

# International Criminal Justice in Africa

Issues, Challenges  
and Prospects

HJ van der Merwe  
Gerhard Kemp  
(eds)



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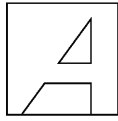
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## **RULE OF LAW PROGRAMME FOR SUB SAHARAN AFRICA**

### **About the African Group of Experts on International Criminal Justice**

#### **About the group:**

The African Group of Experts on International Criminal Justice was formed in 2010 under the auspices of the Multinational Development Policy Dialogue of the Konrad-Adenauer-Stiftung (KAS) based in Brussels, Belgium. In 2012, the group's activities were transferred to the Rule of Law Programme for Sub Saharan Africa based in Nairobi, Kenya. The group meets annually 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 consist of academics and legal practitioners holding expertise in the field of international criminal law.

#### **Mission statement:**

The group's primary focus is to produce a regular edited publication to serve as *an annual compendium of international criminal justice on the African continent*. The publication is created *by Africans for a global readership* and aims to provide contemporaneous, diverse and critical perspectives from within Africa regarding important developments and issues relating to the prosecution of international and transnational crimes on the continent. The publication aims to reflect 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 Sub-Saharan Africa. Furthermore, the publication aims to reflect both legal and extra-legal developments in order to provide a holistic understanding of the project of international criminal justice as it affects Africa and Africans as well as the challenges facing this project.

'The views expressed in these articles are solely those of the authors and do not necessarily represent those of Konrad Adenauer Stiftung'.





## ABBREVIATIONS

ANC	African National Congress (South Africa)
AU	African Union
CAT	Convention against Torture
CIA	Central Intelligence Agency (US)
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
GWOT	Global War on Terror
ICC	International Criminal Court
ICC-ASP	Assembly of States Parties to the Rome Statute
ICD	International Crimes Division of the High Court (Kenya or Uganda)
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia)
IDMC	Internal Displacement Monitoring Centre
IHL	international humanitarian law

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IMT	International Military Tribunal (Nuremberg)
KHRC	Kenya Human Rights Commission
KNDRC	Kenya National Dialogue and Reconciliation Committee
KPTJ	Kenyans for Peace Truth and Justice
LRA	Lord's Resistance Army (Uganda)
ODM	Orange Democratic (Movement) Party (Kenya)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
PCLU	Priority Crimes Litigation Unit (South Africa)
PEV	post-election violence (Kenya)
SALC	Southern Africa Litigation Centre
SCSL	Special Court for Sierra Leone
SGBV	sexual and gender based violence
TJRC	Truth Justice and Reconciliation Commission (Kenya)
UN	United Nations
UN OCHA	Office for Coordination of Humanitarian Affairs of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
US	United States of America

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*Prosecutor v Al Bashir (Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya) ICC-02/05-01/09-107 (27 August 2010).*

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American Convention on Human Rights (1969) 1144 UNTS 123.

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Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85.

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Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II) 75 UNTS 85.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV) 75 UNTS 287.

Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III) 75 UNTS 135.

ICC-ASP, Assembly Procedures Relating to Non Cooperation.

ICGLR Pact on Security, Stability and Development for the Great Lakes Region

(Protocol for the Prevention and the Punishment of the Crimes of Genocide, War Crimes and Crimes against Humanity and all Forms of Discrimination) (2006), 46 ILM 173.

ICTR Statute (UNSC Resolution 955 (1994) on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal).

International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171.

Negotiated Relationship Agreement between the International Criminal Court and the United Nations (concluded 22 July 2004) ICC-ASP/3/Res.1.

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# INTRODUCTION

HJ VAN DER MERWE\*

This book contains a collection of papers by members of the Konrad Adenauer Stiftung's *African Group of Experts on International Criminal Justice*. The book is the third of its kind<sup>1</sup> and follows in the footsteps of its predecessors by drawing together a number of wide-ranging and contemporaneous perspectives relating to the prosecution of international crime on the African continent.<sup>2</sup> This year's publication contains seven contributions from new and old members of the group. Collectively, they offer an African perspective regarding the prospects and challenges facing the project of international criminal justice in Africa. The contributions cover situations and cases from across the continent as well as larger debates and contemporary issues affecting and shaping the application of international criminal law in Africa.

This year, as in previous years, the project of international criminal justice finds itself on the defensive on the African continent. At the core of this conflict lies the fractured relationship between the International Criminal Court (ICC or the Court) and the African Union (AU) (spearheaded by a number of African states, especially, Sudan, Kenya and, most recently, South Africa). This state of affairs would have been hard to predict in light of the amount of support for the ICC among African states when the Court was established in 2002. But we have learned

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<sup>1</sup> K Ambos and OA Maunganidze (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (Universitätsverlag Göttingen 2012) and B van der Merwe (ed) *International criminal justice in Africa: Challenges and opportunities* (Konrad Adenauer Stiftung 2014).

<sup>2</sup> The contributions in this book generally do not reflect on developments relevant to international criminal justice in Africa that occurred after 30 August 2015.

that the legal-political landscape can change very quickly. In June 2015, Navi Pillay commented that '[...] it is extremely unlikely that South Africa or any African country will withdraw from the ICC' since '[a] majority of African countries played an enormous role in asking for this court.'<sup>3</sup> Many, including myself, would not have hesitated to support this assertion. Yet, as of writing, the threat of withdrawal remains a very real one.

The African continent seems to have split into two opposing camps, namely, those criticising the way that international criminal law is enforced (especially enforcement of the Rome Statute of the ICC (Rome Statute)) and those defending it. This is, off course, an oversimplification of the matter. Nonetheless, it cannot be denied that – as the calls of opponents and proponents alike become louder – the calls of those of observers with a more objective and reconciliatory point of view are drowned out. Crucially, what seems to be missing is a genuine, broad-ranging and constructive debate between the opposing camps. The absence of such a debate is perhaps best exemplified by the decision of the African National Congress (ANC), the ruling political party in South Africa (traditionally a strong proponent of the ICC), to withdraw its support for the ICC – a decision that John Dugard has called 'defeatist, naïve and reactionary.'<sup>4</sup>

In a speech to the Assembly of State Parties, South Africa's International Relations Minister, Maite Nkoana-Mashabane, openly questioned the impartiality of the ICC:

We ask ourselves, as have many, why no investigations have been opened in Afghanistan, Iraq and Palestine after long periods of preliminary analysis, notwithstanding clear evidence of violations. Is it because those investigations have the potential to implicate the 'great powers'?<sup>5</sup>

Hennie Strydom has argued that the ANC's opposition to the ICC is disingenuous.<sup>6</sup> In reality, this opposition is an expression of its dissatisfaction with the United Nations system, particularly the power of veto afforded to the five permanent members of the United Nations Security Council. Strydom also points out that South Africa's international legal obligations towards the prosecution of international crime extend beyond the ICC. One is left with the impression that the South African Government is trying to make a political point with its reaction. If so, the

<sup>3</sup> F Haffajee 'Former ICC judge speaks of Omar Al Bashir case' *News24* 28 June 2015.

