International Criminal Justice in Africa

Challenges and Opportunities

Edited by Beitel van der Merwe

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ISBN: 978-9966-021-15-1

Typeset & Printing by:-
LINO TYPESETTERS (K) LTD
P.O. Box 44876-00100 GPO
Email: info@linotype.co.ke
Nairobi-Kenya

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Introduction

I.

This book contains a collection of papers authored by members of the Konrad Adenauer Stiftung's *African Group of Experts on International Criminal Justice*. The group was formed in 2010 under the auspices of the Multinational Development Policy Dialogue and the Rule of Law Programme of the German Konrad-Adenauer-Stiftung (KAS). The group meets on a regular basis to discuss matters related to international criminal justice on the African continent. The members of the group are drawn from various parts of Sub-Saharan Africa and are academics and legal practitioners with expertise in the field of international criminal law.

This book is the second of its kind and builds on the first, which was published in 2012 with the title *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa*.[1] Following in the footsteps of its predecessor, this publication provides contemporaneous and varied perspectives on important developments relating to the prosecution of international crime on the African continent.[2] To some extent, the publication may be viewed as reflective of the character of the modern, complementarity-centred international criminal justice system in that its focus falls not only on supranational (continental and regional) developments, but also on developments at state level within Africa.

1 Kai Ambos and Ottilia A. Maunganidze (eds) *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universitätsverlag Göttingen 2012).

2 As a result of a lengthy publication process, the contributions in this book do not reflect on those developments relevant to international criminal justice in Africa that occurred after June 2014.

It is impossible to write an introduction to a publication of this nature without making mention of the ongoing strife between the African Union (AU) and the International Criminal Court (ICC). Twelve years into its existence, the euphoria over the establishment of the world's first international and permanent criminal court has diminished in the face of the realisation that the ICC - like its institutional predecessors - faces severe limitations in reaching its objectives as set out in the Rome Statute. Broadly, these limitations are attributable to the fact that the ICC operates within the political confines of the anarchic international order wherein the 'swords of war and of justice' remain to a large extent '[...] annexed to […] Sovereign Power.'[3] The clash between the AU and the ICC serves as a prime example of the disruptive influence that power may at times exert on international criminal justice. The conflict seems unlikely to be resolved in the near future and will most likely continue to shape the future of international criminal justice in Africa. The circumstances surrounding the AU-ICC conflict have given rise to widespread misgivings and misconceptions regarding the role of the ICC and international criminal justice in Africa. In the midst of this, many have lamented the fact that the gap of impunity in respect of international crimes in Africa and the interests of the many victims of conflict and atrocity remain largely peripheral concerns.

The debate on international criminal justice in Africa is too often viewed as a binary conflict between those who are 'pro-ICC' (and therefore 'anti-Africa') or *vice versa*. This state of affairs is regrettable. First, it represents an oversimplification of the position of international criminal justice in Africa. Although the ICC may be viewed as the flagship institution of international criminal law, the province of international criminal justice does not belong exclusively to the ICC, but also – through, *inter alia*, the ratification and implementation of treaties on international criminal law and the exercise of extraterritorial criminal jurisdiction in respect of international crimes - to states themselves. Secondly, emotional and politicised debates detract from the more pertinent debate over how to maximize the potential that international criminal justice holds for the ideals of

[3] G Schwarzenberger, 'The problem of international criminal law' (1950) 3 *Current Legal Problems* 263-296.

peace and justice on the African continent, which for time being retains its tragic status as one of the world's most conflict-ridden regions.[4] This book successfully avoids emotional and/or politicised debates, but instead delves deeper and more carefully into the challenges and opportunities facing international criminal justice on the African continent.

What then, is the true state of affairs as regards international criminal justice in Africa? Should Africa be viewed as the 'experimental farm'[5] of the ICC? Does the ICC truly have an 'Africans only' indictment policy? It is not the first time that an institution of international criminal law has been accused of bias and selectivity. Will it be the last time?

Yet, many have paused to ask whether the criticism of the ICC from within Africa is truly merited. Many view such criticism as a smokescreen for powerful actors who stand to benefit from perpetuating the view that the ICC is a biased and Western-centric institution? Moreover, what of the interests of current (and future) victims of international crime and atrocity in Africa?

The questions above present only a few examples of the difficult questions surrounding the relationship between the project of international criminal justice and the African continent. To borrow from the concluding remarks of Gerhard Kemp in his contribution, the story of international criminal justice in Africa cannot be captured fully by way of a one-dimensional narrative:

> It is not a one-dimensional happy story. But it is also not a story of international criminal justice in decline. There are pockets of impunity, yes. But there are strong movements – international, regional and domestic – to end impunity. The devil is, as always, in the detail.

4 See *Armed Conflict Database* <https://acd.iiss.org/> accessed 30 September 2014.

5 CC Jalloh, 'Africa and the International Criminal Court: Collision course or cooperation' (2012) 4 *North Carolina Central Law Review* 203.

In his contribution, ***Gerhard Kemp*** (Professor of Law, Stellenbosch University, South Africa), 'takes stock' of international criminal justice in Africa by bringing together three important and contemporaneous developments at global, regional and domestic levels. The contribution reflects on the complexities of the relationship between the ICC and Africa; the proposal for the establishment of an 'African Criminal Court'; and the obligations of states under the United Nations Torture Convention[6] as interpreted by the International Court of Justice (ICJ) in *Belgium v Senegal*.[7]

Looming large on the horizon of international criminal justice in Africa is the proposed establishment of a criminal chamber in the African Court of Justice and Human Rights with jurisdiction in respect of, *inter alia*, genocide, crimes against humanity and war crimes. One could speculate that the establishment of a regional criminal justice mechanism might have been viewed as an overwhelmingly positive development for international criminal justice in Africa, were it not for the contextual background that has led to the proposal for it to be established. As it is, the proposed criminal chamber is surrounded by some controversy.[8]

The contribution of ***Evelyne Asaala*** (School of Law, The University of Nairobi) provides an overview of the debate surrounding the creation of an African criminal court. Should it be viewed as a challenge to, or an opportunity for international criminal justice in Africa? The contribution also contains a number of recommendations to the AU regarding the establishment of the proposed criminal chamber.

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6 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 24 *International Legal Materials* 535.

7 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ, 20 July 2012.

8 The integrity of the proposed court is especially called into question by the immunity clause for serving heads of state and senior government officials, which was adopted by the AU in May 2014. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides, art 46A*bis*:

> No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

As mentioned, a holistic appraisal of international criminal justice in Africa must turn its attention also to developments at the domestic level, especially so in the complementarity-centred ICC-era of international criminal law. The ability and willingness of states to incorporate international crimes into their domestic law; to empower domestic actors and legal institutions; and, to cooperate with the ICC and other states, is crucial for the success of the project of international criminal justice not just in Africa, but the world over. In this regard, this book also contains two contributions offering domestic perspectives on international criminal justice from within Africa.

The contribution of ***Ottilia Anna Maunganidze*** (Researcher on international criminal justice and counter-terrorism in the Transnational Threats and International Crime Division of the Institute for Security Studies) offers a critical perspective on the potential for the domestic prosecution of international crimes through the International Crimes Division of the High Courts of Uganda, which was established to investigate, prosecute and adjudicate international crimes by way of Uganda's International Criminal Court Act of 2010. Her contribution highlights some of the challenges and prospects associated with prosecuting international crimes in Uganda.

Finally - and also on the domestic front - the book turns to the situation in Nigeria, which is one of several countries currently under preliminary examination by Office of the Prosecutor of the ICC (OTP).[9] In his contribution, ***Benson Olugbuo*** (Programmes Manager, Centre for Democracy and Development, Abuja, Nigeria), investigates the ability of the Nigerian domestic legal system to complement the ICC in the investigation and prosecution of international crimes. In particular, his contribution reflects critically on a Draft Bill aimed at the domestic implementation of the Rome Statute in Nigeria.

[9] According to the OTP there is a reasonable basis to believe that crimes against humanity have been committed in Nigeria <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx> accessed 28 September 2014.

II.

I wish to thank, first and foremost, the Konrad-Adenauer-Stiftung for its generous support of the *African Group of Experts on International Criminal Justice* and, more generally, for the cause of justice and peace in Africa.

Secondly, but no less important, I wish to thank all the authors who have contributed to this book for their hard work and patience.

I extend a special word of thanks to the KAS Rule of Law for Sub Saharan Africa team of Dr. Arne Wulff (Director) and Mr. Peter Wendoh (Project Advisor) for their guidance and invaluable assistance in coordinating the project.

Beitel van der Merwe
Cape Town, September 2014

Taking Stock of International Criminal Justice in Africa – Three Inventories Considered

Gerhard Kemp*

Abstract

Current affairs, by their nature, have a tendency to often overshadow broader and deeper developments that are best evaluated in terms that are perhaps not so dramatic but arguably more nuanced, and reasonable. This contribution attempts to provide a reasonable evaluation of the state of affairs in Africa with respect to international criminal justice. In a sense it is a snapshot, but the evaluation is done within a certain historical and jurisprudential context. Three areas of development are considered, namely the International Criminal Court and in particular the relationship between the ICC and Africa, regional developments, and finally, the application of international criminal law at domestic level.

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1 The Task at Hand

The past two years turned out to be opportune for stocktaking and a holistic evaluation of the international criminal justice project. The obvious (but not exclusive) focus point for any discussion and critical reflection in this regard is the International Criminal Court (ICC). 2012 marked the tenth anniversary of the entry into force of the Rome Statute of the International Criminal Court, 1998. And, by coincidence (presumably not design) the ICC was able to deliver its first verdict (in *Prosecutor v Lubanga*) a decade after the entry into force of the Rome Statute.

The evolving system of international criminal justice consists of more than just the ICC. This is not to say that the ICC is not, in many important respects, one of the most prominent (if not *the* most prominent) symbol and actual manifestation of international criminal justice. However, developments during the past two years reminded us that, while the ICC is indeed important, it is not the whole story.

During the course of 2012 the International Court of Justice (ICJ) delivered judgment in *Belgium v Senegal* (Questions relating to the obligation to prosecute or extradite), thus reminding us of one of the oldest enforcement mechanisms in international criminal justice: *aut dedere, aut judicare*. Indeed, this enforcement regime (with its normative roots in the idealised vision of the international community as *civitas maxima*) is relevant even in the age of international criminal tribunals.

South Africa's (long overdue) promulgation of the Implementation of the Geneva Conventions Act, 2012, serves as confirmation of the continued

importance of the implementation and enforcement of international criminal law at domestic level; and the co-operation between states as concomitant enforcement regime.

During 2013 South Africa also expanded its ability to investigate and prosecute the crime of torture, which is arguably the most important of the international crimes that do not as yet fall under the jurisdiction of any international criminal tribunal or court as a distinct crime.[1] The Prevention and Combating of Torture of Persons Act 13 of 2013 entered into force on 29 July 2013. The aim of this statute is to give effect to South Africa's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Prevention of Torture Act furthermore provides for the offence of torture of persons and other offences associated with the torture of persons. It also provides for an enforcement framework to prevent and combat the torture of persons within or across the borders of South Africa.

While the past two years can be regarded as a good time to reflect on the importance and value of the ICC, a potential counterpoint in the form of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights for the creation of a so-called *criminal chamber* with jurisdiction over crimes under international law and other transnational crimes, may yet serve to illustrate the volatile nature of international criminal law and politics. A whole number of issues are raised in the context of the so-called criminal chamber, notably: the scope of substantive and enforcement jurisdiction (including the relationship between the African court and other international courts and national courts); privileges and immunities of officials of the African court; applicable law; institutional issues and relationship with the African Union and the United Nations, and so on.

[1] Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 110. The other notable crimes in this category would include terrorism and aggression, although the position regarding the latter might change due to the adoption of a definition and conditions for the exercise of ICC jurisdiction over the crime of aggression at the Kampala Review Conference in 2010.

Given the above mentioned, and other developments, I want in this contribution to ponder the possible role of three developments that affect the international criminal justice project on the African continent. First, and by way of introduction, I want to highlight the importance of the ICC on this continent. The number of states party, the cases and situations, the position of the Prosecutor, and the debates about issues such as positive complementarity all serve to remind us that the ICC is, in a very real sense, an *African* court as well. My thesis is that the ICC is not anti-Africa; nor is it a European or imperialist project.

Second, I want to touch on the possibility of a developing regional criminal law co-existing and complementary to an international criminal justice system dominated by the ICC. Here one can look at the way other regional criminal justice systems (like, for instance in Europe) has developed systems that address regional priorities and protected interests (for instance the financial resources and budget of the Union, the environment and so on). Third, the importance of domestic application of international criminal law will be emphasised. The assumption is that the international criminal justice system functions optimally when international criminal law is implemented and enforced at domestic level. This thesis will briefly be illustrated with reference to a number of important developments, like the incorporation of the Geneva Conventions in South Africa as well as important cases such as the judgment in *Southern Africa Litigation Centre v National Director of Public Prosecutions* (2012) in a South African high court; and eventually also the Supreme Court of Appeal (2013).[2]

Given these three themes (the ICC, regional developments, and application of international criminal law at domestic level), the contribution will conclude with a prognostic view of international criminal law on the African continent in the next decade or so.

[2] The matter has since been argued before the Constitutional Court of South Africa (*National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and others*). The expectation is that the judgment by the Constitutional Court will provide a clear standard for the police to conduct investigations into international crimes (including torture as a crime against humanity) committed beyond the borders of South Africa.

2 Africa and the International Criminal Court

To say that the relationship between Africa and the ICC is complex is probably an understatement. It also assumes a kind of monolithic view of 'Africa'. For present purposes I will simply use 'Africa' in the geographical sense, and not to imply that there is a single African view of the ICC. I also do not equate 'Africa' with the African Union. This is not to say that the latter is not an important role player – but more on that in part III below.

Discussions about the relationship between Africa and the ICC often (if not always) start with the factual observation that all the current situations and cases before the ICC are from Africa. In the words of Chris Black, this 'basic factor, more than any other, seems to have irritated the Court's African critics the most.'[3] Simplistic rhetoric is not helpful. A more nuanced *factual* analysis of the reasons for the current state of affairs in terms of the situations and cases before the ICC is called for. Indeed, it was pointed out that, although the current situations and cases before the ICC are all from Africa, the prosecutor is not exclusively concerned with African matters only. Preliminary examinations were conducted or are still ongoing with regard to situations in countries like Afghanistan, Colombia, Georgia, and even the controversial situation in the Palestinian territory.[4]

To this one must add that even *subsequent* to strong African Union criticism[5] of the so-called 'anti-African bias' of the ICC, African states continue to support the ICC and continue to sign and ratify the Rome Statute of the ICC. For instance, on 18 March 2013, the ICC held a ceremony to welcome Côte d'Ivoire as the 122nd state party to the Rome Statute.[6] Furthermore, four of the eight situations

3 C Black, 'Some reasons for considering why the ICC may not be considered as an anti-African institution' (2009/2010) *African Yearbook of International Humanitarian Law* 142.

4 Ibid 146.

5 Notably the AU resolution adopted on 3 July 2009, in Sirte, Libya, calling on African states not to enforce the ICC warrant of arrest for President Al Bashir of Sudan. See further M du Plessis, 'A new regional International Criminal Court for Africa?' (2012) 2 *South African Journal of Criminal Justice* 286-296.

6 The Rome Statute entered into force for Côte dÍvoire on 1 May 2013.

currently before the ICC came about because of so-called 'self-referrals'. These are the situations in Uganda, the Democratic Republic of the Congo, the Central African Republic and, most recently, the situation in Mali.

Of course, it is not only the African Union and other voices on the continent that point to an 'African-bias' as evidence to support the argument that the ICC is not only biased, but also dysfunctional. Some powerful states outside Africa, notably the United States, continue to have a rather cool relationship towards the ICC. Of course, some would argue that the relationship between the United States and the ICC has improved since the early openly hostile US position towards the ICC, as evidenced by the fact that the US supported or at least did not oppose Security Council referrals to the ICC with respect to the situations in Sudan and Libya. Perhaps it is too early to share the optimism of France's United Nations envoy, Gérard Araud, who declared that the Security Council referrals to the ICC constitute recognition of the Court as a 'key actor' on the international stage.[7] It is arguably more realistic to depict the ICC as an *important* role player; but the ICC's potential is still impeded by the whims of the most important military and economic powers, notably the United States, China and Russia.

Although *ad hoc* referrals by the Security Council might suggest that the United States has officially started to embrace the ICC, a significant lobby in American politics still strongly oppose the very notion of a permanent ICC. These conservatives employ various strategies in their opposition to the ICC. In a misguided attempt to use opposition in Africa to the ICC to their advantage, American conservatives believe that the ICC will not grow in importance; in fact the opposite will happen. This view is illustrated by conservative commentators like Brett Schaefer, who observed as follows:

[7] As quoted in C Lynch, 'The world's court vs the American right' *Foreign Policy* (11 February 2013) <http:// turtlebay.foreignpolicy.com/posts/2013/02/11/ the_icc_vs_american_ conservatives> accessed 21 March 2013.

> The ICC itself also helped alleviate conservative concerns. For better or worse, the court has not proven terribly effective. It has completed only two trials since its creation in 2002, one of which resulted in acquittal. The court's most significant warrants, such as those for Sudanese president Omar al-Bashir and Ugandan rebel Joseph Kony, remain outstanding. Budgetary constraints and waning support in Africa, where all of the court's cases have been located, have led some scholars to predict that, unless the ICC implements key changes to regain the support it once had, in 10 to 15 years it may begin 'withering away'.[8]

One may dismiss statements like these as conservative wishful thinking. However, by co-opting (real or imagined) African opposition to the ICC into the anti-ICC narrative, conservatives in the United States, like opponents of the ICC elsewhere in the world, play into the hands of those on the African continent who would rather like to see an end to the ICC, or if not that, then at least an ICC that slowly but surely withers away. The merits of American opposition to the ICC is not the focus of this contribution. But it is necessary to highlight and expose the immorality and cynicism underlying attempts to exploit African opposition to the ICC in order to bolster a conservative agenda in the United States (or elsewhere, for that matter). But this is more than just cynicism at work; the assumption of commentators like Schaefer that support for the ICC on the African continent is waning, is, as pointed out above, factually wrong.

The picture that is emerging in terms of Africa vis-à-vis the ICC is a nuanced picture. There is opposition (including from the African Union as a regional body), but there most certainly is also support; new support, for the ICC on the African continent.

Whatever American conservatives believe about Africa's relationship with the ICC, their own country's official position seems to be far less hostile when

[8] BD Schaefer, 'Beating the ICC' *National Review Online* (18 February 2013) <http://www.nationalreview.com/blogs/print/340888> accessed 19 February 2013. It should be noted that a third trial, in the case of *The Prosecutor v Germain Katanga,* has since been completed.

opportunities arise to use the ICC as a force for good on the African continent. Apart from the Security Council referrals mentioned above, an incident early in 2013 underscores the fact that the United States regards the ICC as a legitimate role player in the context of international criminal justice in Africa. On Monday 18 March 2013 Bosco Ntaganda, the Congolese rebel leader indicted by the ICC on seven counts of war crimes and three counts of crimes against humanity, walked into the embassy of the United States in Rwanda to surrender himself. The United States decided to transfer him to the ICC in The Hague.[9] Some might say one should not make too much of an incident like this. However, I would like to argue that taken together, official American actions vis-à-vis the ICC when *African* situations are at stake, constitute a narrative much more nuanced than the one presented by Brett Schaefer in his comment, referred to above. Even though the United States is still very much opposed to *US* membership of the ICC, official American actions are strengthening the position of the ICC on the African continent. And this is, on balance, a good thing. ICC Prosecutor Fatou Bensouda's statement that the transfer of Ntaganda from the US Embassy in Kigali to the ICC in the Hague is 'a good day for the victims of the DRC and for international criminal justice'[10] underscores the fact that the international criminal justice system is at work – for the victims and for the benefit and further development of the system itself.

3 Regional Developments

Regional bodies like the European Union (EU) and the African Union (AU) have historically not focussed on criminal law – neither in terms of substance nor in terms of institutional arrangements. However, in the context of the EU for instance, the need to protect certain interests gave rise to the criminalisation of so-called 'eurocrimes'. The latter categories of crimes therefore correspond with the Union interests that are sought to be protected. The main categories

[9] <http://www.un.org/news> accessed 19 March 2013.

[10] Statement by the Prosecutor of the ICC (22 March 2013) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20 releases / Pages / rstatement-22-03-2013.aspx> accessed 22 March 2013.

are: crimes against fair competition, crimes against the integrity of the financial sector, crimes against the financial interest of the Union, crimes against human dignity, crimes against the democratic society, crimes against the integrity of public administration, crimes against public health, crimes against the fair administration of justice, crimes against the environment. While these categories of offences clearly reflect the supranational, regional interests, there is in Europe no supranational court or tribunal with criminal jurisdiction. There are modalities to enforce European law (including European criminal law), but these modalities still rely heavily on enforcement by states. Multilateral co-operation between states and direct enforcement are gaining importance via such modalities as Europol, the Office of the European Public Prosecutor and the European Judicial Network.[11]

Recent developments suggest that the African Union – as a matter of principle - took the matter of the enforcement of (international) criminal law at supranational or regional level, one step further than the EU has done. However, whereas the notion of European criminal law developed gradually and with reference to substantive areas associated with European Union interests (the budget, the common market and so on), the emergence of a proposed African Union regional (international) criminal court has a somewhat different genesis.

Following on a 2009 AU Assembly of Heads of State and Government decision,[12] the AU Commission set out to amend the Protocol on the Statute of the African Court of Justice and Human Rights, in order to provide for a chamber with criminal jurisdiction. The idea to create an African Criminal Court is somewhat older than the AU decision of 2009. Already in 2005, during the drafting process of the legal instrument merging the African Court of Justice and the African Court of Human and Peoples' Rights the idea of a criminal chamber was mooted. The proposal was to create a criminal division which would have

[11] For a comprehensive discussion, see André Klip, *European Criminal Law* (2nd edn, Intersentia 2012), in particular chapters 4, 7 and 8.

