann K. Kleffner eds, *Internationalized Criminal Courts Sierra Leone, East Timor, Kosovo, and Cambodia*, New York: Oxford University Press; Laura A. Dickinson, 2003, 'The promise of hybrid courts', *American Journal of International Law* 97, p. 295.
133. Jalloh, op. cit. n.97.
134. Vincent Nmehielle and Charles Jalloh, 2006, 'The legacy of the Special Court for Sierra Leone', *Fletcher Forum of World Affairs* 30, p. 107; Outreach and Public Affairs, available at http://www.rscsl.org/OPA.html; Stuart Ford, 'How special is the Special Court's outreach section?', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 505.
135. Nmehille and Jalloh, op. cit. n.134.
136. Damaska, op. cit. n.3.
137. Lomé Accords, op. cit. n.119, Article VI.
138. The Truth and Reconciliation Commission Act of 2000, available at http://www.sierraleonetrc.org/downloads/legalresources/trc_act_2000.pdf, accessed 27 July 2014. Hereinafter 'TRC Act'.
139. Lomé Accords, Article IX.
140. William A. Schabas, 2004, 'Truth commissions and courts working in parallel', *American Society of International Law and Procedure* 93, p. 189–91.
141. Linda E. Carter, 'International judicial trials, truth commissions, and *Gacaca*: developing a framework for transitional justice from the experiences in Sierra Leone and Rwanda', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 728.
142. *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT-122, Decision on appeal by TRC and accused against the decision of His Lordship Justice Bankole Thompson to deny the TRC request to hold a public hearing with Chief Norman (28 November 2003), available at http://www.rscsl.org/Documents/Decisions/CDF/Appeal/122/SCSL-03-08-PT-122.pdf.
143. Sierra Leone Truth & Reconciliation Commission, 2004, *2 Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* 1, p. 190.
144. *S v Kallay and Others*, [2006] SLHC 7 (5 April 2006).
145. *Ibid.*
146. *See* Letter from President Alhaji Ahmad Tejan Kabbah to the United Nations Secretary-General dated 12 June 2000, available at http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf, accessed 27 July 2014.
147. See 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone', op. cit. n.2.
148. Charles Jalloh, 'Conclusion', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 770.
149. *See* Superseding Indictment, United States v. Roy M. Belfast, Jr., Case No. 06-20758-CR-ALTONAGA(s), (S.D. Fl., 10 September 2007), available at http://www.justice.gov/criminal/hrsp/pr/2007/september/09-06-07ctaylor-indict.pdf, accessed 27 July 2014.

150. Lansana Gberie, 2005, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*, Indiana University Press Press; Yusuf Bangura, 2001, 'Strategic policy failure and governance in Sierra Leone', *Journal of Modern Afrrican Studies* 38 (4), p. 551.
151. Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay and Morris Kallon.
152. Alex Tamba Brima, Ibrahim Bazzy Kamara, Santigie Borbor Kanu and Johnny Paul Koroma.
153. Sam Hinga Norma, Moinina Fofana and Allieu Kondewa.
154. SCSL Statute, Article 1.
155. Jalloh, op. cit. n.97.
156. Lansana Gberie, 'The civil defense forces trial: limit to international justice?' in *Sierra Leone Special Court Legacy*, op. cit. n. 124 at 624; Charles Jalloh, 'Prosecuting those bearing "greatest responsibility": the contributions of the special court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 589; Jalloh, op. cit. n.97.
157. Jalloh, op. cit. n.97.
158. For instance, some international commentators have called for the arrest of Ibrahim Bah, an associate of Charles Taylor accused of, *inter alia*, supplying arms to the conflict. *See* Centre for Accountability and Rule of Law, CARL Calls for the Prosecution of former mercenary in the Sierra Leone Civil Conflict (13 June 2013), available at http://www.carl-sl.org/home/press-releases/613-ibrahim-tommy-executive-director-carl, accessed 27 July 2014; Human Rights Watch, Sierra Leone: Investigate Alleged Rebel Arms Supplier (19 June 2013) available at http://www.hrw.org/news/2013/06/19/sierra-leone-investigate-alleged-rebel-arms-supplier, accessed 27 July 2014.
159. SCSL Statute, Article 2.
160. *Ibid.* at Article 3.
161. *Ibid.* at Article 4.
162. *Ibid.* at Article 5.
163. Abdul Tejan Cole, 2001, 'The Special Court for Sierra Leone: conceptual concerns and alternatives' 1, p. 107.
164. SCSL Statue, Article1 (1). Those persons must also have been over the age of 15 at the time of the alleged crime. SCSL Statue, Article 7.
165. *Ibid.*
166. ICTR Statute, Article 1.
167. SCSL Statute, Article 1(1).
168. For more detailed analysis and legal history, see Charles Jalloh, 'Prosecuting those bearing "greatest responsibility": the contributions of the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 589.
169. The Special Court also heard several contempt cases related to the primary proceedings.
170. *See* http://www.rscsl.org/Documents/RPE.pdf (showing amendment dates of all prior versions of the RPE).
171. SCSL Agreement, op. cit. n.120, Articles 2,3.
172. SCSL RPE, Rule 72 (iii).

173. Jalloh, op. cit. n.97 at 456.
174. SCSL Statute, Article 1.
175. Jalloh, op. cit. n.173 at 413.
176. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgement, paras 91–92 (2 August 2007).
177. *Ibid.* at para. 92.
178. *Prosecutor v. Brima*, Case no. SCSL-04-16-T Judgement, para. 653 (20 June 2007).
179. *Ibid.*
180. *Ibid.* at para. 654.
181. *Prosecutor v. Brima*, Case no. SCSL-04-16-A, Appeals Judgement, para. 281 (22 February 2008).
182. See, Jalloh op. cit. n.173 at 415–30.
183. David M. Crane, 2006, 'International criminal tribunals in the 21st century: terrorists, warlords, and thugs', *American University International Law Review* 21, pp. 508–9, 511–12.
184. Phoebe Knowles, 2006, 'The power to prosecute: the Special Court for Sierra Leone from a defence perspective', *International Criminal Law Review* 6, pp. 406–7.
185. Human Rights Watch, 2004, 'Bringing justice: the Special Court for Sierra Leone: accomplishments, shortcomings and needed support', 8 September), available at http://www.hrw.org/reports/2004/09/07/bringing-justice-special-court-sierra-leone, accessed 27 July 2014.
186. Jalloh, op. cit. n.173 at 424.
187. International Covenant on Civil and Political Rights, arts. 9(3), 14, 999 U.N. T.S 171 (March 23, 1976).
188. SCSL Statute, Article 17.
189. SCSL RPE, Article 45.
190. Jalloh op. cit. n.173 at 442.
191. *Ibid.* at 444 (citing Wayne Jordash and Scott Martin, 2010, 'Due process and fair trial rights at the Special Court: how the desire for accountability outweighed the demands of justice at the Special Court for Sierra Leone', *Leiden Journal of International Law* 23, pp. 587, 608.
192 ICTR Statute, Article 30; ICTY Statute, Article 32.
193. S. Ford, 2011, 'How leadership in international criminal law is shifting from the United States to Europe and Asia: an analysis of spending on and contributions to international criminal courts', *Saint Louis University Law Journal* 55, pp. 975–76.
194. In practical terms, the SCSL has completed trials for only nine individuals. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T; *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T; *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T.
195. Would that $5,000,000 could be called 'trivial' in our everyday lives. However, the expenditure-per-defendant metric does not take into account many

economic factors that may be important to an overall calculation. Thus, it is a rough measure of a rough estimate, and as such, the resultant numbers are not specific enough to warrant one-to-one scrutiny.

196. See, Helena Cobban, 2006, 'International courts', *Foreign Policy*, March-April, pp. 22–23 (noting that the ICTs had 'ballooning' timelines and costs).
197. S.C. Res 1315 (2000) para.8; SCSL Agreement, op. cit. n.120, Article 6.
198. SCSL Agreement, op. cit. n.120, Article 7.
199. Sara Kendall, 'Marketing accountability at the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 389.
200. Stephen Rapp, 2009, 'The compact model in international criminal justice: the Special Court for Sierra Leone', *Drake University Law Review* 57, pp. 11–48.
201. Jalloh op. cit. n.173 at 430.
202. U.N. Secretary General, Letter dated 12 January 2001 from the Secretary General to the President of the Security Council, para.12, U.N. Doc. S/2001/40 (12 January 2001).
203 Jalloh op. cit. n.173 at 435.
204. Notably, the SCSL had to be rescued financially by the UN in 2004, after its voluntary funding mechanism failed to provide sufficient funding to support the Court's on-going work. Stuart Ford, 2011, 'How leadership in international criminal law is shifting from the United States to Europe and Asia: an analysis of spending on and contributions to international criminal courts', *Saint Louis University Law Journal* 55, p. 993.
205. Human Rights Watch, op. cit. n.185, at 4–6.
206. The Special Court for Sierra Leone, First Annual Report of the President of the Special Court for Sierra Leone for the Period 2 December 2002–1 December 2003, at 27.
207. Cesare P.R. Romano, 2005, 'The price of international justice', *Law and Practice International Courts and Tribunals* 4, pp. 304–5. *See also* Jalloh op. cit. n.173 at 437–44 (describing in detail various implications for the defendants and Defense Office as a result of 'shoestring' funding).
208. The Special Court for Sierra Leone, Fifth Annual Report of the President of the Special Court for Sierra Leone for the Period June 2007–May 2008, p. 11 (documenting numerous fundraising trips to world capitals); The Special Court for Sierra Leone, Sixth Annual Report of the President of the Special Court for Sierra Leone for the Period June 2008–May 2009 (noting that the global financial crisis had increased the difficulty of fundraising from voluntary donors).
209. Kendall, op. cit. n.199 at 393–99.
210. *See* Micaela Frulli, 'Piercing the veil of head-of-state immunity: the Taylor trial and beyond', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 325.
211. *Prosecutor v. Charles Taylor*, SCSL Case no. SCSL-03-01-PT, Second Amended Indictment (29 May 2007), available at http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107, accessed 27 July 2014.