<sup>4</sup> J Dugard, 'How Africa can fix the International Criminal Court' *AllAfrica* 28 October 2015.

<sup>5</sup> J Evans, 'SA questions impartiality of International Criminal Court' *News24* 20 November 2015.

<sup>6</sup> H Strydom, 'Leaving the ICC won't absolve South Africa of its legal obligations' *ENCA* 13 November 2015.

only inference is that the making of political points is regarded as more important than the interests of victims in Africa.

The ANC's decision, and the manner in which it was reached, provides clear evidence of the rift between opposing camps as well as the erosion of the common ground between African states and the ICC that had seemed so firmly established when the ICC came into being. A remarkable and saddening feature of the African critique of the ICC is that - while the debate revolves mainly around issues, such as, political bias, immunity for African heads of state, Western imperialism and African solidarity (not to mention the notable prevalence of political grandstanding) - arguably the most important reasons for the establishment of an alternative and internationalised system of criminal accountability, namely, rights and interest of victims, has somehow flown out the window.

The criticisms of the ICC from within Africa must not, however, be taken to represent a wholesale abandonment of the ideals of international criminal justice in Africa. The true state of affairs is, as always, much more nuanced and complex than it is often portrayed. Other developments from around the continent indicate support for efforts to ensure accountability in respect of international crimes. In this regard, the following developments deserve to be highlighted:<sup>7</sup>

- In January 2015, Lord's Resistance Army leader Dominic Ongwen - wanted by the ICC since 2005 - was surrendered to the ICC. Interestingly, his surrender was the result of efforts by *inter alia* the United States and the AU, both of which are generally critical of the ICC.
- The trial of Congolese commander Bosco Ntaganda opened in September 2015. Ntaganda has been charged with war crimes and crimes against humanity, including, murder, rape and sexual slavery, committed in the Ituri district of the Democratic Republic of Congo between 2002 and 2003.
- Also in September 2015, Ahmad Al Faqi Al Mahdi was surrendered to the ICC by Niger and became the first person indicted for cultural crimes with an international element. He faces charges of war crimes for allegedly directing attacks against buildings dedicated to religion and historical monuments in Timbuktu, Mali.

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<sup>7</sup> See generally Human Rights Watch, 'Memorandum to African state parties of the International Criminal Court for the Assembly of State Parties 14<sup>th</sup> Session' <<https://www.hrw.org/news/2015/11/17/memorandum-african-states-parties-international-criminal-court-assembly-states>> accessed 19 November 2015.

- Another significant development from an African perspective is that the Office of the Prosecutor (OTP) has taken positive steps toward the investigation of international crimes committed outside of Africa. In October 2015, the OTP made an application to the Court for the opening of an investigation in relation to international crimes allegedly committed in Georgia, raising the prospect of the first ICC investigation beyond Africa. The OTP has also continued its preliminary examinations in other situations (Afghanistan, Colombia, Iraq, Palestine and Ukraine).

Once again, African conflicts, situations and politics (many of which are discussed in this book) have served to highlight the limitations of international criminal justice. It is sometimes too easily forgotten that the field of international criminal law is, historically speaking, still very much in its infancy. From this perspective, it is understandable that rules and modes of enforcement of ICL are still in somewhat of a state of flux. While there are, and will be disagreements about the ‘means,’ the ultimate ‘end’ of international criminal law – the underlying ideal of putting an end to the culture of impunity for international crimes – should remain as strongly supported as ever. Africa and Africans in particular stand to benefit from the attainment of a fair and efficient system of international criminal law. This should be regarded as the fundamental consideration in any debate on the scope and manner of application of international criminal law in Africa.



# PURSUING AL BASHIR IN SOUTH AFRICA: BETWEEN 'APOLOGY AND UTOPIA'

JERUSHA ASIN\*

## Abstract

*Few things elicit a more vehement response from the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) than allegations that decisions made by the Office are subject to political considerations. The OTP publicly ascribes to the ideological conception of the Court as a manifestation of uncompromising legalism. Yet, the twin threads of legalism and realism were deliberately and closely woven together into the fabric of the Rome system of justice and have found expression in the continuing conundrum faced by the Court in securing state co-operation to facilitate its judicial mandate, especially in the execution of arrest warrants. The single most spectacular expression of the 'reality deficit' of international criminal law has been the staging of the 'Great Escape' by President Omar Al Bashir, the subject of ICC arrest warrants, from Johannesburg, South Africa, in June 2015, during an African Union Summit.*

*This paper considers that the inability of the ICC to persuade other state parties, third states, the Security Council and even high ranking officials of the United Nations to apply consistent, sustained international pressure to execute outstanding arrest warrants issued by the Court, even after referral by the Security Council points to a deeper malaise permeating the state cooperation regime under the Rome Statute of the ICC (Rome Statute). It is now apparent that the conflict between law and politics inherent in securing state cooperation with the Court cannot be mediated by appeal to strictly legalist arguments. Accordingly, this study joins the dialogue*

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*on the ICC by considering whether the state cooperation regime under the Rome Statute enacts international politics within the classic Koskenniemiian meaning.*

*Ultimately, the paper ponders whether the state cooperation regime under the Statute and the record of state practice in cooperating with the Court to date demands that the false necessities of uncompromising legalism be discarded in favour of strategic legalism within the statutory frame of the Prosecutor's mandate to seek state cooperation with the Court.*

## 1 Introduction

*'You are my creator, but I am your master; obey!'*<sup>1</sup>

In contemporary literature on international institutions,<sup>2</sup> the tale of Frankenstein stands as a cautionary tale of the manner in which the agent does not always heed the call of the principal and may eventually overreach the principal by means of deeds, which are inimical to the interests of the principal.<sup>3</sup> Logically, the received wisdom is that once international institutions are imbued with legal personality, their interests and those of their creators (member states) diverge.