[12] Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, AU Doc Assembly/AU/3 (XII) Assembly/AU/Dec 213 (XII), para 9 (2009).

jurisdiction over serious human rights violations, constituting crimes under international law. However, political support was lacking and there was at the time also strong support in civil society for the strengthening of the ICC on the African continent.[13]

By 2009 the political dynamics has changed – in no small part due to growing AU unhappiness with what was perceived to be an anti-African bias at the ICC.[14] Thus the need for an African court to deal with crimes like genocide, crimes against humanity and war crimes, as well as certain transnational crimes like corruption and terrorism, in an African institutional context and with reference to an African legal framework.[15]

At first glance, any international criminal lawyer with an eye for institutional developments that might assist in the fight against impunity for the worst crimes under international law (and some other important transnational crimes affecting international interests) might be pleased with a development like the proposed 'African Criminal Court' (although technically part of an existing institutional structure – the African Court of Justice and Human Rights). In terms of the grand narrative of international criminal justice it even sounds like the kind of development that fits the project to plug all possible impunity loopholes – at the national, the regional and the international levels. The truth is that a number of serious objections can be raised with reference to the proposed 'African Criminal Court'. These objections will not be analysed in full here. Others have done that elsewhere.[16] Suffice to say that these objections are not spiteful, anti-African

[13] P Manirakiza, 'Towards an African Criminal Court: Contribution or obstruction to the international criminal justice?' unpublished Paper (on file).

[14] S Odero, 'Politics of International Criminal Justice: The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-colonial Conspirator Thesis' in C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 145-149; S Schwerdtfeger, 'The prospects of an African Criminal Court' unpublished LLM thesis, University of Stellenbosch, 2011 24-27; Du Plessis (n 5) 287.

[15] See the text of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Legal/ACJHR-PAP/4(II). For a critical discussion see Du Plessis (n 5).

[16] M du Plessis, A Louw and OA Maunganidze, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' (November 2012) *ISS Paper* 241, 1.

objections. They contribute to the proper and thoughtful debate that is necessary in order to help the international criminal justice project reach its goals on the African continent. The most important objections, or concerns, with which I fully agree, are the following:

- The drafting process: Compared to the Rome Statute of the International Criminal Court, the legislative history of the Draft Protocol on the 'African Criminal Court' is rather thin and did not benefit from the input of a diversity of academics, civil society and other interested individuals and groups.
- **Motive:** The motivation for the creation of a regional international criminal court seems to be (in part at least) informed by the recent unhappy relationship between the AU and the ICC. The *ad hoc* motivation to create a regional criminal court because of the issues that came to the fore when Senegal was confronted with the obligation to prosecute former president Habré of Chad (discussed in Part 4 below) seems to have played a prominent role in the AU decision that formed the political springboard for the drafting of the protocol to amend the Statute of the African Court of Justice and Human Rights.
- Jurisdictional overreach: A further concern is the proposed Court's jurisdictional overreach. Indeed, the substantive jurisdiction of the proposed court will go beyond the so-called 'core international crimes' of genocide, war crimes, crimes against humanity and aggression. It will include other crimes of regional concern like terrorism, mercenarism, corruption, trafficking in persons, drug trafficking, and piracy. The crime of 'unconstitutional change of government' has since been left out of the list of crimes. The latter development is understandable in terms of concerns about the definition and elements of such a crime and the concomitant legality concerns. Legal problems aside, the obvious further problems in terms of jurisdictional overreach like this relate to financial and logistical problems: How to pay for all the investigations and how to conduct the actual prosecution of complex crimes like these (and one must say that in terms of elementology and proof, a

crime like human trafficking or corruption can be every bit as complex as a crime like genocide).

- Relationship with the ICC: A very serious issue would be the many political and legal problems stemming from the competing obligations that will inevitably flow from the fact that more than 30 African states are states party to the Rome Statute of the ICC. Some of them have adopted implementation legislation, thus incorporating not only the core crimes under international criminal law, but also giving effect to their legal obligations to the ICC. Du Plessis, Louw, and Maunganidze correctly observed: '[W]hich court will have primacy? Careful thought would also have to be given to the question of domestic legislation to enable a relationship with the expanded African Court (especially around the issues of mutual legal assistance and extradition). Given these difficulties, it is surprising that the draft protocol nowhere mentions the ICC.'[17]
- The concern that the creation of an African regional International Criminal Court can be viewed as 'negative complementarity' (that is to say an attempt to create a 'regional exceptionalism in the face of the ICC's currently directed investigations' on the African continent[18]) should be taken seriously. Without suggesting that developments in Europe can somehow be regarded as a blueprint for developments in Africa, it is useful to note that the development of a 'European criminal law' has been incremental, with a finely calibrated balance between the national and regional interests, and with due regard to the broader international context in which Europe operates. And it is telling that there is no European regional International Criminal Court. The international criminal justice project will be best served if the proper and well thought out balance and synergy can be found between the national, regional and international attempts aimed at ending impunity.

[17] Du Plessis, Louw and Maunganidze (n 16) 7-8.
[18] Du Plessis, Louw and Maunganidze (n 16) 8.

4 The Application of International Criminal Law at Domestic Level

International criminal justice is more than the International Criminal Court. Historically, and normatively, the development of international criminal justice can be viewed as reactions of the international community, expressed in various forms and modalities, to the worst atrocities that affect or shock the whole of humanity. The constitutionalist notion of an international community (the idealised *civitas maxima*) entails that this community's reactions must also be governed by norms and rules (the international rule of law), and not in terms of raw (lawless) power.[19] In terms of a criminal justice response to atrocities, there are a number of well-known modalities, including international criminal tribunals, as already discussed under Parts 2 and 3 above. The other modalities are: the exercise by national courts of jurisdiction over offences on grounds of territoriality or nationality; the exercise by national courts of extraterritorial jurisdiction (which may also be the result of obligations in terms of the *aut dedere, aut judicare* enforcement model[20] in international criminal law); and the establishment of truth commissions[21] to complement traditional criminal justice responses to atrocities.[22]

[19] For thoughts on the role of rules, norms and power in the international (legal) system, see W Werner, 'Constitutionalisation, fragmentation, politicization, the constitutionalisation of international law as Janus-faced phenomenon' (2007) 8 *Griffin's View on International and Comparative Law* 17-30; D Caron, 'Framing political theory of international courts and tribunals: Reflections at the Centennial' (2006) *ASIL Proceedings* 56; A Peters, 'There is nothing more practical than a good theory: An overview of contemporary approaches to international law' (2001) 44 *German Yearbook of International Law* 25-37.

[20] Many international instruments provide for this model of enforcement of international criminal law. It imposes on states parties the duty to either 'extradite or prosecute' individuals responsible for crimes under international law. The Dutch author Hugo Grotius used the phrase *aut dedere aut punire*, but this was in 1973 reformulated by Cherif Bassiouni to '*aut dedere aut judicare*', in order to emphasise the judicial process in the form of a trial that is necessary to determine criminal liability. See M. Cherif Bassiouni, *International Criminal Law* (Volume 1) (2nd edn, Transnational Publishers 1999) 5.

[21] Such as the South African Truth and Reconciliation Commission, which dealt with South Africa's apartheid past. The process included public and institutional hearings, as well as conditional amnesty for gross human rights violations committed by both sides of the conflict. The Final Report of the TRC was handed to then President Thabo Mbeki on 21 March 2003.

[22] Cassese (n 1) 6-14.

While the International Criminal Court and obligations flowing from the Rome Statute have been dominating the international criminal justice discourse on the African continent, other modalities of international criminal justice, notably regimes that provide for *aut dedere, aut judicare* enforcement, have also contributed to the deepening of the normative and institutional impact of international criminal law in Africa. One such regime is provided for in the United Nations Torture Convention.[23] The obligations of states under this Convention were considered by the International Court of Justice (ICJ) in *Belgium v Senegal*.[24]

The matter in *Belgium v Senegal* came before the ICJ because Senegal, according to Belgium, has breached its obligations under international law by failing to take the necessary steps against Mr Hissène Habré, former President of the Republic of Chad. The essential allegations were that Mr Habré was responsible, as the perpetrator or co-perpetrator, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes. Habré served as President of Chad from 1982 till 1990, when he was overthrown by Mr. Idriss Déby. During Habré's time in office large-scale violations of human rights were allegedly committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. Habré fled Chad and, after a short stay in Cameroon, he was granted political asylum in Senegal. Belgium – which claimed jurisdiction to try Habré for the above mentioned crimes on the basis of passive personal jurisdiction (the initial complaint in Belgium was filed by a Belgian national of Chadian origin) – requested Senegal for the extradition of Habré on a number of occasions. Senegal refused[25] these requests, hence Belgium's claims before the ICJ. Apart from the internal processes normally associated with extradition requests,

[23] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 24 *International Legal Materials* 535.

[24] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ, 20 July 2012.

[25] It has to be said that the refusals were not only executive incalcitrance. Judicial bodies in Senegal also held that former president Habré cannot be extradited, *inter alia*, because of 'jurisdictional immunity' flowing from Habré's status as a former Head of State. See *Belgium v Senegal* (n 24) para 22 for a brief exposition of the judgment by the relevant court in Senegal.

Senegal clearly viewed Belgium's request also as a significant regional-political issue. The question was therefore referred by Senegal to the African Union. In July 2006, the AU Assembly of Heads of State and Government decided,[26] *inter alia,* 'to consider the Hissène Habré case as falling within the competence of the African Union, […] mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial' and furthermore 'mandate[d] the Chairperson of the [African] Union, in consultation with the Chairperson of the Commission [of the Union], to provide Senegal with the necessary assistance for the effective conduct of the trial.'

Belgium took note of Senegal's internal decisions and of the referral of the matter to the AU. Nevertheless, Belgium took the view that Article 7 of the Torture Convention (the *aut dedere aut judicare* obligation) imposes obligations only on a State – in this case Senegal. Belgium clearly was of the view that whatever the AU decided on the matter could not free Senegal from its obligations under the Torture Convention.[27] Indeed, Senegal took certain legislative and constitutional measures in order to deal with the Habré situation and in order to fulfil its obligations in terms of the Torture Convention (in particular Article 5(2) of the Convention).

In 2007, Senegal implemented Articles 431-1 to 431-5 of its Penal Code. These new provisions define and proscribe the crime of genocide, crimes against humanity, war crimes and other violations of international humanitarian law. The package of international criminal law provisions that were added to Senegal's Penal Code was also supplemented by a provision on retroactivity, which provides that any individual could 'be tried or sentenced for acts or omissions […], which at the time and place where they were committed, were regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not they constituted a legal transgression

[26] For more detail see *Belgium v Senegal* (n 24) para 23.
[27] See Belgium's Note Verbale of 11 January 2006, discussed in *Belgium v Senegal* (n 24) para 25.

in force at that time and in that place.'[28] Two further provisions were added or amended in order to provide for extraterritorial jurisdiction over the above mentioned crimes under international law. Article 669 of Senegal's Code of Criminal Procedure was amended to provide as follows:

Any foreigner who, outside the territory of the Republic, has been accused of being the perpetrator of or accomplice to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code […] may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition.

Article 664*bis* was added to the Code of Criminal Procedure. It essentially provides for extraterritorial jurisdiction based on passive nationality; thus, '[t]he national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic by a national or a foreigner, if the victim is of Senegalese nationality at the time the acts are committed.'[29]

In support of its case before the ICJ, Belgium made the following submissions:

1. (a) Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under customary international law by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in

[28] The translation of the relevant provision as quoted in *Belgium v Senegal* (n 24) para 28.
[29] *Belgium v Senegal* (n 24) para 28.

particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of such criminal proceedings;
(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.
2. Senegal is required to cease these internationally wrongful acts
(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or
(b) failing that, by extraditing Mr Habré to Belgium.

Senegal rejected the requests of Belgium. It countered that it has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'try or extradite' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any other rule of conventional law, general international law or customary international law in this area. Senegal furthermore pointed out that, in taking the various measures that have been described (including the adoption of relevant legislation and the investigations into the allegations against Mr Habré), Senegal was fulfilling its commitments as a State Party to the 1984 Convention against Torture. Senegal also amended its Constitution. In 2008, Article 9 of the Constitution was amended in order to provide for an exception to the criminal law principle of non-retroactive application of criminal laws. The amended Article 9 of the Constitution provides for a general principle of non-retroactivity, but now with an important exception: 'the provisions of the preceding subparagraph [on non-retroactivity] shall not prejudice the prosecution, trial and punishment of any person for any act or omission which, at the time when it was committed, was defined as criminal under the rules of international law concerning acts of genocide, crimes against humanity and war crimes.'[30]

While Senegal adopted various legislative reforms, including a constitutional amendment, in order to fulfil its obligations under the Torture Convention,

[30] See *Belgium v Senegal* (n 24) para 31.

the question remained about the actual trial or extradition of Mr Habré. The issue became more pertinent, because since the adoption of the legislative measures fourteen victims (one of Senegalese nationality and thirteen of Chadian nationality) filed a complaint with the Public Prosecutor of the Dakar Court of Appeal in September 2008, accusing Mr. Habré of acts of torture and crimes against humanity during the years of his presidency.[31]

Former President Habré, for his part, approached the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice) with a request that the court must find that his human rights would be violated by Senegal if criminal proceedings were instituted against him. This submission mainly referred to Senegal's legislative reform that would make retroactive criminal prosecutions with regard to crimes under international law possible in the criminal courts of Senegal. The ECOWAS Court of Justice consequently held that Senegal should respect the interpretations of its own national courts, namely that Senegal must comply with the absolute principle of non-retroactivity. In terms of the position of Mr Habré, the ECOWAS Court of Justice held that any prosecution of him must take place within the strict framework of special *ad hoc* international criminal proceedings.[32]

The judgment by the ECOWAS Court of Justice was followed by further political action by the African Union. In January 2011 the Assembly of African Union Heads of State and Government 'request[ed] the [AU] Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision.' In July 2011, the Assembly 'confirm[ed] the mandate given to Senegal to try Hissène Habré on behalf of Africa' and urged Senegal to carry out its legal responsibility in accordance with the United Nations Convention against Torture[,] 'the decision of the United Nations […] Committee against Torture[,]

31 *Belgium v Senegal* (n 24) para 32.

32 *Hissein Habré* v *Republic of Senegal*, Judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010 (ECOWAS Court of Justice) as discussed in *Belgium v Senegal* (n 24) para 35.

as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial.'[33]

The subtext of the AU position in this matter was obviously that former president Habré should be tried by Senegal (or another country) on behalf of Africa – that is to say proceedings in Africa. The desire to keep the trial of Habré in Africa is underscored by the further communications of the AU. In January 2012, the Assembly of the Heads of State and Government of the AU 'observed that the Dakar Court of Appeal had not yet taken on Belgium's fourth request for extradition.' Furthermore, the Assembly noted that Rwanda was prepared to organise Mr Habré's trial and 'request[ed] the Commission [of the African Union] to continue consultations with partner countries and institutions and the Republic of Senegal[,] and subsequently with the Republic of Rwanda[,] with a view to ensuring the expeditious trial of Hissène Habré and to consider the practical modalities as well as the legal and financial implications of the trial'.[34]

The crisp question is whether all these legislative as well as regional political and legal developments in the end satisfied the basic international obligation of Senegal to either try or extradite Mr Habré. From an African perspective the context in which the question is posed is also quite important. Belgium, a former colonial power in Africa, did not dispute the contention that none of the alleged victims was of Belgian nationality at the time of the alleged atrocities. As mentioned above, Belgium intended to exercise jurisdiction on the basis of passive personality on a rather limited ground, namely that a complaint was filed by a Belgian national of Chadian origin. Belgium at any rate argued that the UN Torture Convention provides for a progressive enforcement regime and that every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform.[35]

[33] *Belgium v Senegal* (n 24) para 36.
[34] *Belgium v Senegal* (n 24) para 41.
[35] *Belgium v Senegal* (n 24) para 65.

Belgium thus requested the ICJ to adjudge and declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and, failing that, to extradite him to Belgium. Furthermore, Belgium requested the Court to adjudge and declare that Senegal breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him.[36]

It is clear from the judgment by the ICJ in the matter of *Belgium v Senegal* that fulfilment of obligations in terms of international instruments such as the UN Torture Convention cannot be rhetorical, political, and legislative action *only*; it must also include *actual investigations* to establish the relevant facts if an opportunity arises out of actual complaints. Of course, an important part of the obligations on a state party to the UN Torture Convention is to take the necessary steps to criminalise the relevant crimes under international law and to establish its jurisdiction over such crimes. The ICJ pointed out that this obligation (to provide for the criminalisation of torture under domestic law) has to be implemented by the State concerned as soon *as it is bound by the Convention*. The implementation has a preventive and deterrent character, since by equipping itself with the necessary legal tools to prosecute this type of offence, a State party ensures that its legal system will operate to that effect and commit itself to co-ordinating its efforts with that of other states to eliminate any risk of impunity.[37]

In terms of Senegal's international obligations, the ICJ held that since Senegal adopted relevant implementation legislation only in 2007, the delay in terms of the submission of the Habré matter to the Senegalese authorities was of its own doing.[38] Furthermore, the ICJ also noted that Senegal:

> […] has not included in the case file any material demonstrating that [it] has carried out [...] an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the [Torture] Convention. It is not sufficient, as

[36] *Belgium v Senegal* (n 24) para 71.
[37] *Belgium v Senegal* (n 24) para 75.
[38] *Belgium v Senegal* (n 24) para 76.

> Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts.[39]

Most importantly, the ICJ noted that all the obligations in the UN Torture Convention must be regarded as elements of a *single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven*.[40]

Of course, the obligations flowing from international instruments like the UN Torture Convention create mechanisms to end impunity, but not at the cost of other norms, for instance the norm against the retroactive application of criminal law. With reference to Senegal's position under the UN Torture Convention, the ICJ held as follows:

> The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the [Torture] Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.[41]

Regarding some of the other contextual matters surrounding the case, it is prudent to note that the ICJ indicated that neither financial nor regional-

[39] *Belgium v Senegal* (n 24) para 85.
[40] *Belgium v Senegal* (n 24) para 91.
[41] *Belgium v Senegal* (n 24) para 102.

political concerns can absolve a state from its obligations in terms of international instruments that are aimed at ending impunity for crimes under international law.

Ultimately the ICJ held that Senegal was in breach of its international obligations. Simply put, it had to either prosecute or extradite Mr Habré.

The judgment by the ICJ in *Belgium v Senegal* is a good illustration of how the international criminal justice project is best regarded as a comprehensive, multi-layered and complex system that relies on different modalities to reach the same aim: an end to impunity for the worst atrocities. The role of states that are willing to act as forum states for the investigation and possible prosecution of crimes under international law is crucial. Whether it is Belgium, or eventually Senegal, it does not really matter – at least not in terms of the central goals of the international criminal justice project.

A very useful model to analyse these developments is what some commentators refer to as *complementarity in a broad sense* – 'the idea that states act as a complement to the International Criminal Court (ICC) to make the world a smaller place for genocidaires and war criminals.'[42] As rightly pointed out by these commentators, complementarity has a technical meaning in terms of the Rome Statute, but their method or frame of reference use the term in a broader sense. It is thus 'less focussed on how states work as a direct complement to the ICC (although that remains important), and is rather concerned with what they are doing to further the international criminal justice project more generally, which could [...] include domestic and regional cooperation efforts by states and civil society organisations.'[43]

The notion of *complementarity in a broad sense* dovetails nicely with Cassese's modalities for the realisation of international criminal law, as mentioned above. At the same time the notion of complementarity in a broad sense is also fluid enough to incorporate or at least take note of the growing importance of

[42] Du Plessis, Louw and Maunganidze (n 16) 1.
[43] Ibid.

civil society. *Belgium v Senegal* is a classic example of an enforcement mechanism rooted in conventional obligations and the normative demands of an idealised *civitas maxima*. But *aut dedere aut judicare* as an enforcement mechanism can also be viewed as part of a broader complementarity, because the ICC cannot and should not deal with all the cases that would substantively and normatively fall within the rubric of international criminal law.

It is for the above reason that it is so important that states take their international legal and normative obligations seriously. Implementation legislation of the important international instruments in the field of international criminal justice is the indispensable modality.[44] A good example of this is South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. It provides for a comprehensive co-operation scheme for South Africa vis-à-vis the ICC. Crucially, it also provides for the incorporation of the core crimes under international law into South African law, as well as for the establishment of universal jurisdiction over these crimes. The normative benefit of the latter aspect was illustrated in the judgment by the North Gauteng High Court in Pretoria in *Southern Africa Litigation Centre and others v National Director of Public Prosecutions and others*.[45] In this judgment the High Court ordered the Police and the National Prosecuting Authority 'in so far as it is practicable and lawful, and with regard to the domestic laws of the Republic of South Africa and the principles of international law, to do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket.'[46] On appeal, the Supreme Court of Appeal of South Africa confirmed[47] the basic approach taken by the High Court in the *Southern Africa Litigation Centre* case,

[44] For a critical assessment of domestic implementation of the Rome Statute of the ICC on the African continent, see G Kemp, 'The implementation of the ICC Statute in Africa' paper delivered at the conference Africa and the International Criminal Court, South African-German Centre for Transnational Criminal Justice, Cape Town, 22-23 Nov 2013, reported in *Zeitschrift für Internationale Strafrechtsdogmatik* <www.zis-online.com>.

[45] *Southern Africa Litigation Centre and others v National Director of Public Prosecutions and others* 77150/09 [2012] ZAGPPHC 8 May 2012 (unreported).

[46] For a critical discussion, see C Gevers 'The Prosecution of International Crimes' in Gerhard Kemp *et al*., *Criminal Law in South Africa* (Oxford University Press 2012) 561-563.

[47] *National Commissioner of the South African Police Service v Southern Africa Litigation Centre* 485/2012 [2012] ZASCA 27 Nov 2013 (unreported).

thus making it clear that the relevant South African government agencies – including the police – have certain duties to investigate and where appropriate, prosecute, international crimes committed extraterritorially. The matter is currently before the Constitutional Court of South Africa.[48] Indeed, this case is an endorsement, in no uncertain terms, of the acceptance by South Africa, via the relevant legislation, of universal jurisdiction over the crimes of genocide, crimes against humanity, and war crimes.

The benefit and normative impact of the incorporation of international instruments like the Rome Statute of the International Criminal Court and the UN Torture Convention (or, the 'transformative value of international criminal law'[49]) are clearly illustrated with cases like *Belgium v Senegal* and the *Southern Africa Litigation Centre* case. It is therefore to be welcomed that South Africa incorporated the Geneva Conventions of 1949 via the Implementation of the Geneva Conventions Act, 2012, providing for the criminalisation of grave breaches of the four Geneva Conventions and Additional Protocol I, as well as the UN Torture Convention, via the Prevention of Torture Act, 2013. Other African states have also adopted legislation to incorporate and implement the Rome Statute of the ICC, namely Senegal, Burkina Faso, Kenya, Uganda, the Comoros, Mauritius, and the Central African Republic. Furthermore, it should be noted that some or all of the core crimes have been incorporated into the penal codes of a number of states.[50]

[48] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and others* Case No.: CCT 02/14 (CC). The author is one of four *amici curiae*, all experts in international criminal law, who argued before the Constitutional Court that international law permits, but does not require, South Africa to investigate allegations of torture, systematic or otherwise, committed in Zimbabwe, before the suspects are present in South Africa. At the time of writing the judgment by the Court was not yet delivered.