212. In particular, the defence cited case concerning arrest warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*) 2002 I.C.J. 1 (14 February) (commonly, 'Yerodia').
213. Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004); Sarah Nouwen, 2005, 'The Special Court for Sierra Leone and the immunity of Taylor: the arrest warrant case continued', *Leiden Journal of International Law* 18 (2), p. 645; Zsuzsanna Deen-Racsmany, 2005, 'Prosecutor v. Taylor: the status of the Special Court for Sierra Leone and its implications for immunity', *Leiden Journal of International Law* 18 (3), p. 229; Charles Jalloh, 2004, 'Immunity from prosecution for international crimes: the case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights* 8, p. 21.
214. Decision on Immunity from Jurisdiction, op. cit. n.213 at para. 59.
215. *Ibid.* at paras 50–53.
216. *Ibid.* at paras 39–42.
217. Frulli, op. cit. n.210 at 328.
218. Alison Smith, 2004, 'Child recruitment and the Special Court for Sierra Leone', *Journal of International Criminal Justice* 2 (4), p. 1141; Cecil Aptel, 'Unpunished crimes: the Special Court for Sierra Leone and children', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 340.
219 Noah Benjamin Novogrodsky, 'After the horror: child soldiers and the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 361.
220. *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (31 May 2004).
221. This term has been highly contentious. It is used here not to endorse any particular interpretation, but as a restatement of the wording used by the Special Court.
222. Michael P. Scharf, 'Forced marriage as a separate crime against humanity', in *Sierra Leone Special Court Legacy*, op. cit. n. 124 at 193; Valerie Oosterveld, 2011, 'Forced Marriage and the Special Court for Sierra Leone: legal advances and conceptual difficulties', *Journal of International Humanitarian Law Studies* 2 (1), p. 127; Patricia Sellers, 2011, 'Wartime female slavery: enslavement?', *Cornell International Law Journal* 44, p. 115.
223. *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgement, para. 168 (2 March 2009).
224. *Prosecutor v. Brima, Kamara and Kanu*, Case no. SCSL-03-06-T, Judgement, para. 174 (20 June 2007).
225. *Prosecutor v. Brima, Kamara and Kanu*, Case no. SCSL-03-06-A, Judgment, para.195 (22 February 2008).
226. *See* Nicholas A. Goodfellow, 2011, 'The miscategorization of "forced marriage" as a crime against humanity by the Special Court for Sierra Leone', *International Criminal Law Review* 11, p. 848–53; Sidney Thompson, 'Forced marriage at the Special Court for Sierra Leone: questions of jurisdiction, legality, specificity,

and consistency, in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 215.

227. Simon M. Meisenberg, 2004, 'Legality of amnesties in international humanitarian law: the Lomé Amnesty Decision of the Special Court for Sierra Leone', *International Review of Red Cross* 86, p. 856.
228. Lomé Accords at Article IX.
229. SCSL Statute, Article 10.
230. *Prosecutor v. Kallon & Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenged to Jurisdiction: Lomé Accord Amnesty, para. 3 (13 March 2004).
231. Leila Nadya Sadat, 'The Lomé amnesty decision of the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 311, 323; But *see also* William Schabas, 2005, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *U.C. Davis Journal of International Law and Policy* 11, p. 145 (criticizing the SCSL's decisions on the applicability of the amnesty provision because, *inter alia*, they were too absolute and went beyond existing law).
232. *See* Truth and Reconciliation Commission of Liberia, *Final Report: Volume One*, pp. 49–50.
233. Ozonnia Ojielo, 2010, 'Critical lessons in post-conflict security in Africa: the case of Liberia's Truth and Reconciliation Commission', *Institute for Justice and Reconciliation in Africa Programme*, Occasional Paper 1, p. 3.
234. Truth and Reconciliation Commission of Liberia, *Final Report: Volume Two*, at 144.
235. *Ibid.* at 144–49.
236. Ojielo, op. cit. n.233 at 3.
237. TRC Final Report Vol. 2 at 152–53.
238. *Ibid.*
239. TRC Final Report Vol. 2 at 157–58.
240. 2004 Witness to Truth: Report of the Truth and Reconciliation Commission of Sierra Leone, 3A.
241. Notably, ULIMO itself was fractionalized on ethnic grounds. ULIMO-J was composed primarily of ethnic Krahns loyal to General Roosevelt Johnson. ULIMO-K was composed mostly of ethnic Mandingos loyal to Alhaji Kromah. *Ibid.* at 3.
242. Taylor's National Patriotic Party cleared more than 75 per cent of the votes. *See* International Foundation for Electoral Systems, Final Results of Liberia's 1997 Elections, available at http://www.ifes.org/~/media/Files/Publications/Election%20Results%20Evaluation%20of/1997/835/1997_Liberia_Election_Final_Results.pdf.
243. Ojielo, op. cit. n. 233 at 4-5.
244. Ojielo, op. cit. n.233 at 5.
245. TRC Final Report Vol. 2 at 168.
246. A copy of the agreement has been made available by the United States Institute for Peace at http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf.

247. *Ibid.* at Article XIII.
248. *See* e.g., Jalloh and Marong, op. cit. n.260.
249. TRC Final Report Vol. 1.
250. TRC Final Report Vol. 3 Appendices Title I.
251. TRC Final Report Vol. 3 Appendices Title II.
252. TRC Final Report Vol. 3 Appendices Title III; TRC Final Report Vol. 2.
253. TRC Final Report Vol. 2 at 349. More broadly, see TRC Final Report Vol 2 at para. 12.0 (discussing 'Recommendations on Accountability: Extraordinary Criminal Court').
254. TRC Final Report Vol. 2 at 349–52.
255. TRC Final Report, Annex 2, Draft Statute Establishing The Extraordinary Criminal Court For Liberia.
256. *Ibid.* at Article 3.
257. Ojielo, op. cit. n.233 at 6–7.
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259. *See* e.g., Human Rights Watch, 1009, 'Liberia: a human rights disaster – violations of the laws of war by all parties to the conflict', 26 October , available at http://www.hrw.org/sites/default/files/reports/liberia1990.pdf, accessed 27 July 2014.
260. Charles Jalloh and Alhagi Marong, 2005, 'Ending impunity: the case for war crimes trials in Liberia', *African Journal of Legal Studies* 1, p. 74.
261. Rome Statute, Article 6.
262. Rome Statute, Article 7.
263. Rome Statute, Article 8.
264. Rome Statute, Articles 122, 123 (actual definition of 'aggression' as a crime at international law is to be made by subsequent approval of the Assembly of States Party).
265. Jalloh and Marong, op. cit. n.260 at 73.
266. Jalloh and Marong, op. cit. n.260 at 75.

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International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda Beyond the ICC

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Abstract

The system established by the statute of the International Criminal Court (ICC) is founded on the principle of complementarity, i.e. that the ICC complements national legal systems. As such, conceptually, the Court is a support system and system of last resort for when domestic systems are 'unwilling or unable' to undertake accountability. This develops the argument that progress in addressing mass atrocities in Africa should be seen in increments not in quantum leaps. As such, this article seeks to reconstruct a regional trajectory of accountability for mass atrocities in Africa with evidence grounded in both state practice and the histories of African countries. It argues that such historically grounded narrative is essential if the mission of international justice in Africa is not to be misplaced. Contrary to popular narrative which tends to suggest that Africa's institutions have tolerated these atrocities, this paper marshals considerable historical evidence to suggest that African institutions have, over time, made considerable progress in discouraging them through different forms of accountability. It explores different ways in which these regional efforts can be supported by looking beyond the ICC and re-imagining international justice.

Résumé

Le système mis en place par les statuts de la Cour pénal international (CPI) est base sur le principe de la complémentarité, c'est-à-dire que la CPI complète les systèmes juridiques nationaux. En tant que tel, conceptuellement, la Cour est un système d'appui et un système de dernier recours lorsque les systèmes locaux sont « non-désireuses ou incapables » de mettre en œuvre la responsabilité. Cela développe l'argumentation que les avancées pour faire face aux atrocités de masse en Afrique devraient être perçues sauts par paliers, non en sauts quantiques. De ce fait, cet article cherche à reconstruire une trajectoire régionale de la responsabilité pour les atrocités de masse en Afrique avec des preuves ancrées

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à la fois dans les pratiques d'Etat et les histoires des pays africains. Il soutient qu'un tel récit historiquement ancré est essentiel si la mission de la justice internationale en Afrique n'est pas mal placée. Contrairement au récit populaire qui tend à suggérer que les institutions africaines ont toléré ces atrocités, cet article rassemble de considérables preuves historiques pour suggérer que les institutions africaines ont, au fil du temps, fait des avancées considérables pour les décourager, à travers différentes formes de responsabilités. Il explore différentes manière dont ces efforts régionaux peuvent être appuyés en regardant au-delà de la CPI et en ré-imaginant la justice internationale.

