



## **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 administrer 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.<sup>1</sup>

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,<sup>2</sup> and its second, two years later.<sup>3</sup> 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.<sup>4</sup> 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)<sup>5</sup> 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 Nuremberg, now commonly called 'Nuremberg Principles', have become a beacon in international criminal justice. The Nuremberg 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 Nuremberg Principles listed what crimes were punishable under international law and affirmed the right

of anyone accused of those crimes to a fair trial.<sup>6</sup> 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),<sup>7</sup> 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'.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> All of the special tribunals, howsoever called, created between 1993 and 2005, have helped to contribute to the jurisprudence of international criminal justice.<sup>11</sup>

### *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,<sup>12</sup> though it has been set up with the capacity to exercise jurisdiction over international crimes.<sup>13</sup> 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.<sup>14</sup>

### ***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,<sup>15</sup> 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.<sup>16</sup> 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<sup>17</sup> 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,<sup>18</sup> 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 Ouattara, 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.<sup>19</sup>

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.<sup>20</sup> 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?<sup>21</sup> Now that a case against British soldiers has found its way to the Court,<sup>22</sup> 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.'<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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'.<sup>26</sup> 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.<sup>27</sup> 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 it', 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](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 international 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/internacional\\_law/revista\\_1/cap.%203.pdf](http://www.javeriana.edu.co/juridicas/pub_rev/internacional_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. Article 17. 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 13<sup>th</sup> 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)'.  

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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 Guantanamo 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.