With reference to the International Criminal Court (ICC or the Court), nowhere has this divergence in interests been more apparent than in the continuing conundrum faced by the Court in securing state co-operation to facilitate its judicial mandate,<sup>4</sup> especially in the execution of arrest warrants, the most prominent of which to date has been that of the serving head of state of the Republic of Sudan, President Hassan Al Bashir.<sup>5</sup> The referral of the situation in Darfur in 2005 by the Security Council acting under the auspices of Chapter VII of the United Nations Charter ostensibly created an agency relationship between the Security Council and the Court, in which international judicial intervention was deemed by the Council to be necessary in order to maintain international peace and security.<sup>6</sup>

<sup>1</sup> MW Shelley, *Frankenstein* (1818) 205.

<sup>2</sup> J Klabbers, *An introduction to international institutional law* (Cambridge University Press 2002) Preface.

<sup>3</sup> Compare J Alvarez, *International organizations as law-makers* (Oxford University Press 2005) 585.

<sup>4</sup> ICC-ASP, Report of the Court on cooperation (9 October 2013) ICC-ASP/12/35, paras 10-26.

<sup>5</sup> *Prosecutor v Al Bashir*; Warrant of arrest for Omar Hassan Ahmad Al Bashir (4 March 2009) ICC-02/05-01/09; *Prosecutor v Al Bashir*; Second warrant of arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) ICC-02/05-01/09.

<sup>6</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 1.

However, the agency relationship between the Court and the Security Council has soured incredibly in the period since the initial issuance of the warrant of the arrest for Omar Al Bashir and three others for crimes against humanity on 4 March 2009 and subsequently on 12 July 2010 for genocide. To date, the Prosecutor has issued a total of 21 reports to the Security Council on the situation in Darfur,<sup>7</sup> with 10 of these communications trenchantly cataloguing various instances of non-cooperation by the Government of Sudan and other states party to the Rome Statute of the ICC (Rome Statute) and urging the Council to take the appropriate action against these states.<sup>8</sup> Indeed, in December 2014, the Prosecutor mordantly observed that:

It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again, most of which are well known to this Council... *In the almost ten years that my Office has been reporting to this Council, there has never been a strategic recommendation provided to my Office, neither have there been any discussions resulting in concrete solutions for the problems we face in the Darfur situation. We find ourselves in a stalemate that can only embolden perpetrators to continue their brutality.*<sup>9</sup> [Emphasis added]

The Darfur referral, however, appears to have been overreached by other conflict resolution alternatives pursued by the Security Council in Sudan, all of which depend upon the continued cooperation of the Sudanese Government headed by President Al Bashir.<sup>10</sup> The Security Council had proved either unwilling and/or unable, within the ordinary meaning of those terms, to buttress the Darfur referral by exacting state compliance in respect of the arrest and surrender of Al Bashir. The recalcitrance, both by the Council and by states, has manifested itself in various ways and has compelled even the Office of the Prosecutor (OTP) to excoriate high level United Nations (UN) officials for their 'unnecessary contact' with Al Bashir and members of his Government, even while they are subject to warrants of arrest.<sup>11</sup> For their part, the judges of the Court have all but termed the Council's referral of the Darfur situation as an exercise in futility because of the Council's

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<sup>7</sup> ICC-OTP, 21<sup>st</sup> Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593(2005) (29 June 2015).

<sup>8</sup> Ibid.

<sup>9</sup> ICC-OTP, Statement to the United Nations Security Council on the Situation in Darfur pursuant to UNSCR 1593(2005) 12 December 2014.

<sup>10</sup> K Rodman, 'Justice as a dialogue between law and politics: Embedding the International Criminal Court within conflict management and peace building' (2014) 12 *Journal of International Criminal Justice* 437, 447.

<sup>11</sup> See ICC-OTP, 19<sup>th</sup> Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2003) (23 June 2014), para 9.

lackadaisical approach to enforcing the Court's requests for cooperation that have gone unheeded.<sup>12</sup>

The above situation has been exacerbated by the current hostility between the Court and numerous member states of the African Union (AU), spurred by the infamous resolution of July 2009 that blatantly urged its members to refuse to cooperate with the Court in respect of the arrest warrant issued against Omar Al Bashir.<sup>13</sup> The said AU resolution has visibly impacted on the execution of requests for cooperation with the Court in connection with Al Bashir.<sup>14</sup> The most recent manifestation of this was the dramatic 'Great Escape' by Al Bashir from Johannesburg in South Africa during the 25<sup>th</sup> AU Summit held in June 2015 with the apparent complicity of the South African Government.<sup>15</sup>

This paper proceeds on the premise that the establishment of the Court as a legalist institution has not enabled it to transcend the biases, compromises and conflicts inherent in the politics of state cooperation,<sup>16</sup> where politics in that sense refers to decision-making on the basis of rational calculations of self-interest.<sup>17</sup> Further, the legalistic conception of the Court as an 'empire of law' secluded from historical and political realities<sup>18</sup> has obscured critical acknowledgment and appraisal of its limitations<sup>19</sup> and the contradictions that are built into its framework.<sup>20</sup>

For the sake of clarity, the term 'legalist' as used in this paper derives from the term legalism, persuasively defined by the political theorist Judith Shklar as 'the ethical attitude that holds moral conduct to be a matter of rule-following and moral relationships to consist of duties and rights determined by rules.'<sup>21</sup> The core of legalism lies in the utter disavowal of any participation in political activity, such

<sup>12</sup> *Prosecutor v Al Bashir*, Decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the Court regarding the arrest and surrender of Omar Hassan Al Bashir (20 March 2013) ICC-02/05-01/09, para 22.

<sup>13</sup> Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII).

<sup>14</sup> ICC-ASP, Report of the Bureau on non-cooperation (7 November 2013) ICC-ASP/12/34, paras 22-24 <[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-34-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-34-ENG.pdf)> accessed 1 January 2014.

<sup>15</sup> P Greef, 'Anatomy of Al-Bashir's great escape' *Daily Maverick* 29 June 2015.

<sup>16</sup> See B Leebaw, *Judging state-sponsored violence, imagining political change* (Cambridge University Press 2011) 24.