Introduction

This article addresses the intersectionality between regional stability and accountability for mass atrocities in Africa. The remit of the article covers "the interaction of geopolitics and international justice, which speaks to issues of history,…"[1] It seeks, among other things, to reconstruct a narrative on accountability for mass atrocities with evidence grounded in both state practice and the histories of African countries and argues that such historically grounded narrative is essential if the mission of international justice in Africa is not to be misplaced. The ICC Statute itself provides the rationale for this study in its explicit acknowledgement and emphasis that the "Court established under this Statute shall be complementary to national criminal jurisdictions."[2] Such complementarity, it will be argued, would be facilitated by a better understanding of the histories and context of the relevant national legal systems. As with all historically grounded narratives, such accounts are unlikely to be as unilinear as international justice advocates would sometimes wish.

In the decade and more since the International Criminal Court (ICC) came into existence, the epistemic enterprise of addressing accountability for mass atrocities especially in Africa has somewhat erroneously been conflated with the institutional life of the Court. With this conflation, conversations concerning international justice in Africa have degenerated into shouting matches in which epithets and denunciations are freely traded. Discussions on this subject are not always models of clarity, contemplation or mutual respect among participants in it. In this respect, this writer had complained five years ago about a "*misbegotten duel between supposed imperialists and alleged impunity apologists.*"[3] Looking beyond the ICC easily gets denounced as advocacy to impunity. Any form of support for the court or its difficult work is liable to be dismissed as support for imperialism.[4]

These disagreements, it seems, hue closely to narratives located in the spectrum between Afro-pessimism and Afro-optimism or "Africa rising" in

popular and area studies literatures, a narrative of hyper-optimism founded largely on somewhat untheorised economic growth statistics.[5] Dispassionate discussion of political economy, crime, punishment and mass atrocities in Africa has suffered as a result, and the capacity to diagnose Africa's pathologies or to reimagine pathways beyond immediate fantasies or frustrations has suffered. Reality remains that Africa continues to be the site of all on going eight situations before the ICC, in addition to being the site of several other recent cases of un-extinguished mass atrocities. The coincidence of these narratives of hyper-optimism on the one hand with evidence of mass atrocities on the other suggests a more complex or nuanced situation than traditional legal or advocacy literature is often ready to countenance. Addressing this reality adequately must begin with eschewing doctrine, intellectual coercion or zealotry and allowing for cross disciplinary inquiries in which context, subtext, history and experience are all relevant.

In seeking to undertake such an inquiry, it is essential to recognize that Africa is simultaneously an idea, a geography and, for most people, a pigment. The African Union and the International Criminal Court (ICC) are both institutions. Peace, justice, and reconciliation are epistemic ideas over which no one person, institution, region or pigment holds proprietary rights. This paper therefore aims to suggest tentative pathways for re-imagining accountability for mass atrocities in Africa as an inclusive, cross-disciplinary and multi-stakeholder enterprise for Africans everywhere. The narrative that follows is developed with the help of sources in history, area studies, politics and international relations, international institutional law and international criminal laws.

Multiple Conversations

International (criminal) justice, peace and reconciliation implicate multiple disciplines. Each of these can be conceptually elusive. These concepts include justice, peace, and reconciliation. In the context of administering international justice to an exclusive collection of Africa situations, the deployment of these concepts telegraphs assumptions about conflict, dysfunction and the capacity (or lack of it) of national institutions. Together, these present infinite challenges of meaning, application, and practice. Pinning down a meaning for any of these concepts could easily be beyond the brief of any paper. It is, nevertheless, important to identify some of these concepts and attempt to infuse them with some limited meaning.

While the meanings may be elusive, the existence of a relationship between them seems well established. In authorizing the establishment of the Special Court for Sierra Leone, for instance, the United Nations Security Council

explicitly suggested an organic link between justice, peace and reconciliation following mass atrocity, saying that "a credible system of justice and accountability for the very serious crimes committed….would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."[6] Eight years later, the African Union High Level Panel on Darfur (AUPD) in its 2009 report argued that "[t]he objectives of peace, justice and reconciliation in Darfur are interconnected, mutually interdependent and equally desirable. None of the three goals can, or should, be pursued in isolation or at the expense of the other objectives."[7]

These related concepts of justice, peace, and reconciliation recur in narratives of accountability for mass atrocities. It is essential to recognize that any examination of these concepts simultaneously involves conversations over space, time, and subject matter. In terms of space, for example, there is a conversation between people most affected by or who live with the atrocities and those for whom such atrocities are ethical, diplomatic, academic, research experiences. Among Africa's populations, there is also a conversation between the Diaspora and those in Africa. In terms of time, there is a concurrent conversation between the past and the present. Past atrocities and how they were responded to deeply shape communities' views of present mass crimes and appropriate responses to them. On subject matter, there is another conversation between the normative focus of lawyers and the more empirical, experiential and narrative-based formats of other social sciences. In addition, there is also a conversation between philosophy, epistemology and institutions.

These conversations can be asymmetrical and noisy to begin with. Agreement on concepts does not necessarily translate into mutual intelligibility or, indeed any form of consensus on institutional design, architecture, or process for their realisation. Finding a common language can also be frustrating. *Non-sequiturs* and other illogics are not unusual and distinct ideas can easily be mistaken for one another. Despite obvious frustrations, this multi-dimensional dialogue is a necessary enterprise.

Persevering in this dialogue, however, requires us to synthesise directions out of the various strands of conversations. It also bears recalling that dominated though it is by cases concerning African countries, international criminal justice is not usually discussed in Africa. Most of the people that claim or are thought to have expertise in it are based outside Africa. The vehicles they use to express their views are media outlets and scholarly journals located outside Africa. Africa is thus increasingly *objectified* in an enterprise in which it ought to have significant agency. This state of affairs implicates political leadership and statehood in Africa. It is thus essential to begin with a brief examination of the political economy of statehood in Africa.

International Justice, African Statehood and the Imperative of Political Reform

The primary obligation of the state is to guarantee the safety and security of all who live in it.[8] This obligation is heavily implicated in the foundations of international criminal law and accountability and forms the base for the principle of complementarity. The existence of state capability to provide safety and security, however, is not to be taken for granted nor asserted glibly. Whether this capability exists, therefore, is a matter for empirical inquiry and evidence.

Most African states continue to struggle with fulfilling this role of providing effective protection to those who live within their borders. State formation in Africa is an ongoing project. Cycles of violence that have afflicted a majority of states on the continent since the end of colonialism reflect this reality. It is quite clear to any interested and objective observer that "governance deficits and pervasive insecurity…. are inter-linked and mutually reinforcing."[9] Steven Pinker has marshalled compelling evidence to show that the course of human progress is defined by a progressive diminution of violence through legal regulation of its deployment and accountability for its unlawful use.[10] "Declines in violence", he argues, "are a product of social, cultural, and material conditions."[11]

Around our continent, these conditions have steadily deteriorated since Independence. For many people around the Africa, the directed and controlled violence of the colonial enterprise has been succeeded by an increasingly deregulated and democratized violence of the postcolonial era. The postcolonial African State appears to have lost its claim to any monopoly of violence and the realization of its responsibility to ensure legal consequences for unlawful violence faces daunting challenges. In their compelling examination of the *Challenges of Security Sector Governance in West Africa*, Alan Bryden, Boubacar Ndiaye and Funmi Olonisakin point out that "in many African contexts, Max Weber's vision of the state holding the monopoly on the legitimacy of coercive violence has never existed and states have historically been unable or unwilling to provide security to their citizens."[12]

The ultimate measure of the effectiveness of any legal system or political economy, therefore, is its ability to protect those that live within its territory. Thus Aryeh Neier explains that "the Weimar government perished in the same way that it began its life: unable to act against political violence..."[13] and adds:

> the lesson of Germany in the 1920s is that a free society cannot be established or maintained if it will not act vigorously and forcefully to punish political

> violence….Prosecutions of those who commit political violence are an essential part of the duty government owes its citizens to protect their freedom….[14]

Turning to contemporary Africa and international justice, the functional relationship of peace, justice and reconciliation can be traced to the evolution of statehood, governance and citizenship in Africa. In the case of Sudan, for instance, the AUPD report on the situation in Darfur, Western Sudan in 2009 reminds us that:

> It is also equally self-evident that the most urgent priority facing the people of Darfur is the achievement of peace, and taking concerted action to deliver justice and reconciliation would itself strengthen progress towards the realisation and consolidation of peace. The three pillars, separately or jointly, are meaningful only within an overall framework of ownership by the people of Sudan, in the context of a system of democratic governance. In that regard, there is a crucially important fourth component to the Panel's vision, which is the integration of Darfur into Sudan in such a way that Darfurians can play their rightful role as citizens of Sudan.

Mahmood Mamdani's history of the continent as a comparative timeline of the preclusion of citizenship is compelling.[15] Citizenship in this context is constitutive of statehood and it is arguable that a state that fully owes its legitimacy to its citizens will not idly sit by while those citizens are killed in mass atrocities. Mamdani's history tale of the evolution of citizenship in Africa could equally be read as a timeline of the destruction of the infrastructure for accountable government. By accountability here is meant mean both political accountability enabling citizens to change their governments through the electoral process; as well as legal or judicial accountability delivered through the institutions of the judicial process. These capabilities are located in the normative and institutional foundations of the State and guaranteed by the independence and skills of the judiciary, civil service, and bureaucracies of government to police the rules without which government becomes whimsical, arbitrary, and personalised.