[49] HJ van der Merwe, 'The transformative value of international criminal law' unpublished LLD dissertation, University of Stellenbosch, 2012.

[50] For information see 'The implementation of the Rome Statute of the ICC in African countries' <http://www.issafrica.org/pgcontent.php?UID=30362> (site accessed 15 January 2013).

5 Concluding Remarks

The metaphor of 'stocktaking', as indicated in the title of this contribution, is not meant to convey something exact, or precise – like an audit or a function of bookkeeping. It is a macro-level appraisal of the international criminal justice project with particular reference to the continent of Africa. I have highlighted a number of developments that are relevant for this stocktaking exercise. It is not an exhaustive study of all international criminal justice related developments on the African continent. But the three broad themes form part of a narrative of international criminal justice that is firmly established as a normative force on the African continent. There is most certainly scope for reflection. It is not a one-dimensional happy story. But it is also not a story of international criminal justice in decline. There are pockets of impunity, yes. But there are strong movements – international, regional and domestic – to end impunity. The devil is, as always, in the detail. The debates surrounding the establishment of a regional African criminal court underscore this truism. Looking back over the past decade, one is left with the impression that, on balance, Africa is moving towards the ultimate goal of the international criminal justice project: to end impunity for the worst crimes under international law. This is no easy task, but as long as there is movement in the right direction, the outlook for international criminal justice in Africa will be good.

The African Court of Justice and Human and Peoples' Rights: An Opportunity for International Criminal Justice?

Evelyne Owiye Asaala [*]

Abstract

As the discourse on establishing an African Court with a criminal mandate over core international crimes pervades the continent's political terrains, academics have cautiously joined the debate with the intent to inform and shape it towards the right direction. This paper recognizes this as a noble effort. It however perceives the political demands as one of the impacts of the ICC within the African continent. It is argued that these demands have predominantly been informed by ideals that may be intended to sabotage the ICC through a regional mechanism that may never realistically hold anyone criminally responsible. Yet, this article remains positive by revealing the reasons informing the unceasing demand for a regional court with criminal mandate over core international crimes. It then focuses on the probable legal and political challenges that must be addressed in order for this mechanism to function effectively.

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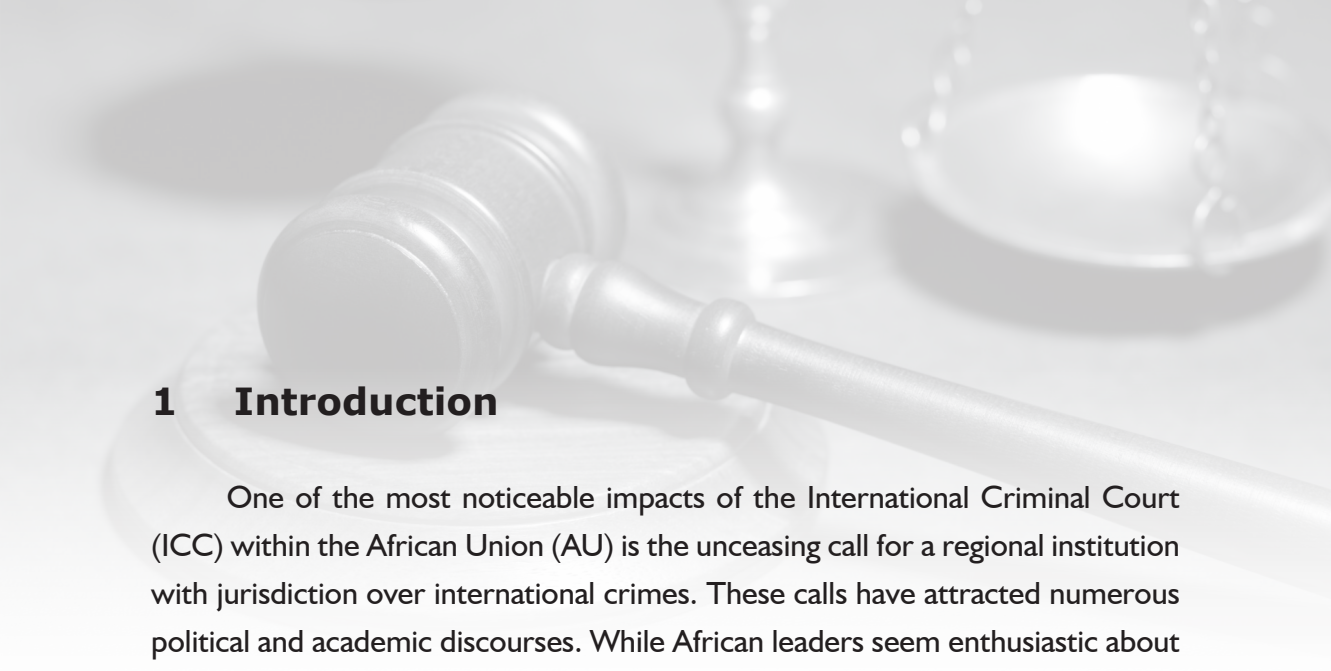

1 Introduction

One of the most noticeable impacts of the International Criminal Court (ICC) within the African Union (AU) is the unceasing call for a regional institution with jurisdiction over international crimes. These calls have attracted numerous political and academic discourses. While African leaders seem enthusiastic about the idea, some scholars are more sceptical, calling for caution as the idea matures to implementation. This paper argues that a regional body with jurisdiction over core international crimes – though a legally sound idea – has to be streamlined in order to evade foreseeable challenges. With apparent practical confronts such as definition of crimes, financial deficiencies, independence of the court, general challenges of establishing the court (whether as a criminal chamber or general court) and the relationship between the regional court and the ICC, it is pertinent for the AU to re-consider these issues before the probable operation of the Court.

In order to achieve this, this paper is divided into four parts. Firstly, the paper provides a historical overview of the emergence of the idea on a regional body with a prosecutorial mandate over international and transnational crimes. Secondly, it provides an in-depth analysis of numerous legal issues that warrant urgent consideration. These include, for example, the jurisdiction of the court, trigger mechanisms, definition of crimes and the relationship between the proposed African Court and the ICC. This section does not undertake an article-by-article exposition of the relevant protocol establishing the Court; rather it focuses on selected themes, which according to the author are key to the processes of the Court. Thirdly, the paper considers political issues that are vital to both the establishment and effective operations of the Court. The

most pertinent question in this regard is thus: how do African leaders insist on a regional body without efforts at reinforcing the independence of their own domestic judicial, prosecutorial and other related local systems necessary in order to implement a similar mandate? Is it a possible explanation that these demands are motivated by efforts to sabotage the ICC through mechanisms that continue to perpetuate impunity? Finally, the paper draws conclusions and makes several recommendations to the AU.

2 Tracing the Origin of a Regional Body with a Criminal Mandate

The idea of an African Court with a criminal mandate is not new. This discourse first emerged in the year 2000 with the enactment and adoption of the Constitutive Act of the AU.[1] Besides being a socio-political integrating force of the continent, underlying the Constitutive Act is yet another philosophy to shun impunity and unconstitutional change of governments.[2] Thus far, not only does the Act create a Court of Justice as one of the organs of the AU,[3] but it also makes the establishment of such a Court mandatory.[4] In 2003, the AU adopted the Protocol of the Court of Justice of the African Union[5] establishing the African Court of Justice. Notably, however, an express criminal mandate was not bestowed upon this Court. Its mandate was broadly embodied in principles that sought to promote democracy, good governance, regional integration, respect for human rights and sustainable development. It neither incorporated core international crimes, nor transnational crimes.

The establishment of this Court as a different institution posed a major challenge to the AU, thus necessitating a merger of the Court of Justice and the African Court on Human and Peoples' Rights. Having an additional structure was

1 Adopted in Lome, Togo, on 11 July 2000 and entered into force on 26 May 2001.
2 Constitutive Act of the AU, art 4.
3 Constitutive Act of the AU, art 5.
4 Constitutive Act of the AU, art 18.
5 Adopted by the Assembly of AU on 11 July 2003 in Maputo, Mozambique.

deemed undesirable given its financial implications to the AU.[6] It was therefore argued that - even though the two institutions were different in terms of structure - there existed potential common areas like jurisdiction.[7] Despite criticism from international human rights bodies,[8] these efforts ultimately culminated in the enactment and adoption of the Protocol on the Statute on the African Court of Justice and Human Rights. This Protocol provides in part as follows:

> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, are hereby replaced by the present Protocol and Statute annexed […].[9]

To this end, the two courts were 'merged into a single Court dubbed as "The African Court of Justice and Human Rights".'[10] The Protocol is yet to come into force as only 5 states (Benin, Burkina Faso, Libya, Mali and Congo) have ratified it as opposed to a required threshold of 15 ratifications in order to bring it into force.[11]

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6 M Hansungule, 'African Courts and African Commission on Human and Peoples' Rights' in Anton Bösl and Joseph Diescho (eds) *Human Rights in Africa : Legal Perspectives on their Protection and Promotion* (Macmillan Education Namibia 2009) 3 <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf> accessed 16 May 2013. See also 'Summary of Procedures of the First Meeting of Experts/Judges and the PRC on the Draft Protocol of the Court of Justice of the African Union', para 31, 22-24 April 2003, Expt.Judg/draft/Prot/ACJ/Rpt. (1).

7 Ibid.

8 Amnesty International, *African Commission on Human and Peoples' Rights: Oral Statement on Item 11: The Establishment of the African Court on Human and Peoples' Rights,* AI Index: IOR 10/005/2005 (Public), News Service No.: 329, Nov. 23, 2005. It was Amnesty International's contestation that the merger would delay the creation of a human rights court, thus delaying the adjudication of human rights cases.

9 Protocol on the Statute of the African Court of Justice and Human Rights, art 1.

10 Protocol on the Statute of the African Court of Justice and Human Rights, art 2.

11 Article 11(1), Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC / Legal / Exp /7 (I), Draft of 14 May 2014; see generally <http: // www.au.int / en / sites / default / files / Protocol % 20on %20 Statute % 20 of % 20 the % 20 African % 20 Court % 20of % 20 Justice % 20 and % 20HR_0.pdf> accessed 26 June 2014 on the most recent status of signatories and ratifications to this treaty;

The idea of incorporating transnational crimes and core international crimes within the merged Court subsequently emerged and has been considered at various levels of the AU.[12] In 2006, the AU established a committee of eminent jurists to examine and advise on the possibility of trying the Chadian president, Hissène Habré in Africa. In its report, this committee underscored the inevitability of the establishment of a regional body with a criminal mandate. It was recommended, *inter alia*, that:

> […] this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of the Convention against Torture….The African Court should be granted jurisdiction to try criminal cases. The Committee therefore recommends that the on-going process that should lead to the establishment of a single court at the African Union level should confer criminal jurisdiction on that court.[13]

These efforts have led to an amendment of the draft protocol establishing the African Court of Justice and Human Rights. It is this amendment that incorporates transnational crimes and core international crimes within an African Court of Justice, Human and Peoples' Rights.[14] While this Protocol will most likely garner the required ratifications to come into force, the possibility of not acquiring the high threshold of signatories - coupled with the reluctance displayed by member states at ratifying the Protocol - is a reality that may keep the Court at bay for a long time.

Article 9 of the Protocol on the Statute of the African Court of Justice and Human Rights as amended by Article 11, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Revised edition up to 14 May 2014).

12 In 2004, the then chairman of the General Assembly and heads of states of Africa, President Olusegun Obasanjo of Nigeria, suggested an integration of the two courts.

13 Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, paras 35 and 39 <http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf> accessed 15 April 2013.

14 Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Exp/7(I) (revised edition as at 14 May 2014), arts 8 and 14.

Although the discourse of an African Court with a criminal mandate has existed for a decade, three cardinal factors have given impetus to, and reshaped the debate in modern day Africa: divergent opinions in the peace *versus* justice debate; a perceived ethnocentric nature of the International Criminal Court (ICC) through exclusive indictment of African heads of states, particularly president Omar Hassan Ahmed Al Bashir of Sudan (Al Bashir),[15] the deposed leader of Libya, Muammar Gaddafi, and currently, the president of Kenya and his deputy: Hon Uhuru Muigai Kenyatta and William Samoei Ruto; as well as the 'abusive' use of the principle of universal jurisdiction.

2 1 A Perceived Ethnocentric Nature of the ICC

Critics of the ICC have often labelled it to be biased towards Africa. While similar atrocities are witnessed elsewhere on the globe, the ICC has been criticized for its exclusive focus on prosecuting African based cases.[16] Despite his immense support for the ICC as an institution, Desmond Tutu has lamentably decried the Court in this regard:

> And while it is indeed troubling that the International Criminal Court mostly seems to call to account dictators with brown skin, Tony Blair is not in the same moral category as Charles Taylor. The war in Iraq was not a systematic genocide or ethnic cleansing. All of this may well be tested in court one day.[17]

[15] The UNSC referred the situation in Darfur to the ICC through UNSC Resolution 1593, UN Doc S/RES/1593, 31 March 2005.

[16] M Ssenyonjo, 'The International Criminal Court arrest warrant decision for President Al Bashir of Sudan' (2010) 59 *International & Comparative Law Quarterly* 205 as cited in M Du Plessis, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' (November 2012) *ISS Paper* No. 214, 2 on other non-African situations under preliminary examination by the Office of Prosecutor. These include: Afghanistan, Colombia, Chad, Georgia, Guinea; See generally ICC-OTP 'OTP weekly briefing' <http://www.icc-cpi.int/NR/rdonlyres/111A878E-C79C-4197-B260-24ABDC186C3C/282595/WBENG.pdf> accessed 30 May 2014.

[17] G Fraser, 'Desmond Tutu should not have snubbed Tony Blair' *The Guardian* 3 September 2012, <http://www.theguardian.com/commentisfree/2012/sep/03/desmond-tutu-snubbed-tony-blair> accessed 13 April 2013.

Accordingly, the answer as to whether or not to indict Taylor seems to have been more a political than a legal question. While it is a reality that international criminal justice operates in an environment instilled with politics, such politics seldom reflect Africa's interests. One of the judges of the ICC has since acknowledged that even though politics and state interest present a delicate balance with the rule of law, the same remains an important obstacle to the effective operations of the court.[18]

Most significantly, although some scholars defend the impartiality of ICC's focus on Africa,[19] they too accept that 'the ICC must expand its focus beyond the African continent in order to gain broader legitimacy and dispel African concerns.'[20] Similarly, Bowman[21] argues that not only is the ICC destroying the potential of national and regional judicial development in Africa, but it is also encroaching on their autonomy. As such, she proposes that the ICC should restrain itself only to those cases referred to it by the UNSC and not those resulting from state self-referrals or the prosecutor's exercise of his *proprio motu* powers.

2 2 Divergent Opinions in the Peace *Versus* Justice Debate

Relatedly, the AU has often expressed its deep concern over the ICC indictment of Al Bashir[22] noting that this undermined peace processes as well as efforts toward a resolution of the conflict in Darfur.[23] The AU and the ICC have,

[18] HP Kaul, 'The International Criminal Court: Current challenges and perspectives' (2007) 6(3) *Washington University Global Studies Law Review* 575.

[19] Kai Ambos, 'Expanding the focus of the African criminal Court' in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 499-529.

[20] Ibid.

[21] R Bowman, 'Lubanga, the DRC and the African Court: Lessons learnt from the first International Criminal Case' (2007) 7 *Africa Human Rights Law Journal* 412.

[22] Assembly of the African Union Thirteenth Ordinary Session, 1–3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec. 243-267 (XIII) Rev.1 Assembly/AU/Decl.1- 5(XIII), Assembly/AU/Dec.245(XIII), Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), 1.

[23] Ibid.

over time, held differing views on peace and justice.[24] While the former perceives 'international justice as an impediment to peace and that the two are mutually exclusive,' the later 'stands for justice for victims irrespective of the situation.'[25] This presents the unresolved issue in international criminal justice regarding the roles of international criminal tribunals and that of political organs of the international community.[26] Historically, while international criminal tribunals are charged with justice, political organs have been concerned with the question of both peace and justice. In an attempt to circumvent these rival interests, the Rome Statute allows the United Nations Security Council (UNSC) not only to refer cases to the ICC[27] in which international crimes have been committed, but also to defer cases from investigations or prosecution by the ICC.[28]

It was in this regard that the AU understandably sought to have the UNSC defer the indictment against the Sudanese President as well as the ongoing Kenyan cases.[29] The AU has equally expressed comparable displeasure regarding the subsequent inaction by UNSC in these matters.[30] As a result, the AU declared its non-cooperation with the ICC in so far as the arrest and surrender of Al Bashir is concerned.[31] This has further prompted the AU to recommend an amendment

[24] D Akande, M du Plessis and C Jalloh, 'Position paper: An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC' Institute for Security Studies (2010) 5. See also Stephen Lamony, 'African Court not ready for international crimes' *African Arguments* (10 December 2012) <http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes-–-by-steven-lamony/> accessed 15 April 2013.

[25] S Lamony (n 24).

[26] D Akande, M du Plessis and C Jalloh (n 24) 5.

[27] Rome Statute, art 13(b).

[28] Rome Statute, art 16.

[29] Decision on Africa's relationship with the International Criminal Court, Extraordinary session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia, Ext/Assembly/AU/Dec.1 (2003) 3.

[30] Assembly of the African Union Thirteenth Ordinary Session, 1–3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec. 243-267 (XIII) Rev.1 Assembly/AU/Decl.1- 5(XIII), Assembly/AU/Dec.245(XIII), Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), 1.

[31] Ibid. This position was reiterated by the heads of state of the AU at its 5th summit in Kampala. See Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/10(XV), 15th Ordinary Session of the Assembly of the AU, Kampala, 25–27 July 2010.

to Article 16 of the Rome Statute to allow the General Assembly of the UN (UNGA) to exercise the power to defer cases where the UNSC had failed to do so within a reasonable time.[32] Even though this is a sound amendment, which the AU continues to agitate for, genuine legal questions must first be addressed. For example, does such a change auger well with the powers bestowed to the UNGA under its parent Charter - the UN Charter – or does it introduce a conflict that will yet again necessitate an amendment of the UN Charter since an amendment under the Rome Statute cannot purport to amend the UN Charter? Alternatively, can the Rome Statute be amended in a way that conflicts with the UN Charter?

Some scholars have observed that the UNGA cannot make such a decision since, firstly, unlike the UNSC it has no mandate under the UN Charter to make binding decisions while, in the case of the Rome Statute; it only makes sense if such a decision to defer is binding on the Court.[33] Secondly, the request for a deferral should be made when the situation in question is a threat to peace and security, in which case only the UNSC has such a mandate.[34]

Since the UN Charter and the Rome Statute are two independent legal regimes, it has been argued to the contrary that nothing bars the Rome Statute from providing the UNGA with the power to make binding decisions to the ICC.[35] Conversely, the UNSC cannot exercise its powers under the UN Charter to make decisions binding on the ICC.[36] Similarly, the fact that the UN Charter bestows upon the UNSC the mandate over peace and security would not bar the UNGA from deferring cases. Even though maintenance of peace and security is a power vested in the UNSC, the UN Charter[37] also envisages circumstances under which the UNGA can have such powers. This stance has however been dismissed by some international scholars who argue that it would be unsuitable

[32] This recommendation was made at the AU ministerial meeting on 6 November 2009, prior to the 8th Assembly of State Parties in The Hague.
[33] Akande, Du Plessis and Jalloh (n 24) 13.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] UN Charter, arts 10, 12 and 14.

to change the roles of the UNGA and UNSC in relation to the ICC.[38]

Likewise, when the ICC issued a warrant of arrest for Muammar Mohammed Abu Minyar Gaddafi on 27 June 2011,[39] the AU pulled the Court into an abyss of condemnation. While claiming that the arrest warrant against Gadhafi complicated the AU's efforts to broker a settlement to Libya's civil war, the Union declined to effect any arrest and surrender of Gadhafi to the ICC.[40] To this end, the AU and some scholars have found comfort in labelling the ICC as having a biased and exclusive focus on Africa.[41]

2 3 'Abusive' Application of Universal Jurisdiction

The AU has further strongly criticized the application of the principle of universal jurisdiction by non-African states claiming it to be tantamount to an abuse of the same and a retrogression of the principle of immunity of state officials.[42] Unlike other principles guiding jurisdiction,[43] the principle of universal jurisdiction is contested territory both in theory and practice. Generally speaking, the notion of universal jurisdiction in its strict sense requires no nexus between the state and the crime. As such, it is the exercise of a prescriptive jurisdiction by a state over offences committed outside its territory, by and against persons who

38 E de Wet, 'Africa and international justice: Participant or target', Speaking notes on the AU's proposed amendment of Article 16 of the Rome Statute at the conference on the Al Bashir warrant, 26 April 2010 as cited in Akande, Du Plessis and Jalloh (n 24) 15.

39 ICC-01/11-13 27-06-2011 1/7 CB PT, Pre-Trial Chamber 1, Situation in the Libyan Arab Jamahiriya.

40 CBC News, 'Gadhafi's indictment hinders peace: African Union' <http://www.cbc.ca/news/world/story/2011/07/02/world-african-union-gadhafi.html> accessed 15 April 2013. See also Glen Ford, 'The African Union says "Up Yours" to the International Criminal Court' <http://warisacrime.org/content/african-union-says-yours-international-criminal-court> accessed 15 April 2013.

41 For example, David Hoile, *The International Criminal Court, Europe's Guantamo Bay?* (Africa Research Centre 2010); see CC Jalloh, 'Africa and the International Criminal Court: Collision course or cooperation' (2012) 4 *North Carolina Central Law Review* 203 (referring to Africa as the ICC's 'experimental farm').

42 Assembly/AU/Dec. 199 (XI), 11th Ordinary session of the assembly of the AU, held in Sharm El Sheik Egypt in July 2008.