<sup>17</sup> J Maogoto, *War crimes and Realpolitik: International justice from World War I to the 21<sup>st</sup> Century* (Lynne Rienner Publishers 2004) 10-11.

<sup>18</sup> J Shklar, *Legalism: Law, morals and political trials* (Harvard University Press 1986) 15.

<sup>19</sup> Leebaw (n 16) 24-25.

<sup>20</sup> B Schiff, *Building the International Criminal Court* (Cambridge University Press 2008) 8-9.

<sup>21</sup> Shklar (n 18) 1.

that legal institutions (as the epitome of the legalistic tradition) are deemed to be hermetically sealed-off from political society.<sup>22</sup>

The main object of this study is not only to illustrate the specific interplay of law and politics in connection to state cooperation, but also to contextualise the glaring disparity between norms of international law and actual state behaviour (or law's 'reality deficit').<sup>23</sup>

The paper is therefore structured as follows: The first part is a conceptual framework that describes the political factors that shape international law and interactions of states with international institutions in order to explain the reality deficit facing the Court.<sup>24</sup> The second part builds on the conceptual framework by outlining a theoretical framework whose primary postulate is that the state cooperation regime under the Rome Statute enacts international politics within the classic Koskenniemiian meaning. The third and final part advances the argument for political intelligence in the pursuit of state cooperation with the Court by reference to the outstanding arrest warrants for Al Bashir and his dramatic exit from South Africa in June 2015. It is worth noting at this point that for present purposes, the term political intelligence as used in this study is an expansion of the concept of political judgment developed by the political theorist Hannah Arendt, which I have assimilated to advance my arguments and is not in any way synonymous with capitulation to power politics.<sup>25</sup> In all arguments, recourse is had, not to a utopian model by which States freely and promptly cooperate with the Court, but to a model of state cooperation that does not render the Court nugatory and its Statute hollow.

## 2 Conceptual framework

There are four prominent theories in international relations, namely: the realist, institutionalist, liberal and constructivist theories.<sup>26</sup>

States are the dominant actors in the realist narrative and constantly compete with each other in the absence of any central government. International law and,

<sup>22</sup> Ibid ix.

<sup>23</sup> AM Slaughter *et al.*, 'International law and international relations theory and a new generation of interdisciplinary scholarship' (1998) 92(3) *American Journal of International Law* 367, 371.

<sup>24</sup> K Abbot, 'International relations theory, international law and the regime governing atrocities in internal conflict' (1999) 93(2) *American Journal of International Law* 361, 362.

<sup>25</sup> Compare *Prosecutor v Kenyatta*, Partially dissenting opinion of Judge Ozaki (18 October 2013) ICC-01/09-02/11, para 21. See also Leebaw (n 16).

<sup>26</sup> Ibid 364-367.

by extension, international cooperation are considered to be useful only when they advance state interests. Realists place heavy emphasis on the interests of powerful states and denigrate the ability of international rules and institutions to constrain state behaviour. Goldsmith and Posner stand out in international criminal law scholarship as realists for their assertion that the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) did not exert any ‘gravitational pull’<sup>27</sup> to lure defendants such as former President Slobodan Milošević for trial before the ICTY.<sup>28</sup> Because realists conceive of sovereignty as predating international law, international law cannot limit sovereignty.<sup>29</sup>

Institutionalists, on the other hand, acknowledge the competing interests in international life, but consider that because states create international institutions to impose order, institutions may modify state behaviour.<sup>30</sup> Institutionalists identify ‘islands of cooperation’<sup>31</sup> in which states are willing to cooperate in order to legitimise different forms of inter-state action.<sup>32</sup> An example may be the decision of the United States to abstain from voting on the Security Council resolution referring the situation in Darfur to the Court because ‘of the need for the international community to work together to end the climate of impunity in Sudan.’<sup>33</sup>

Liberal theorists for their part do not discount the importance of states in international politics, but consider that state interests are determined more by domestic politics than by considerations of relative power. In this conception, the fundamental actors in international politics are both individuals and private groups.<sup>34</sup>

Conversely, the constructivist theory holds that international actors socialise within a context of shared norms, which constitute their identities and determines appropriate forms of conduct.<sup>35</sup> Therefore, fundamental concepts such as the state and sovereignty can only be determined by reference to the rights and duties held by

<sup>27</sup> J Goldsmith and E Posner, *The limits of international law* (Oxford University Press 2005) 116.

<sup>28</sup> Ibid.

<sup>29</sup> M Koskenniemi, *From apology to utopia: The structure of international legal argument*, Reissue with New Epilogue (Cambridge University Press 2005) 254.

<sup>30</sup> Alvarez (n 3) 25.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> UN, ‘Security Council Refers Situation in Darfur, Sudan to Prosecutor of the International Criminal Court: Resolution 1593(2005) adopted by Vote of 11 in Favour and None Against’ (5158<sup>th</sup> Meeting) SC/8351 <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>> accessed 21 June 2014.

<sup>34</sup> Abbot (n 24) 366.

<sup>35</sup> Ibid.

a State.<sup>36</sup> This theory emphasises normative commitments and the internalisation of these norms moving beyond the socialising institution in a 'norm cascade.'<sup>37</sup> Constructivists dispute the pre-dominance of states as analytical units in international law and advance the development of individuals, local organisations and states within international institutions in order to influence these institutions beyond the preferences of the powerful units within it.<sup>38</sup> For instance, recall the role played by the sheer numbers of non-governmental organisations involved in lobbying for the Court during the Rome Conference<sup>39</sup> and the subsequent statutory acknowledgment of their role in propagating these norms within the Rome system of justice.<sup>40</sup>

It is apparent that the establishment of the Court best accords to the constructive model because the Court was established on the basis of normative and legal commitments by state parties to end impunity for the perpetration of atrocities<sup>41</sup> and drawing from the Nuremberg precedent whereby sovereignty was purportedly 'perforated.'<sup>42</sup>

In this regard, the contrasting perspectives on sovereignty under the realist and constructivist schools are especially noteworthy. While realists consider that neither international law nor international institutions can alter sovereignty, which is a structural concept incapable of delimitation,<sup>43</sup> constructivists fluidly define sovereignty as being constituted by the international legal order in accordance with rights and duties held by the state.<sup>44</sup>

It is worth noting that the edifice upon which the entire body of international criminal law is built is the active delimitation of state sovereignty.<sup>45</sup> The paradox,

<sup>36</sup> Koskenniemi (n 29) 245-455.