For the most part, Africa's post-independence regimes precluded any form of political competition for power through the creation of nation-building projects in which power was monopolised by single parties and often single persons. Pluralism or advocacy for it was criminalised. The institutions of state became personalised, corrupted, and instrumentalised to the end of keeping the single person or family in power. This destroyed government as a system of norms, rule constraints and institutional processes established for and by equal citizens. In the words of the ICC Statute, many African countries have suffered "a total or substantial collapse or unavailability of [their] national judicial system."[16] In its place, discrimination was institutionalised and

categories of citizenship created based on status or mass denial of precisely those public goods that the State supposedly exists to guarantee. The result was that by the middle of the 1980s, in most countries and most of our continent, those who controlled government enabled themselves to deliberately conflate the essential distinction between the public and personal, get away with this, and preclude the possibility of ever being held accountable whether through the legal process of investigations and prosecutions, or through the political process of competitive elections.

It is no accident that mass violence has become a shared experience bordering on fate for many peoples around the continent irrespective of borders. To take voting as the political counterpart to judicial accountability, elections in much of the continent were essentially become reduced to three things – administrative processes of manufacturing figures unrelated to ballots (Nigeria);[17] an expensive race to finagle three or four judicial votes from panels of five or seven judges depending on the country or office in dispute (Nigeria; Uganda; Ghana; Kenya); [18] or a diplomatic debacle in which disputants for office are persuaded to split their differences at the risk of mass slaughter (Kenya, Sudan, Zimbabwe).[19] Whichever option it is, they have become tools for affording a veneer of public legitimacy to fundamental illegalities or what Cheeseman has called "democratic breakdowns". [20]At the end of 2009, the African Governance Report concluded with rather remarkable understatement that "elections have yet to be free and fair in most African countries."[21]

Mamdani is on strong grounds, therefore, in asserting that "[i]f we are interested in bringing the violence to a stop, we should be interested not just in crime and punishment but, more so, in political reform."[22] Political reform in this sense is a struggle against power and entrenched interests. Political reform in this sense must be seen as part of of a programme of accountability not an alternative to it. Establishing mechanisms of political accountability within a capable state is thus an essential element of an effective accountability regime in Africa. The elements of reform required for sustainable response to atrocity violence require attention. To appreciate that, one other issue is important: memory.

Memory and Forgetting

Memories of suffering are short in much of Africa. African citizens are descendants of several generations of victims of mass atrocities for which there has hardly ever been acknowledgement, not to speak of accountability. It is possible to suggest that the absence of memories of accountability sustains a tradition of impunity for atrocity. Records of impunity for mass atrocity against Africans have some antiquity and very much pre-date the postcolonial State.

The slave trade commodified Africans, treating them as no worse than chattels of very cheap value. Concentration camps were invented in Africa during the Boer war at the end of the 19th Century before it travelled through the operations of the US in the Philippines back down to Nazi Germany. Contemporaneously, Belgium's King Leopold II converted the Congo into one massive plantation killing field. One witness described atrocities in Leopold's Congo Free State as "positively indescribable….estimates of the death toll range from 5 million to 15 million and historians have compared the atrocities to actual genocide."[23] In 1904, the British Consul, "Roger Casement, delivered a long and detailed eye-witness account",[24] confirming horrific details of the life in Leopold's Congo. In 1908, the year before Leopold's death, the Belgian Parliament, finally driven by European outrage, voted to expropriate Congo from King Leopold, transferring ownership instead to the country. This did little to end the colonial atrocities in The Congo. Contemporaneously, following the rebellion of the Herero against German rule in 1904, Germany embarked on a campaign of extermination in which "Herero were massacred with machine guns, their wells poisoned and then driven into the desert to die" in what has become recognised as the first genocide of the 20th century.[25] In 1935, Benito Mussolini invaded Abyssinia (Ethiopia). In a brief and brutal campaign for territory, troops under his command attacked Ethiopians with chemical weapons gassing and killing an estimated 300,000-600,000 persons. Haile Selassie described what happened in his 1936 "Appeal to the League of Nations" as follows:

> Towards the end of 1935, Italian aircraft hurled upon my armies bombs of tear-gas. Their effects were but slight. The soldiers learned to scatter, waiting until the wind had rapidly dispersed the poisonous gases. The Italian aircraft then resorted to mustard gas. Barrels of liquid were hurled upon armed groups. But this means also was not effective; the liquid affected only a few soldiers, and barrels upon the ground were themselves a warning to troops and to the population of the danger. It was at the time when the operations for the encircling of Makalle were taking place that the Italian command, fearing a rout, followed the procedure which it is now my duty to denounce to the world. Special sprayers were installed on board aircraft so that they could vaporize, over vast areas of territory, a fine, death-dealing rain. Groups of nine, fifteen, eighteen aircraft followed one another so that the fog issuing from them formed a continuous sheet. It was thus that, as from the end of January, 1936, soldiers, women, children, cattle, rivers, lakes and pastures were drenched continually with this deadly rain. In order to kill off systematically all living creatures, in order to more surely poison waters and pastures, the Italian command made its aircraft pass over and over again. That was its chief method of warfare.[26]

This happened notwithstanding that the 1925 Geneva Protocol to the Hague Conventions of 1907 contained an international "prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare." Elsewhere in Africa, from Kenya to Namibia, the colonial era reveled in egregious atrocities against "natives". In her study of colonial Kenya, Caroline Elkins concludes that "an integrated reading of all the sources – written, oral and visual – yields an astonishing portrait of destruction... I now believe that there was in late colonial Kenya a murderous campaign to eliminate Kikuyu people, a campaign that left tens of thousands, perhaps hundreds of thousands, dead."[27]

This pattern of slaughter was facilitated by a bureaucratic and institutional system that was comfortable with and facilitated the idea that the African was expendable. The postcolonial system was established on this foundation and did nothing to reform it. It bears acknowledging that the history of Africa's regional human rights system lies in a history of permissive attitude towards mass atrocities to which the postcolonial state succeeded. Viljoen reflects that the most significant impetus for the adoption of the Charter was "a long list of human rights abusers who were at best ignored and at worst embraced by the OAU, including Idi Amin in Uganda, Emperor Bokassa in the Central African Republic, and Macias Nguema in Equatorial Guinea."[28]By the time the postcolonial state was established, ironically, there was already a very well established tradition of treating the African as a non-person or an object. This was to be the basis for the early indifference of postcolonial African governments to gross violations of human rights.

When between 1978 to 1979 this indifference led to the overthrow of the governments of Idi Amin Dada in Uganda, Macias Nguema in Equatorial Guinea, and Jean-Bedel Bokassa in Central African Republic, it became evident that this attitude had passed its sell-by date.

Arguments over the relative merits and demerits of the ICC seem to have displaced any commitment to or respect for the lesson of memory. At the beginning of his *Book of Laughter and Forgetting*, Milan Kundera reminds us that "[t]he struggle of man against power is the struggle of memory against forgetting."[29] There is a corollary to this in law: there is no time bar to or prescription for crimes of atrocity. Those who work for accountability for atrocity crimes in Africa must, thus, take a long view. As a long term policy issue, history needs to be resuscitated as a subject of study in schools. In the short term, one idea that could usefully be explored is an Africa Atrocity Archive.

Regional System for Protecting Human Rights: Origins of African State Practice and Institutions on Accountability

The obligations subscribed to or recognized by African countries in the field of accountability for mass atrocities have evolved since the emergence of the postcolonial African State, the formation of the African Union (AU) and its predecessor, the Organization of African Unity (OAU). This evolution is tied closely with shifts that have occurred in the practice of African States with respect to the doctrines of sovereignty, domestic jurisdiction and non-interference in the affairs of African States. It is not proposed here to undertake a full mapping of the contours of this evolution. But some landmarks are noteworthy.

The African Charter on Human and Peoples' Rights acknowledges its peculiar origins in a history of mass atrocities in three ways. First, Article 23(1) of the Charter uniquely guarantees a right to "national and international peace and security." Second, Article 26 of the Charter obliges African States to "guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." Third, Article 58 provides for special procedures for dealing with situations of "serious and massive violations" of human rights, or what would in effect be atrocity situations. In reality, these essential provisions for precluding atrocity crimes in Africa have for the most part not worked as envisaged.

At the national level, self-serving leaders have subverted effective institutions triggering conflicts with atrocity consequences. At the continental level, Nigeria's former Foreign Minister, Bolaji Akinyemi, suggested that the early practice of the OAU indicated that, in relation to civil wars and mass atrocity situations, the OAU mostly undertook discussions, resolutions and committee work within the constraints of its self-defeating doctrine on non-intervention.[30] The International Panel of Eminent Persons (IPEP) constituted by the OAU to investigate the Rwanda Genocide complained in its report that "the OAU Charter is categorical about the sovereignty of member states and about non-interference in their internal affairs",[31] noting with resignation that efforts to confront conflicts, violations or atrocities were "complicated by the need to work within these strict guidelines."[32]

Historically, the practice of African States has, however, been mixed and does not lend itself to any single interpretation or to any generalisations. In the Nigerian Civil War, Tanzania, Cote d'Ivoire and Gabon, among others, recognized Biafra as part of a response to what they considered atrocities in those countries – at a time when more established democracies were unwilling

to do so. Tanzania's Julius Nyerere declined recognition to the notorious government of Idi Amin in Uganda, acting unilaterally first to bring down the East African Community in 1977 and later to overthrow Amin's government in 1978.[33]

In the wake of mass atrocities in the Central African Republic, Equatorial Guinea and Uganda, leading to unilateral intervention by different actors to overthrow the governments of all three countries between 1978-1979, a significant shift in the OAU's doctrinal position with respect to gross violations of human rights took place. In 1979, the OAU authorised a mission of investigation to Bangui, capital of the Central African Republic, to investigate alleged massacres of children on the orders of Emperor Bokassa.[34] The mission's report was later tabled by Senegal at the OAU summit in Monrovia, Liberia in the same year. Despite some opposition, a coalition of states led by Senegal's Leopold Senghor and Uganda's Godfrey Binaisa (who had just been installed as Uganda's President at the end of another period of mass atrocities) prevailed in ensuring that the report was considered by the Summit.[35]