43 There are five generally agreed principles that justify the exercise of either civil or criminal jurisdiction in a matter. They include the principle of nationality, territoriality, the protective principle and the passive personality principle.

are non-nationals and the state's interests are in no way endangered.[44] 'There is no link of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit.'[45]

Some scholars broadly classify the concept of universal jurisdiction depending on their sources: *unilateral* universal jurisdiction, *delegated* universal jurisdiction and *absolute* universal jurisdiction.[46] The first category – unilateral universal jurisdiction - is where a state exercises it jurisdiction over a matter on behalf of the international community at large and with no authority from the state that is linked to the crime.[47] The second category – delegated universal jurisdiction - occurs where the state that has territorial jurisdiction over a matter either renounces or delegates such jurisdiction to the state where the alleged perpetrator is found.[48] The final category – absolute universal jurisdiction – is where a state exercises jurisdiction over a matter even against the wishes of the state having territorial jurisdiction.[49] Some commentators however simply distinguish between narrow or conditional universal jurisdiction and broad or absolute universal jurisdiction.[50] While the former requires the presence of an accused in order to prosecute, in the latter prosecution proceeds even if the

[44] K Coombes, 'Universal jurisdiction: A means to end impunity or a threat to friendly international relations?' (2011) 43 *The George Washington International Law Review* 425; R O'Keefe, 'Universal jurisdiction: Clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735, 745.

[45] L Reydams, 'Universal Jurisdiction, International and Municipal Legal Perspectives' (2003) 5 as cited in Palestinian Centre for Human Rights, 'The principle and practice of universal jurisdiction: Palestinian Centre for Human Right's work in the occupied Palestinian territory' (2010) 15-16; MS Jaques, 'The Principle of Universal jurisdiction' (2010) 6 <http://www.redcross.org.au/files/2010_The_Principle_of_Universal_Jurisdiction.pdf> citing Amnesty International, 'Universal Jurisdiction: The duty of States to enact and implement legislation' (2001) 1 <http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/be2d6765-d8f0-11dd-ad8c- f3d4445c118e/ior530022001en.pdf> accessed 8 March 2010; see also the *Princeton Principles on Universal Jurisdiction* (2001), Principle 1(1) <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf> (accessed 8 March 2010); and *AU-EU Expert Report on the Principle of Universal Jurisdiction* (16 April 2009, EU Document 8672/1/09, REV 1), para 8.

[46] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) 110.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Coombes (n 44) 436.

accused is absent from the forum state.[51] Whereas these categorizations may appear convoluted and therefore confusing, it is also of some significance that such jurisdiction is vested upon the commission of crimes that are deemed to be so grave as to shock the collective human conscience, and thus also justifying 'universal intervention'.

While the scope of crimes to which this principle applies is not yet settled, customary international law suggests the general applicability of this principle to *jus cogens* international crimes: piracy, genocide, war crimes, crimes against humanity, apartheid, slavery, slave-trade practices and torture.[52] Some international treaties however acknowledge that some international crimes that may not have acquired the status of *jus cogens*, like aircraft hijacking, fall under this list.[53] It is the gravity of these crimes, coupled with the fact that such crimes are in the interest of all humanity, that every member state of the international community is granted equal standing and interest to prosecute them. With this understanding, several states have incorporated the concept of universal jurisdiction (with varying degrees of conditions) within their municipal laws.[54]

Several African state officials have in the past been subjected to the application of the principle of universal jurisdiction.[55] Invoking universal jurisdiction against African state officials in European domestic courts has however proven

51 Ibid.

52 MC Bassiouni, 'International crimes: Jus cogens and obligatio ergo omnes' (1996) 4 *Law & Contemporary Problems* 59, 63; MC Bassiouni 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice' (2011) 42 *Virginia Journal of International Law* 81; Jaques, (n 45) 7.

53 Aircraft (Tokyo, Hague and Montreal Conventions), art 12(3)(b).

54 Belgium's 1993 Act concerning punishment of for grave breaches of international humanitarian law, which Act seeks to domesticate Belgium's obligation under the Geneva Conventions; Swiss Military Penal Codes; the United Kingdom 2001 International Criminal Court Act; The Organic Law for the Judiciary of Spain; the Netherlands War Crimes Act of 1997; South Africa's Implementation of the Rome Statute of the International Criminal Court Act of 2002.

55 For example, Muammar Gaddafi was indicted in France for torture and conspiracy to commit torture and terrorist acts; the former President of Mauritania, Maaouya Ould Sid'Ahmed Taya was also indicted in France in 2005. In 2007, Rwandan state and military officials were indicted in France for their alleged roles in the 1994 genocide in Rwanda; Rose Kabuye, a Rwandan state official was indicted in France. While she visited Germany in 2008, she was arrested and extradited to France.

to be a very controversial venture. For example, the issuance by French local courts of indictments against nine Rwandan officials and Spain's arrest warrants against 40 Rwandan officials have collectively been perceived as blatant disregard of Rwanda's sovereignty and territorial integrity.[56] These actions have equally been condemned by the AU[57] prompting the establishment of an African Union-European Union expert group to examine Africa's concerns on the abusive use of universal jurisdiction. Despite a range of findings and recommendations by this group, the same seems not to have done enough to assuage Africa's concerns. Africa continues to condemn the unceasing use of this doctrine by non-African countries.

The indictment and/or prosecution of African state officials – particularly heads of states - by foreign states for committing international crimes is arguably what has stirred the discourse on an African Court with a criminal mandate. Understandably, these are individuals who benefit from the selective application of local laws in order to defeat the ends of justice, thus perpetuating impunity on the African continent. The level of support and protection seemingly accorded by other African heads of states to those indicted for these crimes is alarming. For example, Senegal's rejection to extradite Hissène Habré to Belgium for prosecution in respect of crimes against humanity was applauded by the AU, which called upon Senegal to ensure his prosecution.[58] Although Habré still awaits trial in Senegal to date, the AU has done nothing to ensure the enforcement of their resolution. This presents an example of the 'the contrast between the perfections of the text and the imperfections of practice' within the AU,[59] thus rendering questionable Africa's efforts towards establishing a regional body with mandate over international crimes.

[56] CC Jalloh, 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' (2010) 21 *Criminal Law Forum* 29-31; J Geneuss, 'Universal jurisdiction reloaded? Fostering a better understanding of universal jurisdiction' (2009) 7 *Journal of International Criminal Justice* 946.

[57] African Union Assembly '*Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*' 5(i)–(ii), A.U. Doc. Assembly/AU/Dec.199(XI) (July 2008).

[58] Decision Assembly/AU/Dec.127 (VII), (Doc. Assembly/AU/3 (VII)).

[59] M Kitissou, 'Conflicting stories and contending images of Africa' (2008) 5(2) *African Renaissance* 8-18.

Although African leaders criticize the application of the concept of universal jurisdiction as biased towards African leaders, the principle of universal jurisdiction has been in existence since the 1600s in respect of the crime of piracy,[60] the perpetrators of which are considered *hostis humani generis*.[61] After the Second World War, the Geneva Conventions made explicit reference to the application of the principle over international crimes. The trial of Adolf Eichmann – a Nazi war criminal – in Israel, further exemplifies the continuous use of this doctrine in modern time.[62] Similarly, the Permanent Court of International Justice has previously upheld the possibility of a state exercising jurisdiction in its own territory over an act that took place abroad.[63]

Thus, the *jus cogens* nature of certain conduct *mala in se* is what bestows a criminal mandate upon any state to exercise universal jurisdiction. The argument that the indictment of African state officials accused of committing international crimes by non-African states is an abuse of the concept of universal jurisdiction does not make logical sense. History shows that the exercise of universal jurisdiction is not exclusively focused on Africa and African leaders. Besides, the ability to fight impunity on the African continent by utilizing the concept of universal jurisdiction cannot be underestimated. Having recognized the importance of the concept of universal jurisdiction, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights retains it (albeit with conditions).[64] Nevertheless, this has often times been cited as one of the continent's motivations towards the initiatives of creating a regional court with criminal mandate, which initiative is still underway.

Even though the concept of immunity of state officials does not form part of this contribution, the author acknowledges the controversy surrounding the

[60] J Garson, 'Commentary on handcuffs or papers: Universal jurisdiction for crimes of jus cogens, or is there another route?' (2007) 2 *Journal of International Law and Policy* 4.

[61] Enemies of all mankind.

[62] CrimA 336/61 *Israel v Eichmann* [1962] IsrSC 16 2033, reprinted in 36 I.L.R. 277.

[63] *S.S Lotus (France v Turkey)*, 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927).

[64] Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights inserting Article 46E*bis*, art 22.

doctrine of universal jurisdiction *vis-à-vis* immunity of state officials. This paper takes cue from like-minded academic opinions, which hold that the concept of universal jurisdiction for core international crimes has since superseded that of immunity of state officials.

3 Investigating the Court's Mandate over Core International Crimes

Thus far, the AU has sought to amend the Protocol establishing the African Court of Justice and Human Rights by incorporating transnational crimes and core international crimes: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.[65] While some critics view the proposed incorporation of international crimes within the African Court as expanding the mandate of an already overstretched Court,[66] the inclusion of crimes like money laundering, corruption, illicit exploitation of natural resources and unconstitutional change of government has generally been perceived as addressing the long standing question over the jurisdictional gap that exist between the regional human rights and international criminal justice system.[67] It is also commendable that the Court will be able to apply a much broader body of international law when rendering its decisions in this regard.[68]

3 1 Trigger Mechanisms

A referral to the Prosecutor of the Court can be done by: a state party, the Assembly of Heads of States and Government of the AU, the Peace and

[65] Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights inserting Article 28A on crimes over which the Court has jurisdiction, art 14.

[66] S Lamony (n 24).

[67] A Abass, 'The proposed international criminal jurisdiction for the African Court: some problematical aspects' (2013) 60 *Netherlands International Law Review* 33.

[68] Protocol establishing the African Court of Justice and Human Rights, arts 19 and 20.

Security Council of the AU and the prosecutor through the exercise of his or her *proprio motu* powers.[69] The Draft Protocol thus adopts provisions similar to the Rome Statute in so far as the trigger mechanisms of the Criminal Chamber are concerned.

Much of Africa's concerns against the ICC revolve around international politics within the United Nations Security Council as well as the prosecutor's *proprio motu* powers in relation referral of African based cases. How Africa then adopts similar structures to those it is already opposed to beg for answers as to whether these new institution cures its problems. If Africa's grievances towards the ICC as regards the selection of cases for referral to the Court are at all genuine, it is submitted that the choice of borrowing the ICC model of referral for use at the proposed Criminal Chamber is tantamount to transferring Africa's problems from The Hague to Africa. For example, if an ICC prosecutor is criticized for exclusively focusing on African cases, what about a prosecutor whose sole mandate is to prosecute African cases? In my opinion, either Africa does not understand what it wants or it does not appreciate where the problem really lies. Using the prosecution analogy, it cannot therefore be true that Africa's problems arise with respect to who is prosecuting, or where the prosecution is taking place. There must be more philosophically convincing challenges against the ICC in this regard.

3 2 The Relationship between the Court and the ICC

International law knows no hierarchy of criminal courts. As such both the ICC and the African Court occupies the same status in the international criminal justice realm. None of the two courts ranks higher than the other. It is in this regard that the author underlines the need to guard against duplicity of mandate. From the jurisdictional competences accorded to the two courts, it is evident that there is an overlap of their mandate.[70] 'Effective international governance

[69] Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights inserting Article 46F and 46G, art 22.

[70] Both courts have jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression.

and state compliance requires a common understanding of the normative content of international law, normally achieved through norm clarification by judicial organs.'[71] Underlying this philosophy is the need to ensure coherence in application of international norms. Duplicating the mandate of the African Court of Justice and Human Rights with that of the ICC only works to undermine this spirit. This necessitates streamlining this mandate to allow one court to exercise the overlapping jurisdiction. Not only will this alleviate the cost of the yet to be established African Court, but it will also eradicate the dangers of producing conflicting jurisprudence on similar issues.

One major shortcoming of the Draft Protocol is that it seems not to foresee a probable intercourse between the ICC and the African Court. Are there certain circumstances under which the ICC can be seized of a matter within the region? If so, how does the Protocol cure the possibility of competing jurisdictions where the party to a case prefers the ICC to the regional court?

4 Political Considerations

As much as international criminal justice is a legal issue, it does not operate in a vacuum but within a political context. International politics is thus a cardinal component of any international criminal justice system. Even then, it is essential for any study of this kind to guard against political interference that compromises the core mandate of such a system. In this regard, political considerations related to the independence of the Court and the actual political motives behind the establishment of the Court will be among the key determinants of the efficiency of the Court once established. A brief reflection on AU politics is therefore important to this study.

The strength of any judicial system lies in its independence. A conducive political atmosphere, aspects of remuneration, security of tenure and mode of appointment are the other key political determinants of the independence of any justice system.

[71] D Juma, 'Lost (or found) in transition? The anatomy of the new African Court of Justice and Human Rights' (2009) *Max Planck Year Book of United Nations Law* 13.

4 1 Appointments

Regarding appointments, discretion has been given to states to nominate judges to the African Court of Justice and Human and Peoples' Rights.[72] These nominees are then elected by the Executive Council and finally appointed by the Assembly. The nomination stage already politicizes the process of appointment. It is true that states are the central players in international law. However, if the experience of the African Court and national courts is anything to go by, it should be a lesson on how not to nominate judges to the Court of Justice. The allegiance expected of political appointees is unparalleled. For example, in 2008 the Ugandan government blocked the reappointment of Justice George Kanyeihamba on grounds that he would embarrass the state at the Court, thereby prompting the state to nominate a 'politically convenient' nominee - Joseph Mulenga.[73] Arguably, this experience resonates with the practice in most African countries.

Even in countries that have seemingly consolidated their levels of democracy, like Kenya, the culture to hold these real 'wielders of power' judicially accountable is glaringly lacking as the national courts continue to wallow in the deeply entrenched culture of protecting the *status quo*. The Kenyan Courts portray a particularly interesting picture within the ambit of international criminal justice. Whilst the AU declared its non-corporation with the ICC in the arrest and surrender of President Al Bashir, a Kenyan High Court was bold enough to hold that, should Al Bashir step foot in Kenya again, he should be arrested.[74] This did not auger well with the government of the day.

72 Annex to Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 4.

73 G Mukundi, *Report on African Court on Human and Peoples' Rights: Ten Years on and Still No Justice* (Minority Rights Group International 2008) 17. Citing Email correspondence with Sheila Nabachwa of the Ugandan Foundation for Human Rights Initiative (FHRI) and the East African representative of the Coalition for an Effective African Court on Human and Peoples' Rights, 5 June 2008; see also 'Uganda's government accused of blocking the re-election of judge to African Court', <http://www.voanews.com/english/Africa/2008-06-23-voa4.cfm> accessed 5 July 2008.

74 *The Kenya Section of the International Commission of Jurists v the Attorney General and The Minister of State for Provincial Administration and Internal Security,* Final Judgment, [2011] eKLR; ILDC 1804 (KE 2010), 28 November 2011.

Regarding a subsequent constitutional question as to whether the current president was fit to vie for presidency given the fact that he was an ICC indictee, the same High Court declared its lack of mandate to deal with a presidential election petition even when this was not an election petition *per se* but a matter of constitutional interpretation based on the integrity requirements of public officers.[75] Following on from this, the Supreme Court of Kenya shied away from invalidating presidential elections despite their very own findings that irregularities had occurred.[76] What is most saddening is the fact that this is the Kenyan judicial system that has apparently undergone drastic reforms. The traces of impunity are however inherently ingrained and evident in their decisions, particularly those involving the 'real wielders of powers'. In an interesting turn of events, the East African Legislative Assembly, in April 2012, unanimously resolved to have the ICC cases related to the current Kenyan president referred to the East African Court for prosecution regardless of the fact that the said court has no criminal mandate.

The trial of Hissène Habré in Senegal is yet another essential indicator of the levels of impunity reigning on the African continent. While giving Senegal the responsibility to try the Chadian president, the Committee of Eminent African Jurists was emphatic as regards its support for a mechanism that upheld the principle of 'total rejection of impunity.'[77] The unfolding events in Senegal can best be described as only corresponding to a call for a total denial of justice. Not only has there been a lack of any meaningful prosecution of the accused person, but the AU also seems not to be in the least interested about it.

There can be no doubt that the initiative towards the establishment of a regional body with a criminal mandate is a commendable effort. However,

[75] *International Centre for policy and conflict and 5 others v the AG and 4 others,* Constitutional and Human rights Division Petition No 552 of 2012 (2013) eKLR, <http://kenyalaw.org/CaseSearch/view_preview1.php?link=119030658917561929345 59> accessed 17 May 2013.

[76] Report by the Supreme Court on its *suo moto* motion to re-tally certain polling stations.

[77] See generally Report of the Committee of Eminent African Jurists on the case of Hissène Habré, <http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf> accessed 16 May 2013.

caution must be exercised for various reasons. A culture of impunity, which predominantly seems to correspond to the philosophy held by a majority of the African political class, must first be curtailed.[78] This has largely contributed to the poor human rights record on the continent not to mention the perpetual commission of international crimes. Often, it is the African leaders who are blamed for most of these atrocities.[79] Unfortunately, domestic and regional laws have been applied selectively so as to cushion these leaders from local justice systems. In this regard, political appointees have been the key facilitator of impunity.

Although the Rome Statute establishing the ICC underscores the fact that the Court is complementary to national criminal jurisdictions,[80] national courts have been the least interested in effective prosecution of their very own employers.[81] It therefore defies logic that these same leaders would champion

78 African Commission on Human and Peoples' Rights 'Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court' adopted during the African Commission 38th Ordinary Session, Banjul, The Gambia, 21 November – 5 December 2005.

79 On the application of universal jurisdiction against African leaders, see notes 54 and 55 above. This is also evident by the fact that three of African leaders have been or are subjects of international criminal prosecutions: the indictment and trial of the former Liberian leader, Charles Taylor, by the Special Court for Sierra Leone; the ICC indictment of Sudanese President, Omar Al Bashir; the indictment of the Chadian president, Hissène Habré, in Senegal; the indictment of the current Kenyan President by the ICC.

80 Rome Statute, preamble (para 10) and art 1.

81 There have been only four national prosecution systems established in Africa. This is in Rwanda, Ethiopia, the Democratic Republic of Congo (DRC) and Uganda. All these local prosecution mechanisms have been variously criticized. In Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press 2009) 193, the authors have faulted the transitional Government of Ethiopia for abuse of the due process of the law. According to the authors, Ethiopian courts charged 5000 individuals of the previous repressive regime under Mengistu Haile-Mariam. Although most of these detainees were arrested by 1991, it was not until December 1994 that trials began. Besides, Amnesty International, 'Ethiopia: Accountability past and present: Human rights in transition' (April 1995) 4, has lamented that several defendants have been tried and sentenced to death penalties *in absentia*. On the other hand, Bert Ingelaere, 'The *Gacaca* courts in Rwanda' in Luc Huyse and Mark Salter (eds) *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences* (International Institute for Democracy and Electoral Assistance 2008) 45, has criticized the Rwandan courts for offering selective justice. While other alleged perpetrators were subjected to trial, the Rwandan Patriotic Front (RPF) soldiers have since been cushioned from the local justice system. Similar criticisms have been levelled against the trials conducted in the DRC and Uganda.

an independent regional Court that would effectively hold them criminally liable for their atrocious acts. With key appointments to the regional Court having been entirely placed under the political arm of the AU, steps must be taken to guarantee the independence of the Court.

4 2 Remuneration

The main reason why the AU agreed on a merger of the African Court of Justice and Human Rights was the cost implications due to the growing number of AU institutions that the AU could not afford.[82] Besides, the AU's financial contribution record to international bodies like the UN and the ICC, as well as meeting its own budget, has been wanting. It is therefore doubtful whether the AU will be able to provide the additional section of the Court with the amount of funding necessary so as to guarantee its independence.

5 Recommendations to the African Union

In order to guard against the possibility of the Court undermining the rule of law in the foregoing areas, this paper recommends the following to the AU:

5 1 Jurisdiction of the Court

There is need to bestow a leaner and more practical mandate on the Court. The author suggests that since the ICC already has a mandate over international crimes like war crimes, crimes against humanity, genocide and crimes of aggression, it is unnecessary to duplicate these mandates. This will not only relieve the court of a bulging jurisdiction, but also saves the AU the financial burden of dealing with these crimes. After all, if we are interested in justice, it matters less where the same is delivered. Perhaps the Court's general section should be mandated to work closely with the ICC in related cases emanating from the continent.

[82] Coalition for an Effective African Court on Human and Peoples' Rights, The African Court of Justice and Human Rights' available at <http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=6%3Aafr-court-integrate&catid=7%3Aafrican-union&Itemid=12&lang=en> accessed 16 May 2013.

The regional prosecution of transnational crimes and the crime of unconstitutional change of government is however a welcome idea. While this is a common problem on the continent, it also addresses the long-standing gap where such jurisdictional has been lacking.

5 2 Financial Implications

The AU has a poor record of funding not only its own institutions but also other international institutions. It must therefore invent ways of funding the additional structure and not rely on donor funding. Prompt and periodic remittance of funds to the Court by its member states should thus be made compulsory.

5 3 Political Influence

It is also important to protect the integrity of the Court from political influence. It is therefore suggested that appointment of judges to the Court *must* be rigorous and devoid of politics. For example, nomination of probable candidates to the bench should not be done by states alone but in conjunction with independent non-governmental organizations and national human rights institutions. This should be based on individual's qualifications and not political patronage. Secondly, a provision for two non-African judges in the criminal chamber *must* be provided for.

Relatedly, the AU *must* encourage its member states to institute autonomous national judicial systems. After all, the international criminal justice system is only complementary to national systems.

6 Conclusions

This paper set out to discuss whether the probable establishment of an African Court with mandate over core international crimes presents an opportunity for the African continent in prosecuting international crimes or whether the same poses a challenge. It began by establishing the history behind the proposal seeking to establish this Court. It then discussed important legal and political issues that Africa must guard against in order to ensure an effective Court. The establishment of an African Court with criminal mandate is a noble idea. However, it is important for the AU to take into consideration any competing negative forces that are likely to compromise the probable operations of the Court.

Uganda's International Crimes Division: A Step in the Right Direction

Ottilia Anna Maunganidze*

Abstract

This chapter will analyse the work of the International Crimes Division of the High Court of Uganda. In so doing it will explore the potential for the domestic prosecution of international crimes. It will begin by discussing the existing domestic legal regime that governs the prosecution of war crimes, crimes against humanity and genocide in Uganda. In this respect it will focus on the Geneva Conventions Act and the International Criminal Court Act. In discussing Uganda's attempts to prosecute international crimes through the International Crimes Division, the chapter will highlight some of the challenges and prospects of prosecuting international crimes domestically.