<sup>37</sup> See K Sikkink, *The justice cascade: How human rights prosecutions are changing world politics* (Norton & Co 2011) 5-28. See also José Alvarez (n 3) 44.

<sup>38</sup> Ibid.

<sup>39</sup> K Barrow, 'The role of NGOs in the establishment of the International Criminal Court' (2004) 2(1) *Dialogue* 11, 17.

<sup>40</sup> Rome Statute of the International Criminal Court, (1998) 2187 UNTS 90 (hereinafter the "Rome Statute"), art. 15(2).

<sup>41</sup> Rome Statute, preamble para 4.

<sup>42</sup> G Mettraux, 'Judicial inheritance: The value and significance of the Nuremberg Trial to contemporary war crimes tribunals' in G Mettraux (ed) *Perspectives on the Nuremberg trial* (Oxford University Press 2008) 604.

<sup>43</sup> Alvarez (n 3) 29-30.

<sup>44</sup> J Goldsmith, 'Sovereignty, international relations theory and international law' (2000) 52 *Stanford Law Review* 959, 960.

<sup>45</sup> B Broomhall, *International justice and the International Criminal Court: Between sovereignty and the rule of law* (Oxford University Press 2003) 56-57.

which is the scope of inquiry in this paper, is that sovereignty reappears in the form of states failing to cooperate with the Court and when the international community fails to exact compliance.<sup>46</sup>

### 3 Theoretical framework

Upon the conclusion of the constitutive treaty of the Rome Statute in 1998, Court officials and the Prosecutor in particular,<sup>47</sup> gloried in proclaiming the Court's apolitical nature, averring that it would subordinate politics to the law and speak 'law to power'<sup>48</sup> by establishing legal realities that constrained, if not bound other entities.<sup>49</sup>

These views speak to the theory of legalism, earlier defined as a rule-centred approach that eschews the role of politics in any legal activity.<sup>50</sup> In the present context, legalism refers to a conception of global norms that seeks the separation of law from politics for the promotion of human rights.<sup>51</sup>

However, there appear to be two primary types of legalism, distinguished primarily on the basis of their approach to the role of politics in international justice.<sup>52</sup> The first is ideological legalism, which rests on the uncompromising and rigid character of just action and disparages any other kind of social policy.<sup>53</sup> In this conception, politics is a 'dirty'<sup>54</sup> word because it is the child of competing interests and ideologies and has a disreputable recourse to expediency that must by necessity be inferior to the law.<sup>55</sup> By parity of reasoning, law is superior because it aims at justice, which is the sum of all legalistic aspirations<sup>56</sup> and is therefore neutral and objective. Therefore, to maintain the distinction between legal order and political chaos, law is magically lifted and elevated beyond politics, which then becomes

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<sup>46</sup> Ibid.

<sup>47</sup> L Moreno-Ocampo, 'Statement' (ICC Review Conference, Kampala, 31 May 2010).

<sup>48</sup> S Nouwen and W Werner, 'Doing justice to the political: The International Criminal Court in Uganda and Sudan' (2011) 21(4) *European Journal of International Law* 941, 965.

<sup>49</sup> Ibid.

<sup>50</sup> Shklar (n 18) 1.

<sup>51</sup> Rodman (n 10) 439.

<sup>52</sup> Leebaw (n 16) 36.

<sup>53</sup> Shklar (n 18) 111-122.

<sup>54</sup> Leebaw (n 16) 38.

<sup>55</sup> Ibid 111.

<sup>56</sup> Ibid 113.



embattled with the law.<sup>57</sup> For the law to subdue politics, it becomes necessary to insist on a policy of uncompromising rules and rule-following.<sup>58</sup>

This ideological conception of legalism, which presents the law as a complete monolithic structure with no limitations is the one most commonly advocated in connection with the ICC. It is difficult, however, to contest that the legalistic conception of justice as the impartial execution of existing laws<sup>59</sup> that eschews arbitrariness,<sup>60</sup> is the very essence of the law.

A different approach advanced by critical theorist, Marti Koskenniemi, argues that a rule-centred approach that maintains a strict distinction between law and politics does so because of the perceived normative strength of the law,<sup>61</sup> which needs to be shown to bind states regardless of their behaviour or interests.<sup>62</sup> Notwithstanding that international law is the product of international politics and diplomacy, legalism assumes that the law mysteriously transcends these to bind states regardless of their interests or opinions when it is invoked against them. However, the dilemma in the ideological conception of legalism in completely severing law from politics, power and state interest is that it is tantamount to reverting to doctrines of natural and divine law, whereas international law positively derives from state behaviour (custom), will and interests.<sup>63</sup> Certainly, the negotiated nature of the Rome Statute proves this point. All international criminal tribunals without exception owe their existence to the expressed will of states.<sup>64</sup> Therefore, the legalist consequences of maintaining the rigid distinction between law and politics is that, when state behaviour fails to conform to legal rules because of an outright refusal to accept certain standards for any number of reasons, legalists ascribe this failure to politics. Koskenniemi describes this phenomenon as an *apology* for politics.<sup>65</sup>

In that event, the idiosyncrasy of the uncompromising approach to rule-following constrains legalists to emphasise that despite the changes in state behaviour and interests out of a desire to escape the constraining effect of international law in any particular situation,<sup>66</sup> the legal rules are still binding on states. To the extent that

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<sup>57</sup> Ibid 122.

<sup>58</sup> Ibid.

<sup>59</sup> Leebaw (n 16) 37.

<sup>60</sup> Ibid 111.

<sup>61</sup> Koskenniemi (n 29) 184.

<sup>62</sup> Ibid 17-18.

<sup>63</sup> Ibid.

<sup>64</sup> See generally Maogoto (n 17).

<sup>65</sup> Koskenniemi (n 29) 17-18.