At the same Summit in 1979 also, the Assembly of Heads of State and Government of the OAU for the first time clearly drew a link between human rights and economic development in Africa when it acknowledged for the first time in 1979 that a political regime that protects fundamental human rights was indispensable for Africa's development.[36] At the suggestion of Senegal's President Leopold Senghor,[37] the Assembly adopted by consensus a resolution reaffirming "the need for better international cooperation, respect for fundamental human and peoples' rights and, in particular, the right to development,"[38] and requesting the Secretary-General of the OAU to "organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an 'African Charter on Human and Peoples' Rights', providing, *inter alia*, for the establishment of bodies to promote and protect human and peoples' rights."[39]

These normative developments were reinforced by developments in the field of regional peace and security. Also in 1979, under the Lagos Accord negotiated at Nigeria's instance between eleven warring factions in the Chadian conflict, Nigeria unilaterally deployed a peace keeping operation in the country, later to be succeeded by an OAU force under Nigerian command.[40] Between 1978 and 1981, sixteen West African States, under the auspices of ECOWAS, concluded two Protocols respectively on Non-Aggression and Mutual Defence, enabling the deployment of regional enforcement action by the Community.[41]

Addressing the Ministerial conference on the negotiation of the African Charter on Human and Peoples' Rights in Banjul, Gambia, in 1980, Gambian

President, Dauda Jawara, acknowledged the dawn of a new era in the OAU's disposition as follows:

> It is unfortunate that we in Africa have tended, for too long, to overstate the principle of non-interference in the affairs of other African States in relation to violations of human rights, when it is obvious that the question of human rights should be of universal concern and not only of that State within whose borders the gross violations are allegedly occurring. In this context, it will be recalled that at the Monrovia Session, the Heads of State and Government, without dissent, specifically requested the group of legal experts to provide for the establishment of bodies to promote and protect human and peoples' rights. We believe that implicit in that request is the desire to make gross violations of human and peoples' rights in any African State a matter of concern for all Africans.[42]

The OAU adopted the Charter in June 1981 and it entered into force five years later in October 1986.[43] The adoption of the African Charter on Human and Peoples' Rights in June 1981 crystalised this shift but failed to create any effective mechanisms behind it. Following the entry into force of the Charter in 1986, the establishment of the African Commission in 1987, and the collapse of the Berlin Wall in 1989, the OAU in 1990 adopted the Cairo Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World in which member States, among other things, committed themselves respectively, as a political objective, to establish "a political environment which guarantees human rights and the observance of the rule of law",[44] and declared themselves "equally determined to make renewed efforts to eradicate the root causes of the refugee problem."[45] Today, as when this Declaration was adopted, conflicts and mass atrocities remain the major cause of the refugee problem in Africa. To bolster the commitments embodied in the Declaration, the OAU established a Conflict Resolution Mechanism in 1993.[46] The implications of these commitments for the elimination of mass atrocities in Africa were to be put to test in the Rwanda Genocide and the Liberian Conflict.

Rwanda

The OAU began its involvement in the Rwanda crisis in 1990, three years before the establishment of any formal mechanism within the organization for managing such situations and nearly four years before the onset of the Rwanda genocide. In this, it deployed the full array of its "methods common to such interventions ….a ceasefire agreement, followed by observation, consultation, mediation, and conciliation at the level of regional Heads of State."[47] As described by the IPEP Report:

> The priority of the mediators was to stop the civil war and forge agreements that would bring key players together. That way, they reasonably assumed, the uncivil war against the Tutsi would end. As a result, no direct action was taken against those conducting the anti-Tutsi pogroms with the support of the inner circle around President Habyarimana. Perhaps, no action was in fact possible. But the result was an excellent agreement that had little chance of being implemented.[48]

The major reason for this failure, in the analysis of the IPEP was the failure of moral leadership among African leaders to call the extermination of the Rwandese Tutsi by its proper name. Again in the words of the IPEP:

> Throughout April, May, June, and July, the OAU, like the UN, failed to call genocide by its rightful name and refused to take sides between the genocidaires (a name it would not use) and the RPF or to accuse on side of being genocidaires. …Under the circumstances of the time, this Panel finds that the silence of the OAU and a large majority of African Heads of State constituted a shocking moral failure. The moral position of African leaders in the councils of the world would have been strengthened had they unanimously and unequivocally labeled the war against the Tutsi a genocide and called on the world to treat the crisis accordingly.[49]

In effect, the IPEP called on the OAU to jettison its pre-existing doctrine and practice, especially in the face of mass atrocities. The views of the IPEP appear to have had an influence on the later conduct of the OAU and its member States generally and, in particular, in relation to the situation in Liberia.

Liberia

Regional response to the onset in 1989 of the Liberian conflict began in 1990 through the Economic Community of West African States (ECOWAS), under the leadership of Nigeria. Invoking the ECOWAS Mutual Defence Protocol, member States of the Community inserted a regional peace enforcement deployment – the ECOWAS Monitoring Group (ECOMOG) – into Liberia in October 1990. ECOMOG stabilized the major fronts in the conflict but, without progress in any direction, the warring factions began splintering, leading to a break down in command and control structures and an escalation in atrocities against non-combatants. Serial ceasefires and peace agreements broke down, forcing ECOWAS to seek the political support of the OAU member States. At the instance of the OAU member States at the Yaoundé Summit of the OAU in July 1996, the OAU adopted a decision warning the:

> Liberian warring faction leaders that should the ECOWAS assessment of the Liberian peace process during its next Summit meeting turn out to be negative,

> the OAU will help sponsor a draft resolution in the UN Security Council for the imposition of severe sanctions on them, *including the possibility of the setting up of a war crime tribunal to try the leadership of the Liberian warring factions on the gross violations of human rights of Liberians*.[50]

In a follow up to this decision, the ECOWAS Council of Ministers[51] and later the Summit of Heads of State and Government,[52] citing the "requisite goodwill" among the warring factions in Liberia, resolved in August 1996 to "invoke the OAU 1996 Resolution which calls for the establishment of a war crimes tribunal to try all human rights offences against Liberians." In their decision, the ECOWAS Heads of State specifically "condemned the crimes, atrocities and other acts by the Liberian fighters which violate the rules of armed warfare" and issued "a fresh warning to the factions to desist from such acts which are offensive to the international community", calling also on the "faction leaders to guarantee the safety of relief personnel in Liberia."[53] The ECOWAS Heads of State and Government subsequently transformed this into a summit level decision on "relating to Sanctions against persons who violate the ECOWAS Peace Plan for Liberia", embodying the Code of Conduct for the Members of the Council of State of Liberia.[54]

Liberia's Council of State was the ruling Council for Liberia under the Abuja Peace Agreement and its Chairperson, Ruth Sando Perry, was the Head of State. Under the Code of Conduct instituted by the ECOWAS Heads, "where a member or members of the Council are adjudged to be in breach of the provisions of the code of Conduct for members of the Liberian National Transitional Government (LNTG), and in particular, any act which impedes the implementation of the Abuja Agreement, appropriate steps shall be taken by the Chairman of ECOWAS", including the "establishment of a war crimes tribunal to try human rights offences against Liberians."[55] Implicitly, this decision committed Heads of State of ECOWAS potentially to the support of a possible trial of one of their peers. This was a quite significant development in inter-State relations in Africa. It is somewhat surprising that contemporary debates about accountability for mass atrocities in Africa are conducted without any memory of these developments or of the role that African institutions played in them.

The significance of these decisions was two-fold. First, the threat to invoke war crimes prosecution was directed by African Heads of State and Government at a class that included a sitting Head of State. Secondly, it marked the first time the OAU or any group of African leaders would use such a threat in support of peace negotiations or settlement. In effect, the OAU and ECOWAS in tandem used the threat of war crimes prosecution to force a peace settlement and transition from conflict and mass atrocities.

Normative Developments: The AU Peace and Security Council (PSC) Protocol

Article 58 of the African Charter contained the following dispositions:

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Until the establishment of the African Union, mechanisms for dealing with mass atrocities in Africa under the OAU Charter were mostly ad-hoc, ponderous and ineffectual in preventing these atrocities or mobilizing the kinds of committed responses needed to ensure thay did not recur.[56] It has thus been said that:

> While the [African] Commission's mandate has always extended to responding to mass atrocities or serious and massive violations in Africa, it has not always received habitual cooperation from states parties or regional institutions in doing so. Under the OAU Charter, the only organ that the Commission could liaise with in relation to such situations was the Assembly of Heads of State and Government. Ironically, this is also the organ whose members were most likely to be self-interested or deeply implicated in mass atrocities. Unsurprisingly, the African Charter's mechanism of response to such situations proved to be largely ineffectual.[57]

There were several reasons for this. Serving Heads of State, even as the "Chairman" of the Assembly of Heads of State and Government, were – not unnaturally – reluctant to request the Commission to investigate their peers. The Commission was unable to undertake effective investigations in territories affected by serious human rights and humanitarian emergencies as, in most cases, the safety of its personnel and assets could not be guaranteed by home governments.[58] In some of these situations, such as Malawi under Banda, the host countries refused to guarantee the safety of Commissioners. In some others, such as Chad, Rwanda, and the Democratic Republic of the Congo, developments proved to be too rapid for the Commission to respond adequately. Following Chad and Rwanda, the Commission established

its Special Rapporteur procedures. The first two to be deployed were on Summary, Arbitrary and Extra-judicial Executions and on Prisons and Places of Detention in Africa.