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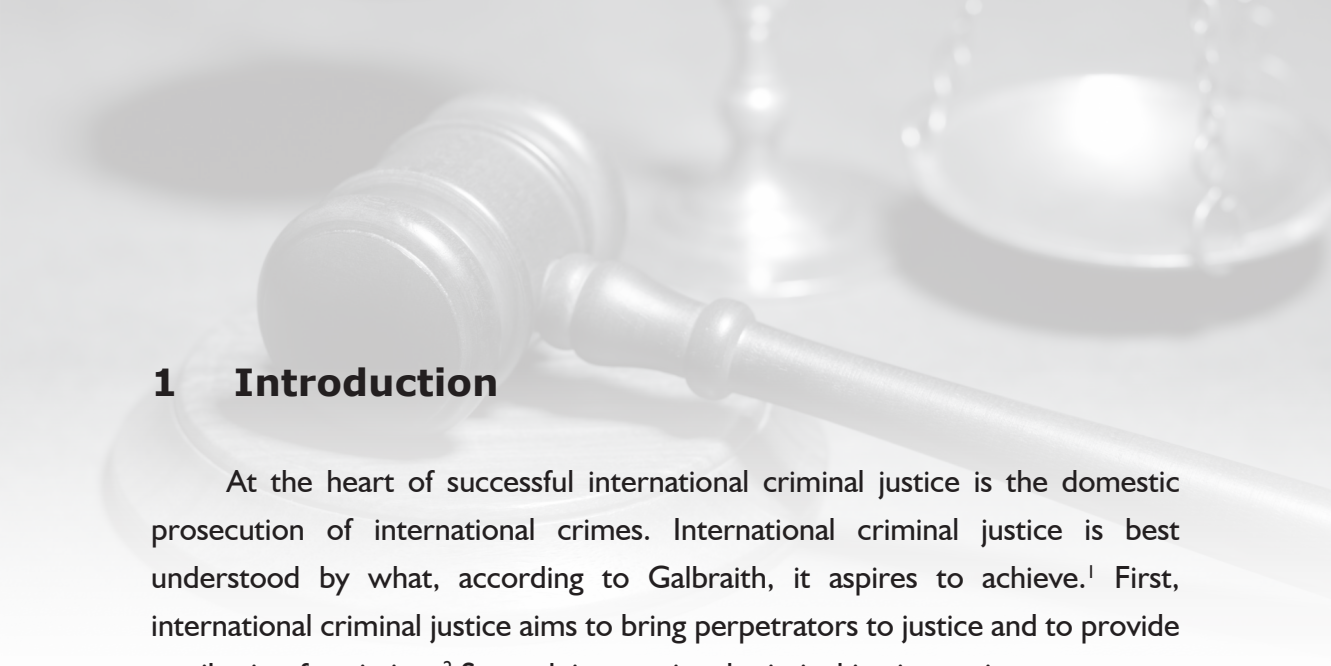

1 Introduction

At the heart of successful international criminal justice is the domestic prosecution of international crimes. International criminal justice is best understood by what, according to Galbraith, it aspires to achieve.[1] First, international criminal justice aims to bring perpetrators to justice and to provide retribution for victims.[2] Second, international criminal justice aspires to create a historical record of mass atrocities.[3] Last, international criminal justice aims to help societies in transition to achieve peace and reconciliation.[4]

International instruments that deal with atrocity crimes often contain provisions that seek to ensure that alleged perpetrators are brought to justice. The Convention on the Prevention and Punishment of the Crime of Genocide[5] mandates states to prosecute those responsible for committing acts of genocide[6] and goes further to permit states to take any action as they consider appropriate for the prevention and suppression of acts of genocide.[7] In terms of the Geneva Conventions of 1949[8] and the Additional Protocols of 1977,[9] states have a duty

1 J Galbraith, 'The pace of international criminal justice' (2009) 31 *Michigan Journal of International Law* 79–155, 83.

2 Ibid.

3 Ibid.

4 Ibid.

5 Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 (hereafter 'the Genocide Convention').

6 Genocide Convention, art 1.

7 Genocide Convention, art 8.

8 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1949) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (1950) 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 287.

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

to investigate and prosecute war crimes.[10] Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other related matters[11] contains a prohibition of torture and related offences and calls on states to criminalise the offences under their domestic laws and put in place mechanisms of prosecution.[12] Last, the Rome Statute of the International Criminal Court (ICC)[13] places a primary responsibility on states to prosecute war crimes, crimes against humanity and genocide.[14]

The majority of domestic prosecutions of international crimes have been done within the scope of these treaties' provisions. Oftentimes, this followed the domestication of the provisions of these treaties and, in exceptional circumstances; specialised courts established for that specific purpose conduct the prosecutions.

A notable historical example of a state-level prosecution of an alleged perpetrator of international crimes is the prosecution of Adolf Eichmann in Jerusalem. Eichmann was an Austrian Nazi General prosecuted in Israel for crimes committed during World War II (WWII).[15] Israel also prosecuted John Demjanjuk for allegedly operating a gas chamber in a Polish Nazi concentration camp during WWII.[16]

Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

10 K Obura, 'Duty to Prosecute International Crimes under International Law' in Chacha Murungu and Japhet Biegon (eds) *Prosecuting international crimes in Africa* (Pretoria University Law Press 2011) 14.

11 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other related matters (1984) **A/RES/39/46 (hereafter 'Convention Against Torture').**

12 Convention Against Torture, art 4.

13 Rome Statute of the International Criminal Court (last amended 2010) 2187 UNTS 90 (hereafter 'Rome Statute').

14 Preamble of the Rome Statute; see also Rome Statute, arts 1 and 17. The Rome Statute also provides for the prosecution of the crime of aggression as and when defined and amendments to the Statute accordingly ratified.

15 H Jallow and F Bensouda, 'International Criminal Law in an African Context' in M du Plessis (ed) *African Guide on International Criminal Justice* (Institute for Security Studies 2008) 17.

16 Ibid 19.

To date, the prosecution of Chilean former president General Augusto Pinochet is considered the most high profile national prosecution of a person alleged to have committed international crimes.[17] Notably, Pinochet's arrest in London was the first time a former head of state was arrested while visiting another country.[18]

In Africa, several countries have prosecuted or attempted to prosecute individuals who allegedly committed international crimes. Examples include the trials of the 'Butare Four' from Rwanda,[19] the impending trial of former Chadian president, Hissène Habré, who is currently detained in Senegal,[20] and the conviction *in absentia* of former Ethiopian leader Mengistu Haile Mariam.[21]

All these prosecutions (or attempts at prosecuting) were not without their challenges. Many practical and legal hurdles stand in the way of individual countries prosecuting international crimes.[22] These challenges must be overcome if international criminal justice is to succeed. It is against this backdrop that an analysis of domestic prosecution in Uganda is conducted and specific recommendations posited.

With the aforementioned in mind, this chapter will attempt to critically analyse the work of the International Crimes Division (ICD) of the High Court of Uganda. It will begin by discussing the importance of domestic prosecutions in the context of Uganda. In this regard, it will briefly examine complementarity as envisioned in the Rome Statute of the ICC. Thereafter, it will cover the existing domestic legal regime that governs the prosecution of war crimes, crimes against

17 C Powell and N Pillay, 'Revisiting Pinochet: The development of customary international criminal law' (2001) *South African Journal of Human Rights* 477-502.

18 G Robertson, *Crimes Against Humanity: The Struggle for International Justice* (2nd edn, New Press 2002) 395.

19 H Jallow and F Bensouda (n 15) 20.

20 M du Plessis, 'The wheels of international criminal justice grind slowly for Hissène Habre' ISS Today (30 April 2013); L Louw-Vaudran, African Union played vital role in Habré arrest, Mail & Guardian (12 July 2013); See too: OA Maunganidze, 'Prosecuting the powerful: will justice ever be done?' ISS Today (28 January 2014).

21 Mengistu was convicted by an Ethiopian High Court is in exile in Zimbabwe. H Jallow and F Bensouda (n 15) 20–30.

22 H Jallow and F Bensouda (n 15) 16–30.

humanity and genocide in Uganda. In this light, Uganda's legislation implementing the Rome Statute (in terms of which the ICD was established to investigate, prosecute and adjudicate international crimes) will be dealt with. Uganda also has legislation implementing the Geneva Conventions and intends to use this Act to prosecute alleged war criminals for crimes that fall outside the ambit of Uganda's International Criminal Court Act of 2010. In 2012, Uganda enacted legislation prohibiting torture and other forms of cruel and inhuman degrading punishment, which can also be used in the prosecution of perpetrators alleged to have committed these offences within the context of crimes against humanity.

In analysing Uganda's attempts to prosecute international crimes through the ICD, the chapter will delve into some of the challenges and prospects of prosecuting international crimes domestically. Throughout, the chapter will also discuss the role that civil society can and has played in the process. All of this is done in an effort to assess whether the ICD can serve to achieve the goals of international criminal justice.

2 Why Domestic Prosecution? omplementarity in Practice

Over the past ten years, there has been an increasing focus on making it possible for national courts to conduct trials in respect of the core crimes under international law, namely, genocide, war crimes and crimes against humanity. This move was necessitated in 2002 by the coming into force of the Rome Statute of the ICC, in terms of which the primacy of national courts is underscored.[23] The principle of 'complementarity', enshrined in the Rome Statute, assigns primary responsibility for the investigation and prosecution of genocide, crimes against humanity and war crimes to national criminal jurisdictions, while providing for certain standards that must be met. These standards stem from the Rome Statute's notions of 'unwillingness'[24] and 'inability'.[25]

[23] Rome Stature, preamble (para 10) and arts 1, 17 and 20(3).
[24] Rome Statute, art 17(2); Rule 51 of the Rules of Procedure and Evidence.
[25] Rome Statute, art 17(3).

In this regard, Roy Lee states that complementarity 'means that the Court will complement, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the ICC will act when national courts are "unable or unwilling" to perform their tasks.'[26]

Developments in the field of international criminal justice come from recognition that national courts are often the most efficient and effective institutions at providing accountability for crimes. Thus, countries are encouraged to actively seek to promote 'proactive' or 'positive' complementarity through empowering their courts to exercise jurisdiction over international crimes.[27] Uganda is one such country that has enacted legislation allowing it to prosecute international crimes and has gone further to establish a specialised division of its High Court that is tasked, amongst others, to adjudicate on matters related to the commission of war crimes, crimes against humanity and genocide.

3 Uganda and International Criminal Justice

Since the late 1980s, the northern regions of Uganda have been ravaged by a rebellion that has in the past decade spilled over into neighbouring countries.[28] The Lord's Resistance Army (LRA), the main antagonist, is a militant rebel movement from northern Uganda with primary operations in northern Uganda, South Sudan and North Eastern Democratic Republic of Congo (DRC).[29] The LRA is alleged to have 'established a pattern of brutalisation of civilians by acts

[26] RS Lee, 'Introduction' in RS Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 2002) 27.

[27] J Iontcheva Turner, 'Nationalising international criminal law' (2005) 41(1) *Stanford Journal of International Law* 1.

[28] Tim Allan *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books 2006); START 'Terrorist Organization Profile: Lord's Resistance Army (LRA)' National Consortium for the Study of Terrorism and Responses to Terrorism, University of Maryland <http://www.start.umd.edu/start/data_collections/tops/terrorist_organization_profile.asp?id=3513> accessed 13 April 2013.

[29] ICG 'Peace in Northern Uganda?' *Africa Briefing* N°41, 13 September 2006 <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/B041-peace-in-northern-uganda.aspx> accessed 13 April 2013.

including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements; that abducted civilians, including children, are said to have been forcibly recruited as fighters, porters and sex slaves and to take part in attacks against the Ugandan army (Uganda People's Defence Force – UPDF) and civilian communities.'[30]

Uganda, a state party to the Rome Statute of the ICC since 2002,[31] has unsuccessfully attempted to quell the LRA rebellion using various strategies, mostly military. It was for this reason, in part, that the Ugandan government in December 2003 referred the situation in northern Uganda to the ICC.[32] Pursuant to this referral, the Office of the Prosecutor (OTP) of the ICC initiated investigations in July 2004.[33] The investigation focused on areas in northern Uganda where the LRA is alleged to have committed numerous atrocities against the civilian population.[34] The ICC has established a field outreach office in Kampala to support its operations in Uganda and has the support of local non-governmental organisations that form part of the Ugandan Coalition on the International Criminal Court (UCICC)[35] and Human Rights Network Uganda (HURINET-U).[36]

In July 2005, the ICC issued arrest warrants for five senior commanders of the LRA, including its leader, Joseph Kony.[37] No arrests have been made to date

30 International Criminal Court, 'Warrant of arrest unsealed against five LRA commanders' (14 October 2005) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders.aspx> accessed 12 July 2013.

31 CICC, 'Country Profile: Uganda' <http://www.iccnow.org/?mod=country&iduct=181> accessed 12 July 2013.

32 ICC Press Release 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' ICC-20040129-44 <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB> accessed 12 April 2013.

33 Ibid.

34 *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.

35 HURINET-U, International Criminal and Transitional Justice Programme <http://www.hurinet.or.ug/programs.php> accessed 21 July 2013.

36 UCICC website <http://www.ucicc.org/> accessed 21 July 2013.

37 The other commanders of the LRA wanted are Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.

and the OTP continues to seek the cooperation of relevant states for the arrest and surrender of the named suspects.[38]

It was only after the ICC issued the warrants for the arrest of the aforementioned senior commanders of the LRA that the LRA was forced to take part in peace negotiations.[39] The negotiations, brokered by the government of Southern Sudan, culminated in the Agreement on Accountability and Reconciliation (a peace agreement that made specific provision for international criminal justice).[40] However, the complete final agreement was never signed and it has been argued that despite the inclusion of provisions related to justice, the accord showed the extent to which criminal justice may be compromised for the sake of peace.[41]

The peace agreement (commonly referred to as the 'Juba Agreement') changed the dynamics on the ground entirely.[42] First, Uganda had now adopted a less militaristic approach to dealing with the LRA. Second, provision needed to be made for the prosecution of international crimes under Ugandan law. This latter development is what led to the enactment of domestic implementing legislation for the Rome Statute. In terms of this implementation law,[43] Uganda has a legal framework to investigate and prosecute the core international crimes.

38 Proceedings against Raska Lukwiya were terminated in July 2007 following his death in August 2006, see: *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen Decision to terminate the proceedings against Raska Lukwiya ICC-02/04-01/05-248*. Otti was allegedly executed on Kony's orders in October 2007, however there is no evidence to support this claim; A Traylor, 'Uganda and the ICC: Difficulties in bringing the Lord's Resistance Army leadership before the ICC' (2009–2010) 6 *Eyes on the ICC* 23.

39 A Joseph, 'Confronting impunity locally: An insight into the principle of complementarity under the Rome Statute - Uganda's experience' in UCICC, *The Forum Magazine: The International Criminal Court and Africa* (July 2011, Issue 2) 32 <http://www.hurinet.or.ug/downloads/publications/2011%20THE%20FORUM%20-%20The%20ICC%20and%20Africa.pdf> accessed 21 July 2013.

40 ICG (n 29).

41 A Greenawalt, 'Complementarity in crisis: Uganda, alternative justice, and the International Criminal Court' (2009) 50 *Virginia Journal of International Law* 108.

42 M Newton, 'The Complementarity conundrum: Are we watching the evolution or evisceration?' (2010) 8 *Santa Clara Journal of International Law* 115, 162; see further F Okumu-Alya, 'The International Criminal Court and its role in the Northern Uganda conflicts - An assessment' (2006) 4 *Uganda Living Law Journal* 16.

43 See full discussion below.

Uganda's legislation also provides for a form of universal jurisdiction[44] that is, at least, indicative of Uganda's commitment to dealing with international crimes beyond its borders. Further, this law provides for the establishment of a War Crimes Division of the High Courts of Uganda with jurisdiction, *inter alia*, over international crimes.[45] The War Crimes Division was later renamed the International Crimes Division.[46]

4 Prosecuting International Crimes in Uganda

Before examining the work of the International Crimes Division (ICD), it is important to understand Uganda's legal system. Uganda's legal system (including its criminal law) was largely inherited from Britain. Thus, Uganda has a common law system. Offences not expressly provided for under the common law must be incorporated into domestic law by way of legislation.

The powers to institute criminal proceedings are constitutionally vested in the Director of Public Prosecutions (DPP).[47] Further, the Constitution gives the DPP the discretion to take over or discontinue any criminal proceedings. In exercising this discretion, the DPP is required to have regard to the public interest, the interests of the administration of justice and the need to prevent abuse of the legal process.[48] Judicial power in Uganda is constitutionally vested in courts that exercise both criminal and civil jurisdiction.[49]

4 1 Legal Basis for the Prosecution of International Crimes

Uganda has domesticated the Rome Statute of the ICC;[50] the 1949 Geneva Conventions governing armed conflicts[51] and the Convention Against Torture and

44 See Uganda's International Criminal Court Act 2010, s 18(d).
45 Uganda, International Criminal Court Act, 2010.
46 See discussion of the ICD below.
47 Constitution of Uganda, 1995, art 123(3)(b).
48 Constitution of Uganda, 1995, art 120(5).
49 Constitution of Uganda, 1995, arts 129-138.
50 International Criminal Court Act, 2010 (hereafter 'the ICC Act').
51 Geneva Conventions Act, 1964, Cap 363.

Other Cruel, Inhuman or Degrading Treatment or Punishment.[52] The ICC Act comprehensively provides for the criminalisation of war crimes, crimes against humanity and genocide in Uganda. The Geneva Conventions Act deals with the laws governing the conduct of armed conflicts. Both can be used to prosecute alleged perpetrators of international crimes.

4 2 Domestic Prosecution under the Geneva Conventions Act

The 1949 Geneva Conventions are at the core of international humanitarian law, and are among the most important treaties governing the protection of victims of armed conflict.[53] In terms of the Geneva Conventions and their accompanying Additional Protocols of 1977, Uganda is obliged to put an end to all 'grave breaches' set out therein. These grave breaches are wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; compelling a prisoner of war or a protected person to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial; the unlawful deportation or transfer or unlawful confinement of a protected person; and the taking of hostages.[54] There is an

[52] Prohibition and Prevention of Torture Act, 2012.

[53] El Nahamya, 'International crimes' presentation at Institute for Security Studies/Uganda training on counter-terrorism and international criminal justice, Kampala 22 July 2013. The presentation is on file with the author.

[54] Article 50 of Geneva Convention I and Article 51 of Geneva Convention II both read:
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.
Article 130 of Geneva Convention III includes all the grave breaches outlined in Geneva Conventions I and II, and adds wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial as grave breaches.
Article 147 of Geneva Convention IV includes all the grave breaches outlined in Geneva Conventions I and II, save for the extensive destruction and appropriation of property. It adds: unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages.

obligation in the Conventions and their Additional Protocols to investigate and prosecute perpetrators of these grave breaches or extradite them for another state to do so. It should be noted that given most of today's conflicts are of a non-international character, reliance is placed on common Article 3 of the Geneva Conventions.

To give effect to the provisions of the Geneva Conventions, Uganda enacted the Geneva Conventions Act, which wholly incorporates the provisions of the 1949 Conventions. The Geneva Conventions Act makes punishable grave breaches of the Geneva Conventions, when committed by '[a]ny person, whatever his or her nationality [...] whether within or outside Uganda.'[55] The principle of universal jurisdiction is provided for under Section 2(2) of the Geneva Conventions Act as follows:

Where an offence under this section is committed outside Uganda, a person may be proceeded against, indicted, tried and punished for that offence in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes […] be deemed to have been committed in that place.[56]

However, the Act does not describe with sufficient clarity, which court(s) have this jurisdiction to try the offences contained. Indeed, prior to the establishment of the ICD, there had been no attempts to prosecute anyone under the provisions of the Geneva Conventions Act.[57]

4 3 International Criminal Court Act

In addition to the Geneva Conventions Act, Uganda enacted legislation implementing the Rome Statute of the ICC in March 2010.[58] The law, which came into effect eight years after Uganda's ratification of the Rome Statute, was

[55] Section 2(1) Geneva Conventions Act.
[56] Section 2(2) Geneva Conventions Act.
[57] See discussion on the use of the Geneva Conventions Act to prosecute alleged perpetrators
[58] The effective date of the ICC Act of 2010 is 25 June 2010.

a prerequisite to Uganda hosting the first Review Conference of the International Criminal Court in May and June 2010.

The objectives of the ICC Act were set out in detail in the memorandum of the ICC Bill. These, *inter alia,* include:

1. Giving force of law in Uganda to the Rome Statute of the ICC;
2. The implementation of obligations assumed by Uganda under the Rome Statute;
3. Making further provision in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes;
4. Enabling Uganda to cooperate with the ICC in the performance of its functions;
5. Providing for arrest and surrender to the ICC of persons alleged to have committed crimes referred to in the Rome Statute;
6. Providing for various forms of requests for assistance to the ICC;
7. Enabling Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the Rome Statute;
8. Enabling the ICC to conduct proceedings in Uganda; and
9. Providing for the enforcement of penalties and other orders of the ICC in Uganda.[59]

The ICC Act provides for the aforementioned through incorporating and therefore domesticating the provisions of the Rome Statute *in toto*. Notably, the ICC Act defines and makes applicable the offences of genocide, crimes against humanity and war crimes as defined in the Rome Statute, and their substantive elements. The ICC Act embodies those fundamental principles of criminal law

[59] The International Criminal Court Bill No. 18, 2006 (accessible at <http://www.iccnow.org/documents/Uganda-ICC_Bill_2006.pdf>). See also T Asiimwe, 'Effecting complementarity: Challenges and opportunities: A case study of the International Crimes Division of Uganda' Paper presented at a Regional Forum on International and Transitional Justice, 30 July 2012 <http://www.asf.be/wp-content/uploads/2012/10/Case-Study-of-the-International-Crimes-Division-of-Uganda.pdf>; El Nahamya (n 53).

that are found in the Rome Statute, namely, the *ne bis in idem*,[60] *nullum crimen sine lege*,[61] *non-retroactivity*[62] and individual criminal responsibility.[63] The ICC Act also has unique implementing provisions related to how Uganda will cooperate with the ICC and the specific forms of assistance it will provide as and when requested.