<sup>66</sup> Ibid 19-21.

states decline to modify their behaviour to comply with the law, it becomes disconnected from state behaviour and connotes *utopia*.<sup>67</sup>

Indeed, it is possible to discern both the apology and utopia in a number of the Prosecutor's statements to the UN Security Council in connection to the Darfur referral, in which she states that no meaningful steps have been taken to apprehend the Darfur suspects and bring them to justice (apology)<sup>68</sup> and that arrests, which can only be effected by international cooperation to enforce the arrest warrants (currently utopia), are needed to implement the Court's processes.<sup>69</sup>

This paper therefore adopts the analytical lens of the second form of strategic or creative legalism that discards the myth that law can be magically and mysteriously separated from its political antecedents. Strategic legalism considers the political provenance of the law in propounding that law and politics are inextricably intertwined in one social continuum<sup>70</sup> and that legalism can be modified and guided by political judgment.<sup>71</sup> However, Shklar's conception of political judgment differs from that advanced in this paper, which is predicated on Hannah Arendt's conception of political judgment and is of important utility in so far as it underscores the fact that, in analysing international institutions, the question is not whether the law is political, but rather to question the sort of interests that are supported by the law.<sup>72</sup>

The ICC is reflective of creative or strategic legalism by reference to the normative and legal commitments lying side by side with the diplomatic bargains, political interests and compromises enacted into the provisions governing state cooperation under the Rome Statute during the Rome Conference.<sup>73</sup>

This paper analyses state cooperation with the ICC within the prism of Koskenniemi's critical theory that the 'politics of international law is what competent international lawyers do,'<sup>74</sup> and avers that far from being the 'unfolding of law's master plan,'<sup>75</sup> the state cooperation regime under the Rome Statute enacts interna-

<sup>67</sup> Ibid.

<sup>68</sup> F Bensouda, 'Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council on the situation in Darfur pursuant to UNSCR 1593 (2005) New York, 17 June 2014' para 3.

<sup>69</sup> Ibid.

<sup>70</sup> Shklar (n 18) 169.

<sup>71</sup> Leebaw (n 16) 40.

<sup>72</sup> Shklar (n 18) 144.

<sup>73</sup> Schiff (n 20) 3.

<sup>74</sup> Koskenniemi (n 29) 571.

<sup>75</sup> F Mégret, 'The politics of international criminal justice' (2002) 13 *European Journal of International*

tional politics and creates both a legal and political mandate for the Prosecutor to seek state cooperation.<sup>76</sup>

#### 4 The state cooperation regime under the Rome Statute

The establishment of the Court on the basis of a multilateral treaty encompassing diplomatic bargains,<sup>77</sup> political interests and 'hard fought political compromises'<sup>78</sup> in addition to legal commitments has inevitably coloured the state cooperation provisions under the Statute establishing the Court. The parallel veins of legalism and realism enacted into the Statute in the course of its drafting history have impacted on the content of the legal duty to cooperate with the Court. Because the Court's focus was not bound to discrete situations like that of the *ad hoc* tribunals, the trigger mechanisms were a procedural safeguard to limit the reach of the Court's jurisdiction over particular conflict situations to the three mechanisms under Article 13,<sup>79</sup> namely; by state party referral,<sup>80</sup> by referral of the Security Council under Chapter VII measures of the United Nations Charter<sup>81</sup> and the initiation of an investigation by the Prosecutor *proprio motu*.<sup>82</sup>

The principle of complementarity where the Court functions as a court of last resort<sup>83</sup> constitutes the most significant compromise to sovereignty and practically stays the exercise of jurisdiction if the case is being addressed within the domestic jurisdiction.<sup>84</sup> The effect is that, contingent on the trigger mechanism,<sup>85</sup> cooperation obligations are stayed or stopped altogether because of challenges to the admis-

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Law 1261, 1269; T Hansen, 'The International Criminal Court and the legitimacy of exercise' in Andersen *et al.* (eds) *Law and legitimacy* (DJOEF Publishers 2014); W Schabas, 'The banality of international justice' (2013) *Journal of International Criminal Justice* 1, 7; C Ryngaert, 'Arrest and detention' in L Reydam *et al.* (eds) *International prosecutors* (Oxford University Press 2012).

<sup>76</sup> See GJ Knoops and R Amsterdam, 'The duality of state cooperation within international and national criminal cases' (2006) 30(2) *Fordham International Law Journal* 260, 272.

<sup>77</sup> Schiff (n 20) 3-4.

<sup>78</sup> P Mochochoko, 'International cooperation and judicial assistance' in R Lee (ed) *The International Criminal Court: The making of the Rome Statute - issues, negotiations, results* (Kluwer 1999).

<sup>79</sup> W Schabas, *An introduction to the International Criminal Court* (Cambridge University Press 2011) 157.

<sup>80</sup> Rome Statute, art. 13(a).

<sup>81</sup> Rome Statute, art. 13(b).

<sup>82</sup> Rome Statute, art. 13(c).

<sup>83</sup> Rome Statute, preamble para 10, art. 1.

<sup>84</sup> Schabas (n 79) 190.

<sup>85</sup> *Ibid* 192.

sibility of a case.<sup>86</sup> The practical effect of challenges to admissibility means that urgent requests or opportunities to effect an arrest or seize an available window of opportunity might be lost in addition to long periods of time spent making complementarity assessments of situations under the Statute.<sup>87</sup>

#### 4.1 Differentiated cooperation obligations under the Statute

Third states that are not party to the Rome Statute are under no obligation to cooperate with the Court, save for voluntary *ad hoc* arrangements to do so,<sup>88</sup> which apply *mutatis mutandis* to intergovernmental organisations.<sup>89</sup> This means that the Court has a chequered jurisdiction over states, practically witnessed with regard to the outstanding arrest warrant for Al Bashir, which non-state parties like Ethiopia are not bound to execute beyond the Security Council's 'encouragement' to do so in Resolution 1593 of 2005.<sup>90</sup> Indeed, a statement issued by the Chinese Foreign Ministry on the invitation extended to Al Bashir to visit China in September 2015 states that 'as China is not a member of the ICC, relevant issues will be handled on the basis of the basic principles of international law.'<sup>91</sup>

#### 4.2 The legal bases of the duty to cooperate with the Court

The obligation to cooperate with the Court derives from the statutory provision to 'fully cooperate with the Court.'<sup>92</sup> The means by which the Court is seized of a situation determines the legal basis of the cooperation obligation, as in the case of the Security Council referral of Libya<sup>93</sup> and Darfur<sup>94</sup> to the Court. Neither of these states were party to the Statute hence their obligation to cooperate with the Court was grounded under the resolution and the duty to implement Council decisions under the Charter of the United Nations.<sup>95</sup> A further basis for cooperation between

<sup>86</sup> Knoops and Amsterdam (n 76) 276.