However, it is also the case that where the Commission undertook an investigation, such as in the situations in Zimbabwe and in Darfur, Sudan, the AU appeared to have failed to act swiftly enough on its reports.[59] Against this background, the AU in 2002 created a Peace and Security Council as "a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa."[60] Article 19 of the PSC Protocol provides:

> The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.

In effect, the mechanisms available to the Commission in response to situations of mass atrocities in the continent or of serious and massive violations are no longer restricted to Article 58 of the Charter. It has, therefore, been said that "the Protocol Relating to the Establishment of the Peace and Security Council of the African Union formalizes the responses of the continental institution to the crises of mass atrocities and serious and massive violations of human rights and the attendant instability in Africa."[61] They are now designed to address mass atrocities in the context of peace and security challenges in Africa. A former Chair of the African Commission on Human and Peoples' Rights, Emmanuel Dankwa, recalls his experience with this provision as follows:

> In 2004 PSC requested the Commission to "carry out an investigation into human rights violations' in Cote d'Ivoire" while it endorsed the UN Commission on Human Rights decision "to set up a Commission to investigate the human rights violations" that had been committed since the beginning of the crisis. The African Commission is damned for waiting "to be prodded into action on a matter of grave concern to the continent, while a UN body had already initiated action". The present writer testifies that long before that date, at the prompting of the Secretary of the Commission of an impending mission by the OAU, at the highest level, he wrote to the Secretary-General of the OAU about the Commission's eagerness to be part of the mission. And long before the UN Commission on Human Rights dreamt of its lauded decision, the Commission, with the intention of dousing the flame of conflict and violation of human rights in Cote d'Ivoire sent a mission to that country with the present writer as leader of the mission. Towards the realization of its objective, the Commission sent another mission to la Cote d'Ivoire.[62]

Complementarity: Regional and National

The preamble to the ICC Statute asserts that the Court "shall be complementary to national criminal jurisdictions." The essential foundation of international criminal justice in the Rome Statute of the ICC is complementarity. The Court can only admit a case if the state from which it originates is "unwilling or unable genuinely to carry out the investigation or prosecution."[63]

While the complementarity envisaged is with the states parties to the Statute, the architecture of the Rome Statute does not preclude complementarity between the ICC and regional mechanisms. Article 52(1) of the United Nations Charter expressly allows for "the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." The only substantive limitation on regional treaty making in international law is in Article 103 of the UN Charter which provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

These developments crystallized a substantial departure from the previous indifference of African countries to mass atrocities. By the turn of the century, the position of the OAU had evolved in all but name from non-interference through a condemnation of mass atrocities to a recognition that in some cases criminal prosecutions for mass atrocities could be warranted or justified in support of a strategic goal. In the course of these developments, it had established by decisions and resolutions several organs that breached its non-interference principle, including Mechanism for Conflict Prevention, Management and Resolution in 1993, with some role in dealing with gross human rights violations,[64] and a standing Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), which meets at the highest levels every two years and amongst whose goals are promotion of rule of law, human, citizenship and participation rights, the elimination of war crimes, crimes against humanity and genocide, and the promotion of ratification of both the African Court Protocol and the Statute of the International Criminal Court.[65]

It was, therefore, easy for the Constitutive Act of the African Union adopted in 2000 to embody new commitments mandating intervention where its predecessor, the OAU Charter established a rule of strict non-interference. Thus the Constitutive Act embodies new common political values, including

a sanction-backed prohibition against a right of the Union to intervene in "grave circumstances", such as war crimes, crimes against humanity and genocide.[66] In constituting a committee of eminent African jurists on the case of former Chadian President, Hissène Habré, in 2006, the AU Heads of State and Government clearly articulated a stand in favour of "total rejection of impunity",[67] and has repeatedly reaffirmed this commitment since then.[68] Concerning the scope of this commitment, the Committee in its report argued that "Hissène Habré cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly."[69]

This position is supported by the normative commitments of most African states. In particular, the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination[70] to the Pact on Security, Stability and Development in the Great Lakes Region,[71] the provisions of the chapter on genocide, war crimes and crimes against humanity apply irrespective of the official status of the suspect.[72] However, the AU has also expressed "strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace",[73] and urged strongly for complementarity between national, regional and international mechanisms of accountability for mass atrocity.[74] In its report, the CEJA had presaged this position by recommending the extension of the jurisdiction of the (then) proposed merged African Court of Justice and Human Rights to include criminal matters. In justifying this recommendation, it argued:

> The Committee discussed the prospects for the creation of the African Court of Justice and Human Rights based on the project to merge the African Court of human and People's Rights and The African Court of Justice. The Committee proposes that this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention against Torture….The African Court should be granted jurisdiction to try criminal cases. The Committee therefore recommends that the ongoing process that should lead to the establishment of a single court at the African Union level should confer criminal jurisdiction on that court.[75]

The Controversy over Immunities

Between 2004 and 2005, three African situations were referred to the ICC: Uganda and DRC were self-referrals while the Security Council referred the situation in Darfur. The referral of the Darfur situation was ultimately based on the report of an international investigation commission headed by Professor Antonio Cassese.[76] The role of African institutions in bringing this

about is not always investigated or acknowledged. The dominant narrative of a continent invested in granting impunity to its rulers is not born out by the evidence or records.

Let's illustrate with the situation in Darfur. It is often forgotten that at its 35th Ordinary Session in May 2004, the African Commission decided to "send a fact finding mission to Darfur to investigate reports on human rights violations in Darfur and to report back to it."[77] Led by the Chairperson of the Commission, the five-person mission deployed 8 – 18 July. In its report, it recommended, among other things that:

- the Government should accept the setting up of an International Commission of Enquiry, which would include international experts from the United Nations, African Union, Arab States, international humanitarian and human rights organisations with the following terms of reference:
- to investigate the role and involvement of the military, the police, and other security forces in the Darfur conflict, and to establish those responsible for committing war crimes and crimes against humanity, violation of human rights and international humanitarian law and ensure that they are brought to justice;
- to investigate the role of rebel movements, all armed militias, in particular the Janjawids, the Pashtun, the Pashmerga, and the Torabora, and to establish those responsible for war crimes, crimes against humanity and massive violation of human rights and international humanitarian law and ensure that they are brought to justice; and
- to rehabilitate the destroyed physical security infrastructure, and to suspend any police or security agents who are alleged to have been involved in the violation of human rights, pending the finalisation of investigations.

The Government should allow the International Commission of Inquiry unhindered access to the Darfur region to enable it to thoroughly investigate alleged human rights violations with a view of further investigating as to whether or not genocide has occurred.[78]

Indeed, in April 2005, the Commission adopted a resolution on the situation in Darfur which, among other things called "on the Government of The Sudan to cooperate fully with the Prosecutor of the International Criminal Court (ICC) in his investigation under the terms of the United Nations Security Council referral of the Darfur situation to the ICC, in order to investigate and bring to justice all persons suspected of perpetrating crimes of concern to the international community."[79] The resolution also appealed

to the UNSC to "continue monitoring the implementation of its resolutions on the Darfur, in particular the cooperation by the Government of The Sudan with the Prosecutor of the ICC."

Another issue that is worth addressing is the impression that African Heads of State always receive a free pass for mass atrocities. Among advocates for accountability, however, memories remain short. In Equatorial Guinea, Colonel Nguema Mbasogo put his uncle and former president, Macias Nguema, on trial in 1979. Following his conviction, President Nguema was put to death. Central African Republic sentenced Emperor Bokassa to death on 12 June 1987. This was subsequently commuted to life and then to 20 years in prison. He died in 1996, three years after being paroled in 1993.[80] In 1989, when he sought to return to Uganda, President Museveni forced Idi Amin to return to Saudi Arabia after he got as far as neighbouring Zaire (as DRC was then known). In response to the request by one of Amin's wives in July 2003 for President Museveni to accede to the return to Uganda of Amin, "the reply from the President was that if he returned, he would have to answer for his sins and face a trial for war crimes."[81] These positive developments made Africa one of the strongest supporters of the ICC supplying an early rush of ratifications for the court. In 2004, Uganda became the first country to refer a case to the Court. In 2006, however, a court in France indicted Rose Kabuye, a former Colonel in the Rwandese Army and Chief of Protocol to the President of Rwanda, in connection with the 1994 genocide in Rwanda. In response, Rwanda sponsored a debate at the AU on the "Abuse of Universal Jurisdiction".

The year 2008 would prove to be a watershed year of rupture between Africa institutions of international criminal accountability. In Sharm-El-Sheikh in June 2008, the AU adopted a decision in which it deplored the "abuse of the Principle of Universal Jurisdiction" as "a development that could endanger International law, order and security."[82] The decision further complained that the "abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations" and requested for a meeting with the European Union to address this issue. Five months later, in November 2008,while this request was pending, Germany, acting on the French indictment, arrested Colonel Kabuye in in November 2008 in Frankfurt, where she had gone to prepare for a state visit by President Kagame to Germany. Earlier in May the same year, Jean-Pierre Bemba, a Congolese Senator and contestant in the Presidential elections in the DRC had been arrested in Belgium on an arrest warrant issued by the ICC. In the same year, the ICC opened an investigation into President Omar

Al-Bashir of Sudan, leading to his indictment in March 2009 for war crimes and crimes against humanity.

In response, on 1 July 2009, the Assembly of Heads of State and Government of the AU at the conclusion of its Summit in Sirte, Libya, decided that "AU Member States shall not cooperate …in the arrest and surrender of President Omar al-Bashir of The Sudan." In a press release issued two weeks later, on July 14 2009, the Organisation explained that this decision "bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonised approach to justice and peace, neither of which should be pursued at the expense of the other".