In furtherance of the principle of universal jurisdiction, the ICC Act makes express provisions on personal and territorial jurisdiction.[64] In respect of persons who may be prosecuted for the offences prescribed, the ICC Act gives courts in Uganda universal jurisdiction over the following persons allegedly responsible for war crimes, crimes against humanity and genocide:

(a) a person who is a citizen or permanent resident of Uganda;
(b) a person who is employed by the Uganda government in a civilian or military capacity;
(c) a person who has committed the offence against a citizen or permanent resident of Uganda; and
(d) a person who after the commission of the offence is present in Uganda.[65]

Thus, in terms of the provisions of the ICC Act, leaders of the LRA can be prosecuted in Uganda. Equally, the ICC Act applies to members of the armed forces who are allegedly responsible for international crimes committed in Northern Uganda. It is worth noting that - in line with Article 27 of the Rome Statute - Section 25(1) of the ICC Act removes immunity for crimes under the

60 Rome Statute, art 20.
61 Rome Statute, art 22(2).
62 Rome Statute, art 24(2).
63 Rome Statute, art 25.
64 ICC Act, s 18(d).
65 ICC Act, s 18. Similar provisions are contained in Section 4(2) of South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. This has been termed as 'quasi-universal' jurisdiction in that its exercise depends on the accused being within the territory of the country. Further, initiation of proceedings prior to the accused being in the territory is done under the doctrine of anticipated presence.

Act. This means that the law also applies to government and military officials bearing responsibility for the international crimes committed by their inferiors.

4 4 Prohibition and Prevention of Torture Act, 2012

The Constitution of Uganda guarantees absolute freedom from torture, and other cruel, inhuman or degrading treatment or punishment in terms of Articles 24 and 44(a). In June 1987, Uganda acceded to the Convention Against Torture. Further, in 2012, Uganda adopted a comprehensive anti-torture law in terms of which all offences outlined in the Convention Against Torture are criminalised and can be prosecuted domestically. The Prohibition and Prevention of Torture Act is a comprehensive law. However, to date, no action in terms of the Act has been instituted. Like all other laws, in order for it to have any impact, it must be implemented in practice.[66] It is worth noting that in 2004 an application in terms of the Constitution of Uganda was brought before the Uganda Human Rights Commission at Gulu[67] in which the complainant sought compensation for being detained and beaten by members of the UPDF in 2001. The Human Rights Commission found in favour of the complainant and held that the conduct of the UPDF constituted torture as envisaged in the Convention Against Torture and the Constitution.

The aforementioned laws are integral to the future prosecution of international crimes in Uganda – a task that has been given to a specialised division of the High Court of Uganda.

5 The International Crimes Division at Work

In 2008, further to the Juba Agreement between the Government of Uganda and the LRA, the government established a War Crimes Division (now

[66] APT 'Uganda roadmap for torture prevention' 28 February 2013, <http://www.apt.ch/en/news_on_prevention/uganda-roadmap-for-torture-prevention/#.UgirMFPeNiU> accessed 12 July 2013.

[67] *Ojera Denis v Attorney General*, *Uganda* Human Rights Complaint UHRC G 199 2001 - 5/12/2004.

the ICD).[68] The establishment of this division was necessitated by provisions in an Annex to the Juba Agreement, which expanded on the framework for accountability described in the Juba Agreement and provided that a special division of the High Court of Uganda would be established to try individuals 'alleged to have committed serious crimes during the conflict.'[69] Prosecutions by the specialised court would focus on those 'alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.'[70] The Annexure also makes provision for the establishment of a special unit in the office of the Director of Public Prosecutions (DPP) for the purposes of carrying out investigations and supporting prosecution of crimes as agreed.[71]

Thus, the ICD is a specialised division of the High Court with the jurisdiction to try cases relating to war crimes, genocide and crimes against humanity. It also has jurisdiction over other serious transnational crimes including terrorism, human trafficking, piracy and any other international and transnational crime.[72] In addition to the ICC Act and the Geneva Conventions Act, the ICD also relies on several other related laws.[73]

Proceedings before the ICD are open to the public and press subject to the exceptions in Article 28(2) of the Uganda Constitution.[74] The ICD consists of five judges, but may sit as a panel of a minimum of three judges as per Section

68 The ICD is a special division established under the 1995 Constitution of Uganda. The name of the War Crimes Division (WCD) was changed to the International Crimes Division (ICD) on 8 June 2011 further to High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, Legal Notice Supplements, Uganda Gazette 38 (CIV), 31 May 2011, para 6.

69 M du Plessis, A Louw and OA Maunganidze, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' (November 2012) *ISS Paper* 241.

70 Agreement on Accountability and Reconciliation, para 7.

71 Agreement on Accountability and Reconciliation, para 10.

72 Section 6 of the High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, without prejudice to Article 139 of the Constitution.

73 The Constitution of the Republic of Uganda, 1995; Penal Code, Cap 120; Magistrates' Courts' Act, Cap. 16; Criminal Procedure Act, Cap 116; Trial on Indictment Act, Cap. 23; Evidence Act, Cap. 6; Judicature Act, Cap. 13; Amnesty Act Cap. 59 and the Children's Act, Cap. 59.

74 Article 28(2) permits courts to exclude the press or the public from all or any proceedings before them for 'reasons of morality, public order or national security, as may be necessary in a free and democratic society.'

4(2) of the High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011. In addition to the five judges, the division has a registrar, along with a team of six prosecutors and five police investigators attached to it. However, given the extensive mandate, this is a relatively small staff component.

The limited human resources notwithstanding, the designation of officers from the judiciary, prosecution and police to the ICD has led to the development of competence and specialty to handle complex international and transnational crime cases in Uganda.[75] The ICD thus should benefit from tailored capacity building and technical assistance.[76] The judges and the registrar of the ICD have benefitted from study tours to the ICC and the International Criminal Tribunal for Rwanda (ICTR). The judiciary and various local and international non-governmental organisations have facilitated these different projects aimed at building the capacity of the ICD. Similar training has been provided for prosecutors and selected investigators and magistrates through the office of the DPP.

In respect of rules of the court, the ICD has adopted the Rules of Procedure and Evidence applicable to criminal trials in Uganda. Where no express provision is made under any written law in respect of a particular procedure or evidence, the ICD can adopt such other procedure as it considers justifiable and appropriate in all the circumstances taking into account of Section 141 of the Trial on Indictments Act, Cap 23 and Section 39 of the Judicature Act, Cap 13. In formulating these new procedures, the ICD must have regard to the rights and views of the parties to the proceedings. Appeals from the decisions of the ICD are heard at the Court of Appeal and thereafter at the Supreme Court of Uganda.

It should be noted that the jurisdiction of the ICD is limited by the terms of Uganda's Amnesty Act of 2000, which provides protection from prosecution or punishment to 'any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda' and thereafter renounced the rebellion.

[75] M du Plessis *et al*. (n 69).

[76] Human Rights Watch, 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division' (2012) 26.

The ICD began work in 2011 with the case against Thomas Kwoyelo, an alleged former commander in the LRA.[77] Thomas Kwoyelo was initially charged before the Buganda Road Chief Magistrate's Court on 6 September 2010 with various offences under Article 147 of the Geneva Conventions Act.[78] He was later committed for trial to the ICD and appeared before the ICD on the 11 July 2011 where his indictment was amended from 12 counts to 53 counts of war crimes under the Geneva Conventions Act, with alternative charges including murder, kidnapping with intent to murder, attempted murder and robbery under the Penal Code Act Cap 120.[79] Kwoyelo plead not guilty on all 53 counts.[80]

Kwoyelo applied for amnesty after he was captured and before the trial commenced. The office of the DPP refused to entertain Kwoyelo's request for amnesty thus blocking the Amnesty Commission from granting amnesty to Kwoyelo. Kwoyelo's legal team consequently approached the Constitutional Court to make a determination on whether the action by the DPP and Amnesty Commission of failing to grant the certificate of amnesty to Kwoyelo, while granting the same to 14 others in similar circumstances was discriminatory and inconsistent with Articles 1, 2, 20(2), 21(1) and 21(3) of Constitution of the Republic of Uganda.[81] Further, the defence sought a determination from the Constitutional Court on whether indicting Kwoyelo under Article 147 of the Fourth Geneva Convention and Section 2(1)(d) and (e) of the Geneva Conventions Act of offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with and in contravention of Articles 1, 2, 8(a) and 287 of the Constitution and objectives of 111 and xxvii(b) of the National Objectives and Directive Principles of State Policy, contained in the Constitution.[82]

Further, the defence also sought to render unlawful Kwoyelo's detention. The defence alleged that Kwoyelo's detention in a private residence of an

77 *Thomas Kwoyelo alias Latoni v Uganda* HCT-00-ICD- Case No. 02/10.
78 El Nahamya (n 53).
79 Ibid.
80 *Thomas Kwoyelo alias Latoni v Uganda* HCT-00-ICD- Case No. 02/10.
81 *Thomas Kwoyelo alias Latoni v Uganda* (Const. Pet. No. 036 of 2011 (reference)).
82 Ibid.

unnamed official of the Chieftaincy of Military Intelligence (CMI) is in contravention and inconsistent with Articles 1, 2, 23(2), 23(3), 4(b), 24 and 44(a) of the Constitution.[83] Last, the defence sought a determination by the Constitutional Court on whether Sections 2, 3, and 4 of the Amnesty Act are inconsistent with Articles 120(3)(b)(c) and (5)(6), 126(2)(a), 128(1) and 287 of the Constitution.[84]

The Constitutional Court, following submissions from both counsel, held that it was satisfied that Kwoyelo had made out a case showing that the Amnesty Commission and the Director of Public Prosecutions had not afforded him equal treatment under the Amnesty Act.[85] Thus the Constitutional Court found that Kwoyelo was entitled to amnesty[86] under the Amnesty Act.[87] The Constitutional Court also issued an order for the file to be returned to the ICD in order for the ICD to cease Kwoyelo's trial.[88] The government's appeal of the Constitutional Court decision was denied and the ICD formally ceased Kwoyelo's trial on 11 November 2011.

According to Lady Justice Elizabeth Ibanda Nahamya, the Deputy Head of the ICD and the Nakawa High Court, the Constitutional Court decision has created serious concerns regarding its implications on the pursuit of justice and accountability in Uganda.[89] She contends that the enactment of amnesty laws, which prevent the investigation, prosecution and punishment of such crimes, conflicts with the international obligation do so. It should be noted that the Rome Statute left States with the room to grant amnesties and pardons.[90] This possibility,

83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ugandan Amnesty Act, Cap 294 of 2000 <http://www.ulii.org/ug/legislation/consolidated-act/294> accessed 21 July 2013.
88 After the Constitutional Court ruling, the ICD deferred Kwoyelo's release to the DPP of Uganda and the Amnesty Commission. Since then, a legal battle has ensued relating to the process of issuing Kwoyelo with an amnesty certificate. Kwoyelo remains in prison and has still not received his amnesty certificate from the authorities. See UCICC, 'About Kwoyelo' <http://www.ucicc.org/index.php/icd/about-kwoyelo> accessed 21 July 2013.
89 El Nahamya (n 53).
90 MM El Zeidy, 'The principle of complementarity: A new machinery to implement international criminal law' (2001-2002) 23 *Michigan Journal of International Law* 869, 946.

in effect, affects the complementarity regime, as has been shown in the first attempt by the ICD to prosecute Thomas Kwoyelo for crimes committed while he was part of the LRA.

In addition to the challenge of amnesty, the ICD is faced with other challenges. These include, according to Nahamya, institutional and procedural challenges; and the sentencing disparities for crimes under the ICC Act, Geneva Conventions Act and the Penal Code Act.[91]

The primary institutional challenge that the ICD has relates to its classification as a division of the High Court in lieu of a specialised independent court. The mandate of the ICD is such that it is not just a 'Division' but also a competent Court with jurisdiction over specified crimes. This distinction is important for a number of reasons. First, the allotment of resources to divisions is less than that to free standing high courts. The implications thereof are that the ICD lacks the requisite human and financial resources to effectively carry out its mandate.[92] The reclassification is necessary to institutionally entrench the ICD in Uganda's criminal justice system.[93]

In respect of procedural challenges, the ICD operates in the absence of its own Rules of Procedure and Evidence enabling it to handle international and transnational crimes that are within its mandate. The administrative arrangement in the High Court enables divisions to enact unique Rules of Procedure and Evidence relevant to specific divisions where the law does not already provide for them.[94] The responsibility to devise these rules of procedure rests with the ICD. Given the peculiarity of the cases that the ICD is tasked with, it would need to devise rules of procedure and evidence that are in line with international standards for courts of its nature. The ICD can develop its rules based on existing rules for specialised courts in other comparative jurisdictions and from the international criminal tribunals.

91 El Nahamya (n 53).
92 Ibid.
93 T Asiimwe (n 59).
94 Ibid.

For example, given that Uganda does not have an existing framework for witness protection[95] and it is likely that witnesses before the ICD would require protection of some sort, the ICD can take cues from the Special Court for Sierra Leone. In this regard, the ICD can look to establishing some protective measures that are in line with Ugandan law and existing evidentiary rules. Such protective measures may include physical protection measures for witnesses during and after testimony. The non-disclosure of the identity of the witness(es) prior to trial can also be used, and where possible the retention of such anonymity during trial. There could also be provision for victims or witnesses to give their testimony via video link, in camera or with their voices and/or features digitally distorted.[96]

In respect of sentencing, there is a noted discrepancy between the penalty provisions in the Rome Statute and those in Ugandan law. For one, the Rome Statute does not provide for death as a penalty for any of the offences. However, under Ugandan law, the death penalty remains the maximum sentence for capital offenders. In seeking to harmonise Ugandan law with the international law, the ICC Act does not provide for the death penalty, instead it provides for life imprisonment as the maximum sentence,[97] if convicted for the very grave offences of crimes against humanity, genocide and war crimes. Meanwhile, a person can be sentenced to death under the Penal Code for what may be viewed as 'lesser offences.' It is worth noting however that the Supreme Court in *Susan Kigula and 417 others v Attorney General, Constitutional Appeal No 3 of 2006,* held that in Uganda it is no longer mandatory to impose a death sentence on persons convicted of capital offences and that such imposition was within the discretion of the presiding judge. It is worth noting, however, that the Rome Statute does not prescribe to States what sentences they should give upon conviction. Indeed, Article 80 provides that: 'Nothing in this part affects the application by States of penalties prescribed by their national law nor the law of States which do not provide penalties prescribed in this part.'

[95] It is worth noting that Section 58 of the ICC Act provides for the protection of ICC witnesses in Uganda.
[96] T Asiimwe (n 59).
[97] Rome Statute, arts 6-9.

The foregoing challenges notwithstanding, the ICD is committed to promoting international criminal justice through the fair adjudication of cases brought before it.[98] At the time of writing, the ICD was involved in other investigations into crimes committed in Northern Uganda. Notably, the ICD is seized of a matter against a top commander of the Allied Defence Force whose group burnt 80 students to death in 1998.

Indeed, Uganda is attempting to address international crimes at the domestic level, but the Amnesty Act has hindered prosecution efforts.[99] Part 11 of the Amnesty Act gave a blanket amnesty to those who renounced the LRA.

According to Joan Kagezi, the head of prosecution at the ICD, many cases were investigated and presented in court only for the accused to seek amnesty and subsequently evade justice.[100] It is worth noting, however, that Part 11 of the Amnesty Act no longer applies to senior commanders of the rebellion.[101]

6 The ICD and the ICC – Competing or Complementary?

Conceptually, the ICD is intended to serve as a complement to the ICC, in line with complementarity provisions of the Rome Statute. However, at present the ICD does not actually have a formal relationship with the ICC.[102] The lack of a formal relationship notwithstanding, prosecutors attached to the ICD have cooperated with the OTP in respect of open investigations.[103]

98 M du Plessis *et al.* (n 69).

99 Avocats Sans Frontières, 'Amnesty: "An Olive Branch" In Justice?' (2012) <http://www.asf.be/wp-content/publications/ASF_AmnestyAdvocacyTool_2012_DEF.pdf> accessed 21 July 2013.

100 J Kagezi, 'Practical aspects of prosecuting and adjudicating international and transnational crimes – The East African perspective' presentation at the 7th Annual Conference of the Africa Prosecutors' Association, Windhoek, Namibia, 9 October 2012.

101 IRIN, 'Rebel amnesty reinstated in Uganda' *IRIN* (30 May 2013) <http://www.irinnews.org/report/98133/rebel-amnesty-reinstated-in-uganda> accessed 21 July 2013.

102 Human Rights Watch (n 76) 6.

103 M Otim, 'The evolution of international criminal justice and the nexus between the ICC and ICD of the High Court of Uganda' in UCICC, *The Forum Magazine: The International Criminal Court and Africa* (July 2011, Issue 2) 4–7 <http://www.hurinet.or.ug/downloads/publications/2011%20THE%20FORUM%20-%20The%20ICC%20and%20Africa.pdf> accessed 21 July 2013.

Bearing in mind that complementarity asserts the primacy of domestic jurisdictions in respect of the prosecution of international crimes, whatever relationship the ICD has with the ICC should have this at its core. However, the ICC still has the primary mandate to handle those cases opened as a result of the referral of the situation in northern Uganda by the government of Uganda in 2003. Indeed, the government of Uganda referred the situation to the ICC on the basis that they were unable at that time to prosecute international crimes committed by the LRA. This was partly due to the fact that the government was unable to arrest members of the LRA, which were at the time operating from bases in South Sudan. The formation of the ICD remedies the inability to prosecute. However, the ICC may still assert its jurisdiction where proceedings in Uganda are unduly delayed or are in some way used to shield individuals from criminal responsibility.[104] Such a situation is yet to arise.

Given that the ICD is still in its infancy and that it is yet to deal with a case through to completion, it is still fairly early to determine whether Uganda is able and willing to investigate and prosecute LRA leaders who may be indicted by the ICC. Should such prosecution be initiated, it will be up to the ICC judges to determine whether domestic processes under the ICD satisfy the admissibility requirements in the Rome Statute.[105] The same applies if Uganda seeks to prosecute those already indicted by the ICC. Such an assessment was made by the Pre-Trial Chamber at the ICC on 10 March 2009 where it found that (at the time) Uganda's national proceedings were not sufficient to warrant the exclusion of the ICC.[106] The Appeals Chamber of the ICC upheld this decision on 16 September 2009 and given that the suspects are still at large, the actual challenge to admissibility remains theoretical.[107] Indeed, for Uganda to prosecute the ICC suspects, it would first need to arrest them and commence domestic investigations

[104] Ibid.

[105] Ibid.

[106] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05 (*Decision on the admissibility of the case under Article 19(1) of the Statute*).

[107] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05-408 (*Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under Article 19(1) of the Statute' of 10 March 2009*).

that lead to genuine prosecutions as envisaged by the complementarity regime of the Rome Statute. In effect, Uganda would show that the ground on which the referral was made no longer applies.

The above notwithstanding, it is worth noting that to date the Ugandan authorities have not stated that the ICD will take over the cases currently before the ICC. Indeed, the then Head of the ICD, Justice Akiki Kiiza noted during the opening of the trial against Thomas Kwoyelo in Gulu on 11 July 2011 that 'the ICD [was] not in competition with the ICC' and that the two courts complement each other.[108] It should be recalled that at the time Kwoyelo was charged Uganda's ICC Act was not part of Ugandan law and he was instead charged in terms of the country's Geneva Conventions Act.

For cases in the future where the ICD will rely on the ICC Act, if such trials are conducted with the fairness and impartiality already displayed by the judges of the court, the ICD would effectively promote international criminal justice.[109] Indeed, as noted by Otim, conducting credible trials in Uganda will 'assist the fight against impunity and promote accountability for serious crimes under international law as well as foster national reconciliation upon which lasting and durable peace can be achieved.'[110]

7 Conclusion

The situation in Northern Uganda and the attempts to bring an end to the conflict raise interesting questions around international criminal prosecutions, complementarity and domestic justice processes. The Ugandan experience illustrates the necessity of a multi-tier holistic approach to dealing with a situation. On the one hand, it shows that balancing the needs of peace and justice in conflict situations is riddled with challenges. The challenges encountered by Uganda are

[108] Refugee Law Project 'Witness To the Trial: Monitoring the Kwoyelo Trial' Opening Criminal Session/Plea Taking, Gulu High Court, International Crimes Division, July 11, 2011 <http://sabarometerblog.files.wordpress.com/2011/07/kwoyelo-trial-updates-l-issue-1.pdf>.

[109] M du Plessis *et al.* (n 69).

[110] M Otim (n 103).

not unique and serve to illustrate some of the challenges other African countries could face in seeking to punish international crimes, deal with impunity and find lasting peace in conflict situations.

Significantly, the Ugandan experience illustrates how perpetrators of international crimes can elude both international and domestic criminal justice processes. In spite of the ICC's arrest warrants, Kony and his accomplices remain at large. Similarly, the ICD, in large part due to the existing amnesty arrangement, remains idle.

Further, in the absence of a defined witness protection framework, if there are clear signs of danger, the judges are only able to order *ad hoc* measures to protect witnesses. The Justice Law and Order Sector of the Ugandan Government are working on laws to alleviate this problem. Last, the ICD does not yet have full rules of procedure; instead it works with guiding principles.[111] The guiding principles are highly flexible and while the ICD is still developing this may serve it well. However, the lack of full rules of procedures could lead to problems of fair trial or delays in some cases.[112]

Thus, while the adoption of the ICC Act and the formation of the ICD are commendable, there is still a long way to go before Uganda can effectively close the impunity gap. Indeed, providing the requisite legal framework and creating institutions in furtherance of international criminal justice is just the first step. Beyond this initial phase, the actual task of ensuring justice is more challenging.

The above challenges notwithstanding, it is important to acknowledge that the ICD is the first in Africa with such a mandate. It cannot be denied that the creation of a High Court division with inherent competency to adjudicate on international crimes is novel. The judges of the ICD include highly qualified experts with experience in international criminal law and human rights law.

[111] P Wegner, 'The Kwoyelo Trial: A Final(?) Roundup' <http://justiceinconflict.org/2012/02/13/the-kwoyelo-trial-a-final-roundup/> accessed 30 July 2013.
[112] Ibid.

Further, all the judges have attended training workshops aimed at enhancing their expertise.[113] The challenges that have been highlighted in this contribution may be surmounted through the mustering of political will, the emulation of best practices, the adoption of procedural provisions designed for use in the adjudication of international crimes, and the provision of adequate funding for the ICD's activities, training and equipment.

[113] Amongst other initiatives, the judges of the ICD have since 2011 received training on a wide range of issues related to the adjudication of international crimes, terrorism and transnational crimes from the Institute for Security Studies. The judges have also attended best-practice training workshops at the ICC and have received technical assistance from the *Justice, Law and Order Sector* and the Public International Law and Policy Group.

