



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 realities 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 Dyilo*), 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 Ntaganda*), 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 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 Ngudiolu 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 acceding 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 Nouwen 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.

References

- Amnesty International, 2007, 'Rwanda: suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice'. AI Index: AFR 47/013/2007.
- Bakum, J.M., 2014, 'International justice: the international criminal court and Africa'. [n.p.]
- Cassese, A., 2007–2008, 'Clemency versus retribution in post-conflict situations', *Columbia Journal of Transitional Law* 46 (1): 1–13.
- Elgizouli, K., 2014, "'Sovereignty" no defence against ICC action in Sudan', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/kamal-elgizouli/%E2%80%98sovereignty%E2%80%99-no-defence-against-icc-action-in-sudan>, accessed 9 February 2014.
- Eltringham, N., 2004, *Accounting for Horror: Post-genocide Debates in Rwanda*. London: Pluto Press.
- Fofe Djofia Malewa, J.-P., 2006a, *La question de la preuve devant le Tribunal pénal international pour le Rwanda*, Paris: L'Harmattan.
- Fofe Djofia Malewa, J.-P., 2006b, *La Cour pénale internationale: Institution nécessaire aux pays des Grands Lacs africains*, Paris: L'Harmattan.
- Gaparayi, I.T., 2001, 'Justice and social reconstruction in the aftermath of genocide in Rwanda: the evaluation of the possible role of the Gacaca tribunals', *AHRLJ* 1 (1): 78–106.

- Haque, A.A., 2005–2006, 'Group violence and group vengeance: towards a retributivist theory of international criminal law', *Buffalo Criminal Law Review* 9 (1): 273–29.
- Hayner, P., 2014, 'Does the ICC advance the interests of justice?', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/priscilla-hayner/does-icc-advance-interests-of-justice>, accessed 9 February 2014.
- ICC, 2011, Rome Statute of the International Criminal Court, available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, accessed 9 February 2014.
- Kambale, P., 2014, 'Justice denied? The ICC's record in the DRC', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/pascal-kambale/justice-denied-icc%E2%80%99s-record-in-drc>, accessed 9 February 2014.
- Kersten, M., 2014, 'The ICC and its impact: more known unknowns', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/mark-kersten/icc-and-its-impact-more-known-unknowns>, accessed 9 February 2014.
- Kimenyi, M.S., 2014, 'The International Criminal Court in Africa: a failed experiment?', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/mwangi-s-kimenyi/international-criminal-court-in-africa-failed-experiment>, accessed 8 February 2014.
- Kindiki, K., 2001, 'Prosecuting the perpetrators of the 1994 genocide in Rwanda: its basis in international law and the implications for the protection of human rights in Africa', *AHRLJ* 1 (1): 64–77.
- Kingsley, M.C., 2002, 'The International Criminal Tribunal for Rwanda in perspective', Paper presented at the African Dialogue II Conference on 'Promoting Justice and Reconciliation in Africa: Challenges for Human Rights and Development', 24–26 May, available at <http://ictr-archive09.library.cornell.edu/ENGLISH/africandialogue/papers/KingsleyII.pdf>, accessed 30 October 2012.
- Mbata Mangu, A., 2015, 'The Bashir Case and Backpedalling on Human rights and the Rule of Law in Post-Mandela South Africa'. *African Journal of Democracy and Governance*, Vol 2, Nos 1 & 2, 179–200.
- Mue, N., 2014, 'The ICC mustn't give up in Kenya', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/njonjo-mue/icc-mustn%E2%80%99t-give-up-in-kenya>, accessed 9 February 2014.
- Mutabazi, E., 2014, 'The United Nations ad hoc Tribunals' effectiveness in prosecuting international crimes', Unpublished LLD Thesis, Pretoria: University of South Africa.
- Nouwen, S., 2014, 'The politics of impunity little impacted by the ICC', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/sarah-nouwen/politics-of-impunity-little-impacted-by-icc>, accessed 9 February 2014.
- Nyabirungu, M.S., 2013, *Droit international pénal*, Kinshasa: Editions Droit et Société.
- Petrasek, D., 2014, 'The ICC – breach in the dyke, or high water mark?', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/david-petrasek/icc-%E2%80%93-breach-in-dyke-or-high-water-mark>, accessed 9 February 2014.