<sup>87</sup> B Swart, 'General problems' in A Cassese *et al.* (eds) *The Rome Statute of the International Criminal Court: A commentary* (Oxford University Press 2002) 1596.

<sup>88</sup> Rome Statute, art. 87(5).

<sup>89</sup> Rome Statute, art. 87(6). See also European Council, Agreement between the International Criminal Court and the European Union on cooperation and assistance (2006) OJ L115/50, art. 4.

<sup>90</sup> See *Prosecutor v Al Bashir*, Prosecution's urgent notification of travel in the case of The Prosecutor v Omar Al Bashir (29 April 2014) ICC-02/05-01/09.

<sup>91</sup> 'China welcomes Sudan's war-crime accused Leader as "old friend"' *Reuters* 1 September 2015.

<sup>92</sup> Rome Statute, art. 86.

<sup>93</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

<sup>94</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

<sup>95</sup> Charter of the United Nations (1945) 1 UNTS XVI, art. 25.

the Court and the UN in the event of Council referral is the Relationship Agreement negotiated between these institutions.<sup>96</sup>

### 4.3 Enforcement of the duty to cooperate with the Court

Similar to the *ad hoc* tribunals, the ICC does not have the residual power to take enforcement measures against states.<sup>97</sup> The net sum of enforcement procedures is contingent on the source of the legal duty to provide support.<sup>98</sup> Where a state party refuses to comply with a request for cooperation, a judicial finding of non-cooperation is made against the state party and referred to the Assembly of State Parties (ASP)<sup>99</sup> or to the Security Council in the event of a Council referral.<sup>100</sup> Where the basis of cooperation was a voluntary *ad hoc* arrangement with non-state parties, the finding of non-compliance is referred to the ASP. The ASP Procedures Relating to Non-Cooperation<sup>101</sup> states categorically that the remit of the ASP under the Statute is to undertake '*political and diplomatic*' efforts to promote cooperation in response to non-cooperation.

Therefore, no enforcement mechanisms beyond the judicial findings of non-compliance are provided *for in the Statute*. This is at once the Court's Achilles' heel and continuation of the now familiar pattern of re-enacting international politics in international law, reminiscent of the truth that '[i]nternational law is still limited by international politics and we must not pretend either can live and grow without the other.'<sup>102</sup> Situating enforcement within the political and diplomatic realm of the ASP sends the clearest possible signal that the Rome Statute does not create an 'empire of law,'<sup>103</sup> but is instead embedded in the very midst of the international political universe.<sup>104</sup>

<sup>96</sup> ICC, Negotiated relationship agreement between the International Criminal Court and the United Nations (2004) ICC-ASP/3/Res.1.

<sup>97</sup> *Prosecutor v Tihomir Blaškić*, Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 (29 October 1997) IT-95-14-AR108bis, para 25.

<sup>98</sup> G Sluiter, 'Cooperation of states with international criminal tribunals' in A Cassese (ed.) *The Oxford companion to international criminal justice* (Oxford University Press 2009) 198.

<sup>99</sup> Rome Statute, art. 87(7).

<sup>100</sup> *Ibid.*

<sup>101</sup> ICC-ASP, Assembly procedures relating to non cooperation.

<sup>102</sup> H Stimson, 'The Nuremberg trial: Landmark in law' in Mettraux (n 42) 617.

<sup>103</sup> J Czarnetsky and R Rychlak, 'An empire of law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55, 62.

<sup>104</sup> Shklar (n 19) 123.

## 5 Pursuing Al Bashir: 'Between apology and utopia' in South Africa

Because the ICC not only operates in a political context, but is itself predicated on overtly political transformational goals,<sup>105</sup> the formula adopted at Rome to predicate cooperation and effective compliance of states without the force of sanction betrayed the legalistic ambitions underpinning the Statute to the political interests of those whose prerogative it is to assist the Court – a classic enactment of international politics in the Rome Statute within the Koskenniemi meaning.<sup>106</sup> This is because a target state's compliance with the Court's orders is very much a question of political expediency and necessity. As pertinently noted by David Bosco, the Court operates in a turbulent world where power matters.<sup>107</sup>

The presence of Al Bashir in South Africa in June 2015 for the AU Summit held in Johannesburg has greatly exemplified this fact. A brief summary of the essential facts will suffice for present purposes. The AU extended an invitation to Al Bashir to attend the Summit that was scheduled from 7-15 June 2015. On 13 June 2015, Al Bashir travelled to South Africa, despite the fact that on that same day, the Pre-Trial Chamber of the ICC issued a decision to the effect that South Africa was under an international obligation to immediately arrest and surrender Al Bashir and called on South Africa 'to spare no effort in ensuring the execution of the arrest warrants.'<sup>108</sup> On 14 June 2015, a civil society group in South Africa urgently applied to the High Court in Gauteng seeking orders compelling South African authorities to arrest Al Bashir under the provisions of both the Rome Statute and those of domestic legislation in South Africa implementing the Rome Statute.<sup>109</sup> Even as the High Court ordered that Al Bashir be prohibited from leaving the country pending the determination of the application,<sup>110</sup> on 15 June 2015, Al Bashir was whisked out of South Africa in circumstances heavily suggestive of complicity by the authorities in his escape. Certainly the President of South Africa dispelled any doubt of the role of his Government in the entire episode when he stated in later

<sup>105</sup> A Greenwalt, "Justice without politics?" Prosecutorial discretion and the International Criminal Court' (2007) 39 *NYU Journal of International Law and Politics* 583, 606.

<sup>106</sup> See M Koskenniemi, *The gentle civilizer of nations: The rise and fall of international law 1870-1960* (Cambridge University Press 2001) 431.

<sup>107</sup> D Bosco, *Rough justice: The International Criminal Court in a world of power politics* (Oxford University Press 2014) 1.

<sup>108</sup> ICC-OTP (n 7).

<sup>109</sup> The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, South Africa.