Nigeria and the International Criminal Court: Challenges and Opportunities

Benson Chinedu Olugbuo*

Abstract

The Nigerian government ratified the treaty that established the International Criminal Court in 2001 and there is currently a draft law in the National Assembly to implement the Statute of the International Criminal Court into domestic law. However, the introduction of the Bill has not been followed up by efforts to ensure that the Bill is passed into law as there is currently a lack of political will in Nigeria to investigate and prosecute those responsible for international crimes. In addition, there are no adequate laws in Nigeria that will aid cooperation between Nigeria and the International Criminal Court using the principle of complementarity. The paper argues that Nigeria has the human, political, financial and judicial capacity to cooperate with the International Criminal Court in the fight against impunity under the complementarity principle. However, this capacity is currently undermined by the lack of a legal framework to provide for the actualization of international criminal justice on the domestic level. The draft legislation currently before the National Assembly contains several provisions relating to cooperation between the Nigerian legal system and the ICC. This paper reflects critically on these provisions and interrogates the challenges and opportunities posed by ICC's involvement in the non-international armed conflict between Nigeria and Boko Haram insurgents.

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1 Introduction

Nigeria takes her obligations towards realizing the ideals of the Rome Statute of ICC very seriously. We have ratified the Rome Statute as far back as 2001. Majority of the crimes created in the Statute are reflected in Nigerian national legislations. Notwithstanding, the procedure for consolidating these crimes into one composite legislation is ongoing.[1]

This paper investigates whether the Nigerian domestic legal system can complement the International Criminal Court in the investigation and prosecution of international crimes. It focuses on the ability of Nigeria to contribute to the pursuit of international criminal justice. It evaluates the current status of the domestic implementation of the Statute of the International Criminal Court (Rome Statute).[2] The paper discusses the challenges faced by Nigeria in relation to its international obligations towards the prosecution of those responsible for international crimes.

Several years of military dictatorships resulted in the commission of widespread human rights abuses in Nigeria. Since the return to civil administration in 1999, not much has changed. In fact, this period has seen an increase in ethnic and religious conflicts and a reign of terror by local militias supported by the elite and dominant political class. The government of Nigeria is currently battling a militant Islamic group known as Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad

[1] Speech by Mohammed Bello Adoke, Senior Advocate of Nigeria (SAN), Attorney-General and Minister of Justice, Federal Republic of Nigeria during the Review Conference of the Rome Statute of the International Criminal Court held in Kampala, Uganda between 31 May – 11 June 2010.

[2] Statute of the International Criminal Court A/CONF.183/9 (1998) 37 *International Legal Materials* 999.

(Boko Haram) accused of committing several human rights abuses against civilians.[3] There have also been allegations that Nigerian security forces have committed serious violations against its citizens while trying to end the terrorist attacks by Boko Haram.[4]

The Office of the High Commissioner for Human Rights argues that some of the crimes committed by Boko Haram amounts to crimes against humanity and has urged the Nigerian government to ensure that perpetrators of the violence are brought to justice.[5] The ICC has listed Nigeria as a country under preliminary examination and the Office of the Prosecutor of the ICC (OTP) has received several communications since 2005 in relation to the situation in Nigeria. These include the ethnic and religious conflicts that have occurred in central Nigeria since 2004 and violent clashes after the parliamentary and presidential elections in 2011.[6] During a visit to Nigeria in 2012, the Prosecutor of the ICC, Fatou Bensouda, stated that Nigeria is not under investigation but preliminary analysis and that as long as the government is prosecuting those responsible for international crimes, the jurisdiction of the ICC will not be activated.[7]

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3 According to a recent report by Human Rights Watch, Boko in Hausa language means 'Western education' or 'Western influence' and haram in Arabic means 'sinful' or 'forbidden'. Boko Haram translated literally means 'Western education or influence is sinful and forbidden'. However the Nigerian Islamic militant group prefers to call itself 'Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad' which means 'People Committed to the Propagation of the Prophet's Teachings and Jihad.' See Human Rights Watch, 'Spiralling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' (October 2012) <http://www.hrw.org/sites/default/files/reports/nigeria1012webwcover.pdf> accessed 13 February2013; A Walker, 'What Is Boko Haram?' United States Institute for Peace Special Report 308 <http://www.usip.org/files/resources/SR308.pdf> accessed 13 February 2013; F Onuoha, 'The Islamist challenge: Nigeria's Boko Haram crisis explained' (2010) 19(2) *African Security Review* 54-67.

4 The Economist, 'Nigeria's crisis: A threat to the entire country' *The Economist* (29 September 2012) <http://www.economist.com/node/21563751> accessed 14 February 2013.

5 L Schlein, 'UN Human Rights Chief condemns Boko Haram attacks' *Voice of America* (23 June 2012) <http://www.voanews.com/content/nigeria-un-human-rights/1246278.html> accessed 13 February 2013.

6 International Criminal Court, *The Office of the Prosecutor: Report on Preliminary Examination Activities* (13 December 2011) <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf> accessed 13 February 2013.

7 M Onuora, 'Nigeria backs ICC's efforts to check impunity' *Guardian Newspapers* (4 July 2012) <http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=91249:nigeria-backs-iccs-efforts-to-check-impunity&catid=1:national&Itemid=559> accessed 13 February 2013.

However, Nigeria currently does not have the necessary legal framework to prosecute those responsible for international crimes. Nigeria is yet to implement the Rome Statute into domestic law, which means that it will not be able to discharge its complementary obligations under the Rome Statute. This is because the ICC operates on the principle of complementarity that makes it the primary responsibility of every state to exercise its criminal jurisdiction over those responsible for international crimes.[8] This is unlike the International Criminal Tribunal for the former Yugoslavia (ICTY),[9] the International Criminal Tribunal for Rwanda (ICTR)[10] and the Special Court for Sierra Leone (SCSL),[11] which have primacy over national jurisdictions on the prosecution of international crimes. The complementarity principle has been recognized as the hallmark of the Rome Statute because of the relationship envisaged between States and the Court. The Rome Statute gives States the primary responsibility to prosecute international crimes committed within their jurisdiction.[12] The ICC is expected to complement and not supplant the prosecution of international crimes by national jurisdictions.[13] The principle of complementarity is based not only on respect for the primary jurisdiction of states, but also on practical considerations of efficiency, since states will generally have the best access to evidence, witnesses and resources and will therefore be in the best position to carry out proceedings.[14] As long as Nigeria is able and willing genuinely to investigate and prosecute a matter that has come to

8 Rome Statute, arts 1 and 17; Markus Benzing, 'The complementarity regime of the International Criminal Court: International criminal justice between states sovereignty and the fight against impunity' in Armin von Bogdandy and Rüdiger Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (Volume 7) (2003) 592.

9 UNSC Res 827 of 25 May 1993 establishing the International Criminal Tribunal for the former Yugoslavia.

10 UNSC Res 955 of 8 November 1994 establishing the International Criminal Tribunal for Rwanda.

11 UNSC Res 1315 of 14 August 2000 establishing the Special Court for Sierra Leone.
M Newton, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 26.

13 Rome Statute, art 17; see also para 10 of the preamble to the Rome Statute, which provides that 'the [ICC] established under this Statute shall be complementary to national criminal jurisdictions', and art 1 of the Statute, which provides that '[the ICC] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.'

14 Robert Cryer *et al*., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 127.

the Court's attention, the Court does not have jurisdiction. This is in furtherance of the preamble of the Rome Statute, which affirms that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[15]

2 Contextual Background

Nigeria obtained independence from the British government in 1960 and operates a federal system of government made up of thirty-six states and Abuja as the Federal Capital Territory. The current population of Nigeria is above one hundred and seventy million and the country is divided into Christians, Muslims and followers of African traditional religion.[16] Nigeria signed the Rome Statute on 1 June 2000 and deposited her instrument of ratification on the 27 September 2001.[17] However, Nigeria is yet to incorporate the Statute into its national law. The implementation of international treaties in Nigeria is governed by the 1999 Constitution, which provides that:

> No treaty between the Federation and any other country will have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.[18]

Nigeria has not acceded to the Agreement on Privileges and Immunities of the Court (APIC). However, Nigeria entered into a Bilateral Immunity Agreement (BIA) with the United States government, which provides that Nigeria will not hand over US citizens who commit international crimes in Nigeria to the ICC.[19]

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15 Rome Statute, preamble (para 4).

16 According to the World Bank, Nigeria's population as at 2013 was 173.6 million. See World Bank, 'Nigeria' <http://www.worldbank.org/en/country/nigeria> accessed 21 September 2014.

17 International Criminal Court, 'Nigeria' (11 March 2003) <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/nigeria.aspx> accessed 21 September 2014.

18 Section 12(1) of the Nigerian Constitution, 1999.
Coalition for the International Criminal Court, 'Nigeria' <http://www.coalitionfortheicc.org/?mod=country&iduct=128> accessed 22 September 2014; O Osinuga, 'Nigeria and the ICC: The dawn of a new era?' *The Nigerian Voice* (26 December 2011) <http://www.

The Nigerian government has made attempts to domesticate the Rome Statute of the ICC. The first effort was in 2001 when the Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2001 was presented to the National Assembly. The Bill was subsequently referred to a Committee of the Whole House on the same date and the report was not released till its dissolution in 2003. The second attempt was when the Federal Ministry of Justice (MOJ) resubmitted the Bill in 2006 as the Rome Statute (Ratification and Jurisdiction) Bill 2006. It was passed by both the Senate and House of Representatives, but was neither harmonized by the legislators nor presented to former President Olusegun Obasanjo for his assent before the end of the administration in May 2007. The Nigerian Federal Executive Council (FEC) on 30 May 2012 approved a Draft Bill on the domestic implementation of the Rome Statute in Nigeria.[20] The Draft Bill was gazetted by the government on 17 July 2012 is currently before the National Assembly in Abuja.[21]

3 Analysis of Challenges and Opportunities in the Field of International Criminal Justice in Nigeria

3 1 Application of Positive Complementarity in Nigeria

Under the principle of complementarity between the ICC and national judicial systems, the ICC complements the primary duties of states to investigate

thenigerianvoice.com/nvnews/78455/1/nigeria-and-the-icc-the-dawn-of-a-new-era.html> accessed 14 February 2013. For a general discussion of Africa's response to BIAs, see D Cotton and G Odongo, 'The magnificent seven: Africa's response to US article 98' (2007) 7 *African Human Rights Law Journal* 1-34.

20 The Draft Bill is titled, 'A Bill for an Act to provide for the Enforcement and Punishment of Crimes Against Humanity, War Crimes, Genocide and Related Offences, and to Give Effect to Certain Provisions of the Rome Statute of the International Criminal Court in Nigeria, 2012' (The ICC Bill); Madu Onuorah, 'FEC okays Bill on war crimes, genocide, others' *The Guardian Newspapers* (31 May 2012) <http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=87791:fec-okays-Bill-on-war-crimes-genocide-others&catid=1:national&Itemid=559> accessed 13 February 2013.

21 Federal Government Gazette HB.12.07.325; I Chiedozie, 'JTF soldiers to face trial for rape, murder, torture' *Punch Newspapers* (2 September 2012) <http://www.punchng.com/news/jtf-soldiers-to-face-trial-for-rape-murder-torture/> accessed 13 February 2013.

and prosecute international crimes.[22] The ICC is expected to take into consideration the principle of complementarity in paragraph 10 and Article 1 of the Rome Statute in determining whether a case is admissible before the ICC.[23] The principle of complementarity is crucial to the efficient functioning of the ICC. The Rome Statute provides that:

> The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.[24]

The complementarity principle is unique to the ICC.[25] The principle of complementarity has evolved into a relationship between the ICC and states referred to as positive, proactive or active complementarity and defined as a proactive policy of cooperation aimed at promoting national proceedings.[26] It is regarded as a managerial concept that governs the relationship between the Court and domestic jurisdictions on the basis of three cardinal principles: the idea of a shared burden of responsibility, the management of effective investigations and prosecutions and the two-pronged nature of the cooperation regime.[27] It is also defined as a process by which the OTP 'would actively encourage investigation and prosecution of international crimes within the court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.'[28]

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22 M du Plessis, 'Complementarity: A working relationship between African states and the International Criminal Court' in Max du Plessis (ed), *African Guide to International Criminal Justice* (Institute for Security Studies 2008) 129.

23 Rome Statute, art 17.

24 Rome Statute, art 19.

25 M Benzing (n 8) 592.

26 International Criminal Court, 'Prosecutorial Strategy 2009-2012' (1 February 2010) <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> accessed 11 March 2013; Morten Bergsmo Active Complementarity: Legal Information Transfer (Torkel Opsahl Academic E-Publisher 2011) 98.

27 C Stahn, 'Complementarity: A tale of two notions' (2008) 19 *Criminal Law Forum* 113.

28 W Burke-White, 'Implementing a policy of positive complementarity in the Rome system of justice' (2008) 19 *Criminal Law Forum* 62.

In support of this argument, it should be noted that in its Prosecutorial Strategy from 2009 to 2012, the OTP argues that it would operate on four fundamental principles: positive complementarity, focused investigations and prosecutions, addressing the interests of victims and maximizing the impact of the OTP's work.[29] The OTP further argues that it has 'adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.'[30]

In analysing the need for positive complementarity, it is important to highlight some provisions of the Rome Statute that support this view. Under part 9 of the Rome Statute, which provides for international cooperation and judicial assistance, the ICC, 'may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.'[31] The OTP is also given the opportunity to request additional information from States regarding crimes that fall under the jurisdiction of the ICC.[32] The OTP can defer an investigation at the request of the state to allow the state to conduct its own investigations and trials.[33] Furthermore, the OTP can encourage state parties to investigate and prosecute crimes and may at any time reconsider a decision to initiate an investigation or prosecution based on new facts or information which may be related to the ability of the state concerned to hold its nationals accountable.[34] These provisions in the Rome Statute recognize the role of the ICC in promoting positive complementarity.[35] Positive complementarity is an

29 OTP Prosecutorial Strategy 2009–2012, para 15.

30 *OTP's Report on the activities performed during the first three years (June 2003 – June 2006)* 14 September 2006, para 58 <http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf> accessed 11 March 2013.

31 Rome Statute, art 93(10)(a).

32 Rome Statute, art 15.

33 Rome Statute, art 18.

34 Rome Statute, art 53.

35 W Burke-White (n 28) 62.

important tool in the fight against impunity and should not be ignored for several reasons. The ICC can only try a few of those who bear responsibility for crimes of international concern. A shortage of effective national judicial mechanisms may create a gap of impunity that may, in turn, undermine any success recorded by the ICC. Furthermore, national courts are the best forums to try these crimes, as they are more efficient in terms of the goal of deterrence and give victims an opportunity to participate and closely follow the proceedings at the national level.[36]

3 2 Domestic Implementation of the Rome Statute in Nigeria

There is a need to incorporate the international crimes provided for under the Rome Statute into Nigerian law. There is currently no law in Nigeria that recognizes genocide as a crime. Nigeria has not ratified the Genocide Convention of 1948 and will therefore have to rely on customary international law to prosecute and punish the crime of genocide. The domestic implementation of the Rome Statute represents an opportunity for Nigeria to amend its criminal and penal codes in a way that will enable the effective prosecution of genocide as well as the other core crimes under international law on the domestic level. Regarding war crimes, Nigeria has ratified the Geneva Conventions and the Additional Protocols I and II in 1961 and 1988 respectively. However, unlike the Geneva Conventions, the Additional Protocols have not been domesticated.[37] The incorporation of the Rome Statute therefore offers Nigeria an opportunity to address the issues of incorporating the Protocols into domestic law and also updating the definition of war crimes to reflect emerging trends in international criminal justice. The need to incorporate international legal instruments into national law cannot be overemphasized. It enables the citizens to go to court and insist on their rights. It also serves as a launching pad for public interest

[36] Report of the Review Conference of the ICC, Kampala, 31 May – 11 June 2010, Official Records, 109 <http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf> accessed 5 March 2013.

[37] See Geneva Conventions Act, Laws of the Federation of Nigeria 2004 (formerly Cap 162 Laws of the Federation of Nigeria 1990).

litigation. For example, several human rights activists and non-governmental organisations petitioned the former Nigerian Attorney-General and Minister of Justice to either extradite former President of Liberia, Charles Taylor, to the SCSL or commence legal actions against him under the Geneva Conventions Act, which confers universal jurisdiction to Nigerian courts for war crimes, for crimes committed in Sierra Leone.[38]

As discussed earlier, the FEC of Nigeria recently submitted a Bill to the National Assembly to domesticate the Rome Statute under national law. The current Bill is an improvement on the previous versions in 2001 and 2006 respectively. This is because the Bill provides a template for cooperation between the ICC and Nigeria, which is a positive development compared with previous versions of the same Bill. The objectives of the ICC Bill are to:

(a) provide for measures under Nigerian law for the punishment and enforcement of international crimes of genocide, crimes against humanity and war crimes;
(b) give effect to certain provisions of the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 (in this [Bill] referred to as 'the Rome Statute');
(c) enable Nigeria cooperate with the International Criminal Court (in this [Bill] referred to as 'the Criminal Court' in the performance of the its functions under the Rome Statute.[39]

The ICC Bill makes provision for active participant universal jurisdiction for international crimes committed outside Nigeria as long as the individual is present in Nigeria. The ICC Bill provides that proceedings may be instituted against any person that committed international crimes if the person is a citizen or permanent resident of Nigeria, has committed the offence against a citizen or

[38] See Geneva Conventions Act, art 3. See also C Obiagwu, 'Why Taylor's stay is illegal' *Vanguard Newspapers Friday* (5 September 2003) <http://allafrica.com/stories/200309050631.html> accessed 11 March 2013.
[39] ICC Bill, s 1.

permanent resident of Nigeria or is present in Nigeria after the commission of the offence.[40] The ICC Bill vests original jurisdiction for adjudication of international crimes in the Federal High Courts, the High Court of the Federal Capital Territory and the High Court of any States in Nigeria.[41] Furthermore, Nigerian courts are empowered to try international crimes committed by a person outside Nigeria. Proceedings may be instituted against the person for international crimes outside Nigeria and courts in Nigeria have jurisdiction to try the offence as if the offence had been committed within the territorial limits of Nigerian courts.[42] It should be noted that if Section 23 of the Bill is read in isolation, the textual interpretation is that Nigerian courts can indict persons who have committed international crimes outside Nigeria *in absentia*. However, read with Section 22, which deals with jurisdiction of Nigerian courts for international crimes, it means that Nigeria can only prosecute those responsible for international crimes committed outside Nigeria if they are present in Nigeria. However, it may be argued that courts in Nigeria will have jurisdiction over persons who commit international crimes against Nigerian citizens or permanent residents.[43]

Under the principle of positive complementarity, the ICC Bill provides that Nigeria may request assistance from the ICC in relation to the investigation and prosecutions of crimes in the Rome Statute for which the maximum penalty under Nigerian law is a term of imprisonment of not less than 5 years.[44] The ICC Bill also provides that Nigeria may act as a state of enforcement of sentences by the ICC. The Bill provides for the Nigerian Attorney-General to notify the relevant government ministries, departments and agencies including the National Security Adviser whenever the need arises.[45] However there is a differentiation between citizens of Nigeria and foreigners. This is because the Bill provides that the state of the foreigner will consent to the convicted person serving his or her sentence in Nigeria and the Attorney-General is satisfied that the ICC has agreed

40 ICC Bill, s 22.
41 ICC Bill, s 99.
42 ICC Bill, s 23.
43 ICC Bill, s 22(b).
44 ICC Bill, s 51.
45 ICC Bill, s 69.

to the conditions stipulated by a regulation made for that purpose.[46] The ICC Bill provides that the prosecutor of the ICC may conduct investigations in Nigeria as provided for under the Rome Statute.[47] Furthermore, ICC judges can sit in Nigeria to take evidence, conduct or continue a proceeding; give a judgment in a proceeding or review a sentence imposed by the ICC.[48]

In relation to the rights of victims of international crimes, the Bill makes provision for the establishment of a Special Victims' Trust Fund (SVTF) for the benefit of victims of crimes and the families of the victims.[49] The Bill further provides for the forfeiture of assets to the SVTF for those convicted of international crimes in Nigeria.[50] The Bill further provides that a victim of an international crime can institute a civil action against appropriate parties and is entitled to compensation, restitution and recovery for economic and psychological damages, which shall be met from the SVTF.[51] The ICC Bill also provides for the protection of witnesses and their families from intimidation, threats and reprisals from a person charged with an offence or his or her associates or any form of reprisals from persons in positions of authority.[52] The Bill recognises the legal personality of the ICC to conduct investigations in Nigeria, grants privileges and immunities to ICC officials in the discharge of their duties in the country and domesticates the relevant provisions of the APIC.[53]

Despite several positive provisions in the Bill, there are several issued that should be addressed in order for the Bill to make a contribution in the fight against impunity in Nigeria. The first issue is that the Bill provides that obligations under the Rome Statute shall be discharged by the Attorney-General on behalf of the government.[54] This provision is unnecessary and may result in political

46 ICC Bill, s 70.
47 ICC Bill, s 87.
48 ICC Bill, s 88.
49 ICC Bill, s 93.
50 ICC Bill, s 93(2).
51 ICC Bill, s 93(6).
52 ICC Bill, s 94.
53 ICC Bill, s 96.
54 ICC Bill, s 3.

interference by the Attorney–General in the investigation and prosecution of international crimes. The alternative to this provision is the establishment of an independent coordinating body or inter-ministerial committee that will handle the relationship between the ICC and Nigeria. In the alternative, judges of the High Courts in Nigeria should be mandated by the Bill to act on behalf of Nigeria since it has already been stated that the High Courts have original jurisdiction for international crimes. Second, the Bill provides that the consent of the Attorney-General is required for all prosecutions under the Bill whether in Nigeria or elsewhere.[55] It is argued that the Attorney-General is a political appointee and may be under the influence of the executive in the discharge of duties under the Rome Statute. This means that the consent for prosecution should rather be obtained from the office of the Permanent Secretary, Director of Public Prosecution or Solicitor-General of the Federation who is a career civil servant.[56] Third, the Bill protects the immunity clause of the Nigerian Constitution.[57] The Nigerian Constitution provides that:

[N]o civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office […]. This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor […].[58]

This provision is incompatible with Article 27 of the Rome Statute.[59] Nigeria can either amend the Constitution to bring it in conformity with the Rome Statute

[55] ICC Bill, s 16.

[56] See, for example, s 17 of Uganda's International Criminal Court Act 2010 <http://www.issafrica.org/anicj/uploads/Uganda_ICC_Act_2010.pdf> accessed 8 March 2013.

[57] ICC Bill, s 20.

[58] See Section 308 of the Nigerian Constitution of 1999.