- Ramanathan, U., 2014, 'The surprising impact of the Rome Statute in India', Open Democracy, available at <https://www.opendemocracy.net/openglobalrights/usha-ramanathan/surprising-impact-of-rome-statute-in-india>, accessed 9 February 2014.
- Schabas, W. A., 2011, *An Introduction to the International Criminal Court*. 4th edition, Cambridge: Cambridge University Press.
- Scharf, P.M., and Schabas, W.A., 2002, *Slobodan Milosevich on Trial: A Companion*, New York: The Continuum International Publishing Library Group.
- Scharf, P.M. and Schabas, W.A., 2002, *Slobodan Milosevich on Trial: A Companion*, New York: The Continuum International Publishing Library Group.
- Tejan-Cole, A., 2001, 'The Special Court of Sierra Leone: conceptual concerns and alternatives', *AHRLJ* 1 (1): 107–26.
- The AU Constitutive Act, adopted in Lomé, Togo, on 11 July 2000, available at <http://au.int/en/sites/default/files/Constitutive%20Act%20-%20Final.pdf>, accessed 10 February 2015.
- The Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights adopted in Ouagadougou, Burkina Faso, on 9 June 1998, available at <http://au.int/en/content/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-peop>, accessed 10 February 2015.
- The Protocol on the Statute of the African Court of Justice and Human Rights adopted in Sharm El-Sheikh, Egypt, on 1 July 2008, available at <http://au.int/en/content/protocol-statute-african-court-justice-and-human-rights>, accessed 10 February 2015.
- 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, 27 June 2014, available at <http://au.int/en/content/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>, accessed 10 February 2015.
- The Rome Statute of 17 July 1998 establishing the ICC (A/CONF 183/9).
- The Vienna Convention on the Law of Treaties, 1969.
- UN Charter of 1945 UN Security Council Resolution 827 of 25 May 1993 establishing the ICTY to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1 January 1991.
- UN Security Council Resolution 955 of 8 November 1994 establishing the ICTR to prosecute persons responsible for genocide in Rwanda from 1 January to 31 December 1994.
- UN Security Council Resolution 1315 of 14 August 2000 establishing the SCSL to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.
- UN Security Council Resolution 1593 (2005) of 31 March 2005, UN Doc S/RES/1593 (2005).

- Van der Wyver, J.D., 2011, 'Prosecuting the President of Sudan: a dispute between the African Union and the International Criminal Court', *AHRLJ* 11(2): 683–98.
- Waldorf, L. and Haskell, L., 2011, 'The impunity gap of the International Criminal Tribunal for Rwanda: causes and consequences'. *Hastings International and Comparative Law Review* 34 (1): 49–85.
- Wippman, D., 1999–2000, 'Atrocities, deterrence and the limits of international justice', *Fordham International Law Journal* 23 (2): 473–88.
- Zolo, D., 2004, 'Peace though law', *Journal of International Criminal Justice* 2 (3): 727–34.

ICC cases cited

- The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/04-01/07 & ICC-01/05-01/08).
- The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido* ICC-01/05-01/13.
- The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.
- The Prosecutor v. Francis Kirimi Muthaura* ICC-01/09-02/11.
- The Prosecutor v. Uhuru Muigai Kenyatta and Ali* ICC-01/09-02/11.
- The Prosecutor v. William Samoei Ruto, Joshua Arap Sang and Kosgey* ICC-01/09-01/11.
- The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)* ICC-02/05-01/07.
- The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.
- The Prosecutor v. Abdallah Banda Abakaer Nourain* ICC-02/05-03/09.
- The Prosecutor v. Abdel Raheen Muhammad Hussein* ICC-02/05-01/12.
- The Prosecutor v. Bahar Idriss Abu Garda* ICC-02/05-02/09.
- The Prosecutor v. Laurent Gbagbo* 2011.ICC-02/11-01/11.
- The Prosecutor v. Simone Gbagbo* ICC-02/11-01/12.
- The Prosecutor v. Charles Blé Goudé* 2011 ICC-02/11-02/11.
- The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11.
- The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 OA 13.
- The Prosecutor v. German Katanga* ICC-01/04-01/07.
- The Prosecutor v. Mathieu Ngudjolo Chui* ICC-01/04-02/12.
- The Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06.
- The Prosecutor v. Callixte Mbarushimana* ICC-01/04-01/10.
- The Prosecutor v. Sylvester Mudacumura* ICC-01/04-01/12.