At the AU Summit in Malabo, Equatorial Guinea, of June 2014, the AU adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46Abis which provides that: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

On immunities, international law does not speak with one voice and all formulations must grapple with the profound doctrinal and political difficulties. For the moment, three points may be underscored. First, with regard to the doctrinal issues, there is no immunity from jurisdiction, responsibility or prosecution for anyone under international law for crimes of atrocity. This is also why there is no prescription or limitation for prosecution of crimes of atrocity. However, customary international law clearly recognizes a rule of functional immunity for sovereigns and the provisions on immunities in the ICC Statute are mutually contradictory. Article 27(1) of the ICC Statute itself is very carefully worded. It reads:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence

A little-noticed provision in Article 89(1) of the ICC Statute reads: "States Parties shall, in accordance with the provisions of this Part and *the procedure under their national law*, comply with requests for arrest and surrender."[83] What does a domestic court do where it is faced with a surrender or transfer request for a Head of State who, under its domestic law, enjoys immunity? Article 98(1) further provides:

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

Dapo Akande has suggested that there is a "tension between Art. 27 and Art. 98 of the Rome Statute on the question of immunity. I have argued elsewhere that the only way to give meaningful effect to both provisions is to interpret Art. 98 as requiring the ICC and national authorities to respect immunities accruing to non-parties. On the other hand, Art. 27 is to be taken as removing immunities accruing to ICC parties."[84]

Second, however, the scope of this most recent Protocol, however, potentially goes beyond Heads of State to cover "other senior state officials based on their functions." This is new and rightly objectionable. In explaining this decision, the report of the Specialised Technical Committee that finalized the Protocol said:

> delegations raised concerns regarding extension of immunities to senior state officials and its conformity with international law, domestic laws of Member States and jurisprudence, underlining the challenges inherent in widening immunities, and especially considering the lack of a precise definition of "*senior state official*", as well as the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials. After exhaustive deliberations, taking into consideration the relevant Decisions of the Assembly of the Union, and appreciating that senior state officials are entitled to functional immunities by virtue of their functions, the meeting resolved that Article 46A*bis* should include the provision "senior state officials based on their functions." The meeting further resolved that interpretation of "senior state official" would be determined by the Court, on a case-by-case basis taking their functions into account in accordance with international law.[85]

The ensuing controversy over this provision in the new Protocol has overshadowed the many significant developments introduced by the Protocol. For instance, it makes Africa the first regional system to establish a criminal competence for atrocity crimes; the Defence Office in this system is a distinct organ of the Court; and it recognizes and punishes corporate responsibility for atrocity crimes. Like all institutions, however, this experiment is imperfect and will need time both to prove itself and to be improved.

Thirdly, there remain practical political constraints on the rendering of a sitting Head of State who remains in effective control of power and enjoys electoral legitimacy. In their comprehensive study on *Prosecuting Heads of State*, Ellen Lutz and Caitlin Reiger rightly point out that "the waxing and waning of political fortunes still dominates the extent to which former leaders are held judicially accountable for their crimes at all."[86]

Avoiding the Regime Change Narrative: Understanding Africa's Rupture with the ICC

It remains important to understand the reasons for the rupture between Africa and the ICC. It has been suggested that this was mainly a response by African Heads of State to the Bashir indictment and that Africa's political leaders are mainly concerned with "protecting themselves from prosecution."[87] Such a position grossly underestimates the extent of the ICC's crisis of credibility in Africa. The extent of the shift in attitudes towards the ICC is evident in the fact that many of the candidates for the Presidency of the Assembly of States Parties in 2014 ran an ICC-sceptic campaign. This would have been unthinkable 10 years ago. What has happened?

To begin with, in terms of factual sequence, the first community of people to fall out of affection with the ICC in Africa were not Presidents or Prime Ministers but victims. In 2009, this writer had warned that:

> Victims now seem to be the people paying the highest cost for international justice. They suffer threats of death, exile, and other forms of persecution for their commitment to justice with little protection, assistance or acknowledgement from governments or international institutions. I have heard claims that those who express uncertainties about the work of the ICC in Africa may have been purchased by powerful enemies of justice. This makes victims seem expendable and discredits their well-founded fears as dubious. They are neither. Most victims need reassurance that when the neighbourhood mass murderer arrives their only defence is not the promise of a warrant from a distant tribunal on thin resources. They are right in asking that the promise of justice should be accompanied by credible protection from reprisals.[88]

Second, beginning with the execution of the Bemba arrest warrant, the ICC had become a factor in African contests for power. As such, it became fair game in political contests. In a continent in which contests for power mobilize ethnic and other narrow identities, the ICC easily became an instrument to be mobilized or denounced along these narrow terms. In Cote d'Ivoire, DRC, Kenya, Sudan and arguably Central African Republic, the ICC became a dispositive and partisan factor in determining the outcome of elections.

With respect to the Bashir indictment, thirdly, the major issue for most African States was not the fate of President Bashir but the consequence for regional peace and security. The reasoning, as I explain elsewhere, was as follows:

> The execution of the warrant without an adequately managed transition could create a power vacuum in Khartoum, unleashing destabilising tremors beyond Sudan's borders. Consequently, all nine countries that share a border with

> Sudan are on a war footing. Without a government for two decades, nearby Somalia is already a major destabilising factor in the region. Uganda's murderous Lord's Resistance Army, long supported by Khartoum and whose leaders are also wanted by the ICC, is re-grouping in vast ungoverned border territory between Sudan, Uganda and DRC. The 2005 'comprehensive' peace agreement (CPA) that ended Sudan's half century-long north-south war risks breakdown, while the Darfur crisis in western Sudan remains active. These uncertainties drive an undisguised arms race in the region. If the CPA collapses, many fear a transnational atrocity site like none this region has known.[89]

Fourth, the capabilities of the ICC has been somewhat overstated arguably to mask the fact that its sovereign enthusiasts have are unwilling to give it the means to match realize its true potentials. The States have been unwilling to give it the means to match the reach of footprint of the Court, while simultaneously saddling it with a crippling burden of expectations and dockets. For many States, the ICC represents cheap diplomacy without costs. Civil society support for the court in its most formative years was uncritical and slavish, creating the impression among the leading personnel of the Court that it could do no wrong. This probably led them to underestimate the extent of the challenges confronted and encouraged mistakes that would prove toxic to the perceptions and reputation of the institution.

Fifth, the Court has been short of the kind of support in strategic diplomatic and other assets that it needs. This kind of hypocrisy has a long history in international relations. In this respect, it is worth recalling Emperor Haile Selassie's lamentation in his Appeal to the League of Nations in 1936:

> What have become of the promises made to me as long ago as October, 1935? I noted with grief, but without surprise that three Powers considered their undertakings under the Covenant as absolutely of no value. Their connections with Italy impelled them to refuse to take any measures whatsoever in order to stop Italian aggression. On the contrary, it was a profound disappointment to me to learn the attitude of a certain Government which, whilst ever protesting its scrupulous attachment to the Covenant, has tirelessly used all its efforts to prevent its observance. As soon as any measure which was likely to be rapidly effective was proposed, various pretexts were devised in order to postpone even consideration of the measure.

Sixth, living out these enthusiasms, CSOs and academic advocates for accountability created a narrative of international justice in the Rome Statute that easily got international justice entrapped into being a tool for regime change by other means. The undue focus on Heads of State and immunities appeared to contradict the strident argument that the ICC was a non-political institution. The challenge was always how to make the case for removing a President who proves himself able to win elections. In heated domestic political

situations, therefore, it was easy to cast the ICC as a project of re-litigating losses in domestic political arenas before a foreign-controlled court. The effort to render the ICC as antiseptic has been patronizing, self-contradictory and not totally honest. Unsurprisingly, it has backfired.

Above all, quite clearly, the ICC was oversold. Promises by the pioneer Prosecutor to make accountability for atrocity crimes "sexy" were misplaced and ill-judged.[90] With an annual budget that has never much been over $160million and optimal staff strength of about 700, the ICC was always a court of very limited means. The burden of expectation on the court was far in excess of what this very limited institution could take. In this connection, it bears recalling that the *Mbeki Report* had argued quite strongly that the ICC's "prosecutorial policy leaves the overwhelming majority of individuals outside of the ICC system and still needing to answer for crimes they might have committed. Justice from the ICC exclusively would therefore leave impunity for the vast majority of offenders in Darfur".[91] It seems clear, therefore, that for the sake of the ICC and its credibility, it is necessary to look beyond the ICC in order to sustain the promise and project of accountability for atrocity crimes in Africa. To use a well-worn metaphor, the demand for accountability is well beyond the supply capabilities of the ICC.

Beyond the ICC: Evolving a Programme and an Agenda

The institutionalization of international justice is a project in progress. As with all such projects, it may experience reversals along the path of increments. That is not unusual. Africa's track-record on international justice is not susceptible to hasty generalization. The origins of Africa's challenges with grave crimes of mass atrocity are traceable to outrages committed by European countries on the continent for which there has been no acknowledgement or accountability and for which memories have been deliberately obliterated in historical record. These fed a narrative of African personhood as expendable. Bureaucratic and institutional mechanisms of colonial and postcolonial governments reinforced this. On the whole, however, despite early challenges, a close review of postcolonial state practice and institutional developments from the continent suggests that there has been considerable progress in establishing norms and practice against impunity for mass atrocities, which predate the establishment of the ICC. All sides would benefit from promoting adequate mechanisms of complementarity between the regional institutions in Africa, African States and the ICC.