[59] Article 27 provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

or give the provision a purposive interpretation to the effect that any Nigerian leader that commits any of the crimes provided for under the Rome Statute cannot claim immunity under the Constitution as bar to prosecution. However, it is argued that the amendment option will better serve the citizenry. It will also send a strong signal to those who commit international crimes and may serve as a deterrent to potential dictators in the country. According to Mohammed Ladan:

Article 27 of the [Rome] Statute therefore necessitates a constitutional amendment to section 308 of the 1999 Constitution by providing an exception to this absolute immunity. This amendment could be minor, and may simply consist of the addition of a provision making an exception to the principle of immunity for the Head of State or other officials, should they commit one of the crimes listed under the Statute.[60]

Fourth, in relation to the rights of victims to institute civil proceedings in order to claim for compensation, restitution and recovery for economic damages, it is submitted that this proceeding is unnecessary. Victim or families of the victims should be able to approach the SVTF for an award based on the judgment and recommendation of the High Court. It is further argued that the SVTF should be open to contributions and government subventions and should be used to alleviate the suffering of victims of international crime. It is unnecessary for such assistance to be suspended pending the conviction of accused person. Furthermore, the Bill needs to state clearly who is a victim of international crime in Nigeria. The current Bill does not have a definition of a victim of international crime in Nigeria.[61]

[60] M Ladan, 'Issues in domestic implementation of the Rome Statute of the International Criminal Court in Nigeria' Paper presented at a roundtable session with parliamentarians on the implementation of the Rome Statute in Nigeria and organised by the Nigerian Coalition on the International Criminal Court (NCICC), 12 November 2002, National Assembly Complex, Abuja, Nigeria.

[61] I Hassan, 'The Chibok girls: International crimes against women in Nigeria and the Special Victims Trust Fund' *NCICC News* (23 July 2014) <http://www.ncicc.org.ng/index.php/latest/80-chibok-girls-and-special-trust-fund> accessed 21 September 2014.

Fifth, the Bill does not provide for the regulation of sentences for international crimes. This means that Nigerian courts can apply the death sentence even though the maximum penalty provided for under the Rome Statute is life imprisonment. However, the Rome Statute also provides that '[n]othing in this part affects the application by states of the penalties prescribed by their national law, nor the law of the states which do not provide for penalties prescribed in this part.'[62] From the foregoing the Nigerian government seems to be willing to confront impunity by way of the domestication of the Rome Statute under Nigerian law. However, the reality is that since the Bill was sent to the National Assembly nothing has been heard of it again. It is expected that the government of Nigeria should galvanise the support needed for the National Assembly to pass the Bill into law.

3 3 Analysis of the ICC Bill

The reasons for the delay in the passage of the Bill into law can be seen from different angles. The Bill was gazetted on 17 July 2012 and subsequently sent to the National Assembly for enactment into law.[63] Subsequently, there has not been any further action on the part of the National Assembly. In relation to the involvement of Non-Governmental Organisations (NGOs) and Civil Society Organisations (CSOs), it should be noted that the Nigerian Coalition for the International Criminal Court (NCICC) had participated as a member of the Working Group coordinated by the MOJ. However, NCICC members were not aware that the Bill had been gazetted and that it is currently before the National Assembly. The information they had was a draft copy of the Bill presented to the Working Group, which is different from the copy currently before the National Assembly. The NCICC's lack of engagement with the Bill is the result of a lack of information on the current status of the Bill. This is because the NCICC has been involved in other projects related to the fight against impunity. On the receipt of the official copy of the ICC Bill before the National Assembly, the NCICC is currently planning a series of events to galvanise public support for the passage

62 Rome Statute, art 80.
63 I Chiedozie (n 21).

of the Bill into law. It is argued that effective advocacy by NGOs and CSOs will help the legislators to appreciate the importance of the ICC Bill. Furthermore, advocacy is needed to get the lawmakers to appreciate the importance of the Rome Statute and to pass enabling laws to give legal teeth to the ICC Bill in Nigeria.[64]

Another issue militating against the passage into law of the ICC Bill is government policy regarding domestic implementation of international treaties.[65] International treaties are regarded as subsidiary matters in relation to budget and fiscal policy issues. For an effective implementation process to be carried out in Nigeria in relation to the domestication of the Rome Statute, the following issues needs to be addressed by various government agencies. It is suggested that the MOJ should produce a list of domestic implementation Bills of international treaties ratified by Nigeria and submitted to the National Assembly and their current status. In addition, the MOJ should establish an inter-ministerial committee on the domestic implementation of the Rome Statute in Nigeria. Furthermore, the MOJ should consult implementing legislation passed by other countries, especially African governments, for best practices in the continent and beyond. However, such a process should take into consideration cultural diversity and legal pluralism existing in Nigeria. The MOJ should monitor the progress of the ICC Bill in the National Assembly and participate in the public hearings to make clarifications when necessary. The MOJ should collaborate with the MFA to write and submit a memo to the FEC on the need for the accession of the APIC by Nigeria.

In addition, the MFA should publish a list of all international treaties ratified by Nigeria from independence until 2013, including the status of their domestic implementation. The MFA should have a monthly publication of international

[64] B Olugbuo, 'Implementing the International Criminal Court Treaty in Africa: The role of NGOs and government agencies in constitutional reform' in Kamari Maxine Clarke and Mark Goodale (eds) *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge University Press 2010) 113.

[65] C Odinkalu, 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 24.

treaties ratified by Nigeria and relevant ministries responsible for implementation. The MFA should participate in the inter-ministerial committee to be set-up by the MOJ on the domestic implementation of the Rome Statute. The MFA should participate in the public hearing and stakeholders meetings to be organised by NGOs and the National Assembly in relation to the domestic implementation of the Rome Statute. The MFA should also ensure that Nigeria complies with its treaty obligations regarding the Rome Statute of the ICC and highlight the need for the government to cooperate with the Court in its investigations in Africa.

Furthermore, the National Assembly should publish a list of all international treaties passed into law and the status of those currently pending before it. In addition, the National Assembly should organise public hearings and stakeholders meetings to receive inputs and comments from the public and other interested parties regarding those international treaties currently under consideration by the National Assembly, especially the ICC Bill currently before it. The National Assembly should make public the relevant committees that deal with international treaties and those that have oversight functions regarding government agencies that implement the treaties. In addition, there should be a database of all international treaties passed into law by the National Assembly and the relevant agencies responsible for implementation.

The National Human Rights Commission (NHRC) should collaborate with MOJ and MFA to publicise all international instruments ratified and implemented by Nigeria since 1960. The NHRC should participate in the inter-ministerial committee to be established by the MOJ on the domestic implementation of the Rome Statute. The NHRC should embark on public enlightenment campaigns on the Rome Statute and its potentials to overhaul the Nigerian criminal justice system. The NHRC should partner with NGOs and CSOs to publish an update on the ratification and domestic implementation of international treaties in Nigeria from 1960 to 2013.

The Nigerian Police Force (NPF) should collaborate with NGOs and CSOs in the stakeholders' workshops and seminars aimed at enlightening its

officers and men on the role of law enforcement officers under the regime of complementarity provided under Rome Statute. The NPF should participate in the inter-ministerial committee to be set up by the MOJ on the domestic implementation of the Rome Statute. The NPF should also provide training on the principles of international humanitarian law and the role of the NPF to those officers involved in peacekeeping missions. The NPF should collaborate with NGOs and CSOs to distribute abridged or simplified copies of the Rome Statute to its members. The Nigerian Police Force should ensure the arrest and surrender of any suspect indicted by the ICC that opts to visit Nigeria in violation of its treaty obligations towards the ICC.

The Nigerian Armed Forces (NAF) should embark on workshops and seminars to educate its officers and men on the provisions of the Rome Statute and its application in the military. Members of the NAF sent on peacekeeping missions should be informed of the principles of international humanitarian law and the rules of engagement. Officers and men of the NAF should participate in the inter-ministerial committee to be set-up by the MOJ on the domestic implementation of the Rome Statute.

In addition, it is argued that there should be coordination of the roles of NGOs and CSOs in Nigeria on the domestic implementation of the ICC Bill currently before the National Assembly and the accession of the APIC by the FEC. NGOs and CSOs in Nigeria should collaborate with the relevant committees in the National Assembly to organise public hearings on the ICC Bill. NGOs and CSOs should advocate for the removal of the immunity clause in the Nigerian Constitution to ensure that state officials who commit international crimes are not protected by the Constitution. NGOs and CSOs should produce copies of the ICC Bill currently before the National Assembly for circulation to different stakeholders for inputs and comments. This is to ensure that the process of the domestic implementation of the Rome Statute in Nigeria is free, open and inclusive. NGOs should be supported to serialise the contents of the ICC Bill in major Nigeria newspapers. NGOs and CSOs should be supported to use social

media to galvanise support for the passage of the ICC Bill and popularization of its contents to a wider audience in Nigeria.

4 Identification of Main Organisations Working on International Justice

Nigerian NGOs and CSOs have been active on international justice related issues. The NCICC, which is an affiliate of the global NGO Coalition for the ICC (CICC), was formed in May 2002 and has been in the forefront for advocacy on the domestic implementation of the Rome Statute and the fight against impunity in Nigeria.[66] The NCICC also played a role in the advocacy activities to ensure that Nigeria surrendered Charles Taylor to the SCSL. The NCICC also carried out advocacy activities to stop the President of Sudan from attending a meeting in Nigeria in 2009 after his indictment by the ICC. Furthermore, the NCICC has trained journalists and other public professionals on the provisions of the Rome Statute of the ICC and have published several materials on its advocacy efforts.[67] In relation to the ICC Bill, the NCICC was a member of the Working Group coordinated by the MOJ that worked on the draft that was submitted to FEC. The NCICC is made up of Steering Committee members, who form the core members, and general members. Membership of the NCICC is limited to NGOs although individuals can be invited to join the Steering Committee if they are considered to have adequate knowledge and expertise on the ICC. The Steering Committee is made up of the Convenor, Chairperson and other members that head several committees including the Advocacy and Publications Committee. One problem with NGOs working on international justice in Nigeria is the lack of coordination and the multi-faceted nature of the advocacy carried out by NGOs and CSOs. The need for adequate funding, capacity building and effective coordination amongst the various actors involved cannot be over-emphasised.

[66] NCICC, 'Communiqué issued at the stakeholders meeting on the International Criminal Court organized by the International Human Rights Law Group in collaboration with the Centre for Democracy and Development (CDD) and Baobab for Women's Human Rights, 13–15 May 2002, Harmonia Hotel, Abuja' <http://www.iccnow.org/documents/AbujaCOMMUNIQUEMay02.pdf> accessed 13 February 2013.

[67] More information can be found on the website of the NCICC at <http://www.ncicc.org.ng/> accessed 21 September 2014.

4 1 Efforts to Advance International Criminal Justice in Nigeria

Nigeria has a robust civil society movement that is involved in activities aimed at ending impunity for international crimes. For example, several NGOs and CSOs were involved in the campaign to end military dictatorship in Nigeria. Organisations like the Civil Liberties Organisation (CLO), the Constitutional Rights Project (CRP), the Campaign for Democracy (CD), the Campaign for the Defense of Human Rights (CDHR), the Media Rights Agenda (MRA) and the Centre for Free Speech (CFS), amongst others, were involved in several activities aimed at ending military rule in Nigeria and the abuse of human rights. This resulted in several complaints filed before the African Commission on Human and Peoples' Rights (ACHPR) on behalf of Nigerians.[68] After the return to civilian government in 1999, Nigerian NGOs and CSOs also played important roles in the advancement of the international criminal justice in Nigeria through the formation of the NCICC in 2002 and advocacy to implement the Rome Statute. An opportunity for further activism came calling when the Nigerian government granted asylum to Charles Taylor. Nigerian NGOs and CSOs mounted several advocacy campaigns for the surrender of Charles Taylor to the SCSL. NGOs and CSOs also supported individuals affected by the war in Sierra Leone to commence civil proceedings against the government of Nigeria regarding the asylum granted to Charles Taylor.[69] It can be argued that international pressure galvanised by NGOs and CSOs in Nigeria resulted in the surrender of Charles Taylor to the SCSL. The NCICC carried out advocacy campaigns in 2009 regarding the visit of President Al Bashir of Sudan to Nigeria after the ICC issued an arrest warrant to him. Members of the NCICC petitioned the Federal Government and several government officials on Nigeria's obligation to arrest and surrender Al Bashir if

[68] ACHPR, 'Nigeria – Decision on Communications' <http://www.achpr.org/communications/decisions/?c=55&o=845> accessed 27 March 2013.

[69] See *David Anyaele and Emmanuel Egbuna v Charles Taylor, the President of the Federal Republic of Nigeria and Three Others Suit No FHC/ABJ/M/216/04*. See also B Fagbohunlu, 'Challenging Charles Taylor's political asylum in Nigeria' in Open Society Foundation, *Justice Initiative: Human Rights and Justice Sector Reform in Africa* (2005) <http://www.opensocietyfoundations.org/sites/default/files/fagbohunlu.pdf> accessed 27 March 2013.

he visited Nigeria.[70] Subsequently, Al Bashir visited Nigeria in 2013 to attend an AU organised meeting in Abuja. The NCICC went to court and requested for a warrant of arrest to be issued against him. He departed Nigeria shortly after arrival probably because of the news of the court proceeding instituted against him.[71] Nigeria argues that the AU resolution requesting member states not to cooperate with the ICC in the arrest and surrender of Al Bashir is superior to the arrest warrant issued by the ICC.[72] However, the NCICC has requested for an Advisory Opinion from the African Court on Human and Peoples' Rights on whether AU's resolution supersedes the obligations of States Parties to the Rome Statute.[73]

4 2 Transitional Justice and Conflicts in Nigeria[74]

In relation to truth, reconciliation and victims' rights to reparation, the Nigerian criminal law system does not recognise the right of victims of crimes to reparations. This is similar to several countries in Africa that operate the common law system. However the provision of SVTF in the current ICC Bill is a welcome development.[75] There have been previous attempts to address human rights abuses in Nigeria through transitional justice mechanisms. For example, the Nigerian government in June 1999 set up the Human Rights Violations Investigation Commission (Oputa Panel), which sat from June 1999

[70] NCICC, 'Nigerian Coalition for the ICC calls on Nigerian Government to withdraw Al-Bashir's invitation to Abuja AU meeting' (28 October 2009) <http://www.iccnow.org/documents/NCICC-Final_press_release.pdf> accessed 27 March 2013.

[71] Y Ali, 'Nigeria under fire for hosting al-Bashir' *The Nation* (16 July 2013) <http://thenationonlineng.net/new/nigeria-under-fire-for-hosting-al-bashir/> accessed 20 September 2014.

[72] The Nation, 'Al-Bashir: AU position superior to ICC warrant – Ashiru' *The Nation* (15 July 2013) <http://thenationonlineng.net/new/al-bashir-au-position-superior-to-icc-warrant-ashiru/> accessed 20 September 2014.

[73] ACHPR, 'Request for Advisory Opinion No 001 of 2014' AFCHPR/Req.Ad.Op/001/2014, 30 June 2014.

[74] Parts of this section appeared in I Hassan and B Olugbuo, 'Exploring the justice, peace and reconciliation pathways in Boko Haram's insurgency in Nigeria' (2014) 4 *West Africa Insight* 15 – 23.

[75] I Hassan (n 61); NCICC Press Release, 'Enhance the Committee on Victims Support Fund (CVSF) through passage of the Crimes against Humanity, War Crimes, Genocide and Related Offences Bill, 2012' (1 August 2014) <http://www.cddwestafrica.org/index.php/en/news/214-committee-on-victims-support-fund> accessed 21 September 2014.

to May 2002 and submitted its report to the government of Nigeria. The Oputa Report identifies military incursions into politics as one of the issues responsible for human rights violations in Nigeria. The report argues that:

Military rule has left, in its wake, a sad legacy of human rights violations, stunted national growth, a corporatist and static state, increased corruption, destroying its own internal cohesion in the process of governing, and posing the greatest threat to democracy and national integration.[76]

The open and transparent process adopted by the Oputa Panel allowed several Nigerians to present their views and to seek redress. However, the government of Nigeria refused to release the report citing the judgment of the Supreme Court of Nigeria in *Fawehinmi v Babangida* as the reason of the decision.[77] The Supreme Court in that case held that under the 1999 Constitution, the Federal Government of Nigeria had no power to set up a Tribunal of Inquiry as the power was now under the residual legislative list exercisable by states only and not, as was the case under the 1966 Constitution, by the federal government. The decision to withhold the report has been criticised by Nigerians, including legal scholars, as a means of supressing the truth.[78] The report has been unofficially released online by NGOs and CSOs.[79] A follow up on the Oputa Panel is the setting up of truth and reconciliation commissions by State governments in Nigeria to address human rights abuses at state level. These include the Rivers State Truth and Reconciliation Commission set up in November 2007, the Osun State Truth and Reconciliation Commission set up in February 2011 and the Ogun State Truth and Reconciliation Committee set up in September 2011.[80]

[76] Oputa Panel Report, para 89.

[77] *Fawehinmi v Babangida* (2003) 12 WRN 1; (2003) NWLR (PT 808) 604.

[78] H Yusuf, 'Travails of truth: Achieving justice for victims of impunity in Nigeria' (2007) 1 *International Journal of Transitional Justice* 283.

[79] Oputa Panel Report <http://www.dawodu.com/oputa1.htm> accessed 15 February 2013; see also 'Synoptic Overview of HRVIC Report: Conclusions And Recommendations (Including Chairman's Foreword)' presented to President, Commander-In-Chief of the Armed Forces of the Federal Republic of Nigeria, Chief Olusegun Obasanjo (GCFR) submitted by the Human Rights Violations Investigation Commission (May 2002) <http://www.nigerianmuse.com/nigeriawatch/oputa/OputaSummaryRecommendations.pdf> accessed 27 March 2013.

[80] Further information on the truth and reconciliation commissions set up in Nigeria can be

The complex mix between religion, ethnicity, politics and control of natural resources in Nigeria have led to several ethnic based militia groups, including, amongst others, the Movement for the Actualization of the Sovereign State of Biafra (MASSOB), the Odu Peoples' Congress (OPC), the Movement for the Emancipation of Niger-Delta (MEND) and the Movement for the Survival of Ogoni People (MOSOP). In June 2009, the government of late Umaru Musa Yar'adua declared an amnesty that allowed militants to hand in weapons for cash and other benefits of rehabilitation.[81] This was pursuant to the provisions of the Nigerian Constitution of 1999.[82] The amnesty proclamation was in response to the agitation of Niger-Delta militants for self-determination and the crippling effects of its campaign on the production and export of crude oil, which is the main stay of the Nigerian economy.

The current war on terror against the Boko Haram sect is not a new phenomenon. However, a troubling development is that Boko Haram has become a transnational force by linking up with other Al-Qaeda affiliates in Africa. For example, the recent declaration of a caliphate in areas captured by Boko Haram in North-Eastern Nigeria and appointment of emirs to replace the official government appointees is a clear pointer of this synergy.[83]

The sources of conflict in Nigeria are myriad. These include corruption, religious and ethnic issues, competition for scarce resources and the inability to implement laws. Several conflicts in Nigeria have a combination of religious, ethnic and political connotations. In fact, most religious conflicts in Nigeria usually assume inter-ethnic colouration even when they begin as purely religious

found online at <http://www.justiceinperspective.org.za/africa/nigeria.html> accessed 29 March 2013.

81 Nigeria First, 'Text of President Yar'Adua's Amnesty Proclamation' *Nigeria First* (25 June 2009) <http://www.nigeriafirst.org/printer_8923.shtml> accessed 27 March 2013.

82 Section 175 of the Constitution of Nigeria, 1999.

83 R Windrem, 'While world watches ISIS, Boko Haram declares its own caliphate in Nigeria' *NBC News* (15 September 2014) <http://www.nbcnews.com/storyline/missing-nigeria-schoolgirls/while-world-watches-isis-boko-haram-declares-its-own-caliphate-n202556> accessed 1 September 2014; A Folashade-Koyi, 'Boko Haram installs emirs in Gwoza, Dambua' *Sunnewsonline* (17 September 2014) <http://sunnewsonline.com/new/?p=82044> accessed 21 September 2014.

disagreements. In addition, the reverse is sometimes the case where socio-economic conflicts often degenerate into inter-religious conflicts. Hence, the boundary between ethnic and religious conflicts in Nigeria is very hazy and not well defined.[84] Nigeria has witnessed ethnic, economic, religious and political conflicts since independence and current threat by Boko Haram and affiliated groups is threatening the security of the Nigerian state. The limited success recorded by the amnesty granted to the Niger Delta militants has also prompted several highly placed Nigerians, including the Sultan of Sokoto, to request the Federal Government to grant amnesty to Boko Haram members.[85] Whether the government will accede to the request is subject to debate. This is because the government has consistently maintained that Boko Haram members do not have any genuine interest to negotiate peace with the government.

5 Conclusion

The current stance of the present administration of Nigeria on the fight against impunity is commendable. However, more needs to be done by the government to translate this commitment into a reality. Nigeria's population size and political clout in Africa sets it apart as an important case study on the domestication of international criminal justice on the African continent. It is submitted that effective advocacy in Nigeria to ensure an end to impunity for international crimes will have far-reaching effects in other African countries struggling with conflicts and mass violence. The paper reiterates the need for Nigeria to hold their citizens accountable for international crimes. This is because the ICC is a court of last resort and can only try very few people. If a state party to the Rome Statute is not able to hold their citizens accountable, it will result in impunity gap that will erase any success recorded by the ICC. Furthermore, Nigeria needs to balance the fight against Islamic militancy with the need to

[84] D Alabi, 'Religious Conflicts in Northern Nigeria: A Critical Analysis' in Sofiri Joab-Peterside and Ukoha Ukiwo (eds) *The Travails and Challenges of Democracy in Nigeria, 1999–2003 and Beyond* (Centre for Advanced Social Sciences 2007) 95.

[85] Nigerian Watch, 'Sultan of Sokoto requests full amnesty for Boko Haram members' *Nigerian Watch* (6 March 2003) <http://www.nigerianwatch.com/news/1398-sultan-of-sokoto-requests-full-amnesty-for-boko-haram-members> accessed 27 March 2013.

protect the rights of citizens, including defendants. This is because innocent citizens of Nigeria currently bear the brunt of the Islamic militancy and human rights abuses committed by both Boko Haram and the Nigerian security forces. It is therefore important to remind the government of Nigeria of its obligation to hold accountable those who commit international crimes whether they are Islamic militants or government security forces. The domestic implementation of the Rome Statute offers an opportunity for cooperation between the ICC and the Nigeria in the fight against impunity and prosecution of those responsible for international crimes.