This said, it should be acknowledged that the history and footprint of mass atrocities in Africa compels that the continent must look beyond the ICC but it cannot repudiate the Court. As an enterprise, international justice is much

bigger than the ICC. We must begin from first premises: the responsibility for protecting persons living in Africa and affording them justice and fairness lies primarily with African States. This is where we must begin the search for an agenda beyond the ICC. Suggesting that there has to be an agenda beyond the ICC does not, however, imply nor does it mean that the ICC should be irrelevant. Rather it means that there should be explicit recognition of burden sharing between Africa and the ICC as one institution that contributes to a more accountable world. Mindsets need to be adjusted: there are fallacies, illogics and unsustainable expectations inherent in treating the ICC as if it were a proxy for international justice. It isn't.

The burden of expectation on the ICC in fact encourages more irresponsible and unaccountable governments in Africa. A strategy for a more effective ICC must preserve it as a credible threat and an option of exceptional with a limited docket of demonstration cases on which it can concentrate limited resources for effective results. In a world of shrinking budgets, we must accept that there is a relationship of inverse proportionality between the size of the docket of the ICC and its effectiveness as a threat to impunity anywhere.

There is, however, no choice between national or regional mechanisms and the ICC. They're all part of a menu. Therefore, we need an agenda that works for Africa in order for the ICC to be relevant. That agenda, it is submitted, must begin with political and institutional reform in African countries. A lot has been said about reforming elections to make them more credible and reforming courts. African scholars and theorists also have to give more attention to reform of public administration. Just as importantly, we need to make national institutions for the protection of human rights work. One possible agenda that could emerge from here is how to make National Human Rights Institutions (NHRIs) relevant to the agenda of preventing mass atrocities in Africa.

Second, we must address the proclivity for short memories and the need for sustained memory on mass atrocities in Africa. It is worthwhile to consider here the idea of an Africa Atrocities Archive. Alex de Wall recalls a relevant story here to buttress this suggestion:

> When the Organisation of African Unity (OAU) was created in 1963, the Emperor Haile Selassie granted it land near Addis Ababa University. But the Africa's leaders were in a rush and didn't want to wait to construct their headquarters from scratch so they asked for the OAU secretariat to move into a ready-made set of buildings. They were given the police training college, and have been there ever since. Right next door to the college was located the city's central prison. Built by the Italians during their brief colonial occupation (1936-41), it was colloquially known as Alem Bekagn – "farewell to the world."

> During the Italian period, many Ethiopians who passed through its squat, square portal never saw the outside world again. When exercising in the small octagonal courtyard, surrounded by two tiers of cells, all they could see of the rest of the world was the sky. Hundreds of Ethiopia's educated and social elite were killed there in what was called the "Graziani massacre" after the Italian military governor of the day. In Haile Selassie's time – before and after the creation of the OAU – Alem Bekagn continued to house political prisoners, the great majority of whom did actually see the world outside after their spells in prison. During the revolutionary period and the rule of the Dergue – the Provisional Military Administrative Committee headed by Mengistu Haile Mariam, from 1974-91 – Alem Bekagn's name became grimly appropriate. In the first days of the revolution, sixty ministers were killed just outside the prison's front gate. In the days of the Red Terror, it was the site of countless extrajudicial executions. Thousands of political prisoners, and people merely suspected of harboring opposition sentiments, were crammed into the old prison and an expanding cluster of jerry-built barns in the compound. Alem Bekagn was the epicenter of Ethiopia's ruthless experiment in totalitarian rule. The building itself – low and ugly – was physically far smaller than its huge imprint on the psyche of a generation of Ethiopians.[92]

In 2004, the government of Ethiopia donated the site to the AU. On the tenth anniversary of the genocide, April 7, 2004, the AU approved a resolution jointly sponsored by Ethiopia and Rwanda, to turn the site into a permanent memorial for mass atrocities in Africa. This was widely welcome. But in 2005, the site was demolished to make way for the new Chinese-donated headquarters conference building of the AU. This history of the site of the AU headquarters makes places an even greater responsibility on the AU to ensure that such an archive is brought into existence. Until it is done, our obligation to memory remains to be fulfilled. In the short term, African intellectuals and researchers can begin mapping the archaeology, geographies and taxonomies of atrocities.

Third, legal research and anthropology is needed. Models of workable accountability are important. To begin with, African institutions could be taken a lot more seriously. It is not enough to simply dismiss them as unworkable or useless. If there is no demand on these institutions, they cannot prove themselves. The jurisprudence of African institutions as well as their practice thus needs better documentation and analysis. To begin this, we may wish to convene a closer examination of the new international crimes protocol to the African Court Protocol. Evidence-based advocacy is required. We also need to cultivate and grow the skills of Africa's legal and intellectual communities. This will require a knowledge creation and transmission agenda which African universities can lead on.

Such evidence-based advocacy will address the need to wean ourselves of some reflexes and habits. One of such reflexes is the idea that the ICC is able and African institutions are incapable. As institutions run by human beings, the first premise must be that all institutions as imperfect and mostly inward looking. Institutional theories and laws are about seeking mechanisms to perfect inherently imperfect institutions. Many institutions are not always created for the right or sustainable reasons. But every institution is an opportunity waiting to be seized. If everyone went along with writing off the African Commission on Human and Peoples' Rights in 1981, we would have no African Court on Human and Peoples' Rights nor indeed the regional courts and tribunals of the sub-regions of Africa.

Above all, we must not forget that mass atrocities are about human victims. As long as we continue to fixate on the politics, we miss what matters. We also miss the fact that victims will seek help from wherever they can get it. Such help is not always to see someone go to jail or hanged. There needs to be an agenda for how to amplify the voices of victims, ensure they have access to assistance and get across the message that it is not agreeable for people to suffer at the hands of those who govern them.

All these will not be done by one entity or institution. Nor do they require the same concentration or pool of skills. They do require, however, that we sustain conversations beyond a single forum and we find ways to seek mutual understanding and pathways beyond and complementary to the ICC. Zealotry of any hue diminishes this enterprise. Certainty about where it could lead to does not exist. We do need genuine partnerships though – between various disciplines, hemispheres, and points of view: partnerships built on mutual respect among a community of actors that can agree on ends but not always as to means.

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36. Monrovia Declaration of Commitment on the Guidelines and Measures for National Collective Self-Reliance in Economic and Social Development for the Establishment of a New International Economic Order", AHG/ST3 (XVI), July 1979, Preamble, para. 6
37. President Leopold Senghor had requested the drafters of the African Charter to "keep constantly in mind our values of civilisation and the real needs of Africa." "Address by President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/X, reprinted in Kunig P., Benedek W. & Mahalu C.R., eds., *Regional Protection of Human Rights by International Law: The Emerging African System*, 121 (1985).
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41. Under cover of these instruments, ECOWAS States deployed a regional monitoring group in the Liberian civil war in 1991, later backed by the UN Security Council. See, Weller M., *Regional Peace-keeping and International Enforcement: The Liberia Crisis*, (1994); Fatsah Ouguergouz , "Liberia", 2 *AYIL* 208 (1994)
42. Speech by His Excellency, The President of the Republic of The Gambia, at the OAU Ministerial Conference on Human and Peoples' Rights, Banjul 9-11 June, 1980, CAB/LEG/67/8, 7.
43. The Charter contains 68 articles organised in four chapters. Its normative guarantees are enunciated in articles 1-29; articles 30-62 contain institutional provisions, while the remainder contain general provisions relating to its adoption, ratification, entry into force, and amendment. For an account of the negotiating history of the Charter, see, Mbaye K., *supra*,, 147-160. Ouguergouz, *The African Charter, supra,*, 20-48; Ramcharan B., "*The Travaux Preparatoires* of the African Commission on Human and Peoples' Rights", (1992) 13 HRLJ. 307; Kannyo E., "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background", in Welch C.& Meltzer R., eds, *Human Rights and Development in Africa*, 128 (1984)
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49. *Ibid.*, paras 15.86-15.87
50. 64th Ordinary Session of the Council of Ministers of the OAU, 1-5 July, 1996, Resolution on Liberia, CM/Res. 1650 (LXIV), para 12 (italics supplied)
51. 8th Meeting of Ministers of Foreign Affairs of the ECOWAS Committee of Nine on the Liberian Crisis, Abuja 15-17 August, 1996, Final Report, para 32, reprinted in 22 *ECOWAS Official Journal,* 100 at 104.

52. 4th Meeting of the Heads of State and Government of the ECOWAS Committee of Nine on the Liberian Crisis, Abuja, 17 August 1996, Final Communiqué, para 13, reprinted in 22 *ECOWAS Official Journal*, 112 at 114.
53. *Ibid.*, para 28. Also rising from their meeting in Monrovia on 9 November 1996, ECOWAS Foreign Ministers "condemned the abuses, harassment and atrocities inflicted on the civilian population." See, 9th Meeting of Ministers of Foreign Affairs of the ECOWAS Committee of Nine on the Liberian Crisis, 8-9 November 1996, Final Report, para 67, reprinted in 22 *ECOWAS Official Journal, 121 at p. 130.*
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59. See African Commission on Human and Peoples' Rights, Zimbabwe: Report of the Fact-Finding Mission, DOC/OS(XXXIV)/346a (June 2002); African Commission on Human and Peoples' Rights, Report of the African Commission on Human and Peoples' Rights Fact-Finding Mission to the Republic of Sudan in the Darfur Region, EX.CL/364 (XI)Annex III (July 2004).
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70. Adopted in Nairobi, Kenya, 29 November 2006.
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