<sup>110</sup> See *South Africa Litigation Centre v Minister of Justice and Constitutional Development and others*, Case Number 27740/2015, 23 June 2015.

proceedings in Parliament that the presence of Al Bashir to South Africa was 'on the invitation of the AU.'<sup>111</sup> The triumphant return of Al Bashir from South Africa to Sudan was heralded by calls in Sudanese media that the ICC was 'dead' after the exit by Al Bashir.<sup>112</sup> Most recently, President Al Bashir visited China, a non-state party to the Rome Statute and was described by the President of that country as 'an old friend of the Chinese people.'<sup>113</sup>

By all accounts, prior to the above debacle, South Africa was arguably a model state party to the Rome Statute. In fact, soon after the issuance of the first warrant of arrest by the Court in March 2009, it was widely reported that representations had been made to the Sudanese Government that if Al Bashir attended the inauguration of President Jacob Zuma, he would be arrested.<sup>114</sup> Later, President Zuma himself went on public record with the Cable News Network (CNN) affirming that if Al Bashir was to even set foot inside South Africa, he would have him arrested.<sup>115</sup> However, in 2015, amidst the furore generated by the hasty departure of Al Bashir from South Africa in defiance of both the ICC and the High Court of South Africa, the self-same President Zuma had a complete *volte face* and defended the decision to let Al Bashir evade the arrest warrant and leave Johannesburg on grounds that Al Bashir had immunity as a guest of the AU.<sup>116</sup> This comes about in the context of consideration by the ruling political party, the African National Congress (ANC), to withdraw from the Rome Statute.<sup>117</sup>

Recall that in both oral<sup>118</sup> and written policy statements,<sup>119</sup> the first Prosecutor of the Court refuted the importance of state cooperation to case selection and indicated that his office deliberately uncoupled considerations of state cooperation from general discussion on situations and cases before the Court.<sup>120</sup> The position articulated by the then Prosecutor was tantamount to an assertion that states are

<sup>111</sup> 'South African President defends failure to arrest Sudan's Bashir' *Reuters* 6 August 2015.

<sup>112</sup> 'Media consider ICC "dead" after Bashir exit' *BBC News* 16 June 2015.

<sup>113</sup> 'China welcomes Sudan's war crime-accused leader as "old friend"' *Voice of America* 1 September 2015.

<sup>114</sup> 'Sudanese President to skip Zuma's inauguration' *Sudan Tribune* 9 May 2009.

<sup>115</sup> 'South Africa President warns Sudan's Bashir of arrest' *Sudan Tribune* 27 September 2009.

<sup>116</sup> 'South African President defends failure to arrest Sudan's Bashir' (n 111).

<sup>117</sup> 'ICC gives South Africa more time to explain failure to arrest Bashir' *Reuters* 16 October 2015.

<sup>118</sup> Council on Foreign Relations, 'Pursuing international justice: A conversation with Luis Moreno-Ocampo' (5 February 2010) <<http://www.cfr.org/human-rights/pursuing-international-justice-conversation-luis-moreno-ocampo/p21418>> accessed 1 September 2014.

<sup>119</sup> ICC-OTP, *Criteria for selection of situations and cases* (June 2006) 1-2 as excerpted in Human Rights Watch, 'Unfinished business: Closing gaps in the selection of ICC Cases' (2011).

<sup>120</sup> *Ibid.*

the ‘subjects of the law’s empire’<sup>121</sup> as embodied in the Rome Statute, acting as lieges to its ‘methods and ideals’<sup>122</sup> because they are bound to do so both in letter and spirit. This is a pervasive legalist utopia; that justice can be secured above the political world, and not within it.<sup>123</sup>

The political firestorm generated by the decision to apply for arrest warrants for the serving President of Sudan in July 2008<sup>124</sup> appears to me to be one of the most egregious errors in political judgment by the OTP in recent times. This is because this decision was predicated on the familiar legalist utopia of law as empire, hierarchically superior to politics,<sup>125</sup> in which the former Prosecutor, in an exchange with a diplomat who openly advised against an arrest warrant for the President, characterised himself as a ‘train moving down the track’ in order to ‘follow the evidence.’<sup>126</sup> When the diplomat indicated that the Prosecutor would hurt the very institution that he was trying to build, the two agreed to disagree.

All accounts indicate that in shifting to an adversarial strategy against Khartoum, the former Prosecutor failed to persuade the international community to effect a concomitant shift in the political agenda that was necessary for the *extraordinary international political commitment*<sup>127</sup> needed for the execution of the arrest warrants.<sup>128</sup> In effect, the Prosecutor sought to compel states, as purported subjects of the legalist empire under the Rome Statute, to set in motion political events to adhere to the dictates of the Court, which possibly included sanctions, military escalation and regime change.<sup>129</sup>

In response, the international community has to date largely spurned the OTP’s attempts to shame it in the increasingly mordant OTP reports to the Security Council over the failure to execute the arrest warrants and has instead advanced its own agenda of mediation, peace-keeping and humanitarian relief in Darfur, all of which depend on the cooperation of Al Bashir.<sup>130</sup> This episode, as most recently

<sup>121</sup> R Dworkin, *Law’s empire* (Hart 1998) vii.

<sup>122</sup> *Ibid.*

<sup>123</sup> Shklar (n 18) 123.

<sup>124</sup> J Geis and A Mundt, ‘When to indict? The timing of international criminal indictments on peace processes and humanitarian action’ (World Humanitarian Studies Conference, Groningen February 2009), 14 <<http://www.brookings.edu/research/papers/2009/04/peace-and-justice-geis>> accessed 26 June 2014.

<sup>125</sup> See Czarnetzky and Rychlak (n 103) 62.

<sup>126</sup> Bosco (n 107) 143.

<sup>127</sup> Greenwalt (n 105) 606.

<sup>128</sup> Rodman (n 10) 446.

<sup>129</sup> *Ibid.* 456.

<sup>130</sup> *Ibid.*



highlighted by the flight of Al Bashir from South Africa, powerfully underscores the true counterpoint to legalism in relation to politics that justice does not lead, but follows.<sup>131</sup> The emperor in this narrative, the OTP, has been exposed, denuded of any real power or sanction to execute the arrest warrants.<sup>132</sup>

In the absence of independent enforcement capability, the Court depends on external actors, principally states, and organisations as 'surrogate enforcers'<sup>133</sup> to compel compliance with its orders.<sup>134</sup> For their part, the commitment of these surrogate enforcers is subject to varied geopolitical interests and is contextualised against the prevailing political conditions in the target state, or rather, the state that is the subject of focus by the Court.

In the case of South Africa, it is clear that in failing to arrest and surrender Al Bashir to the Court, it furthered the interests of the AU in non-cooperation with the ICC on allegations of the Court's 'imperialistic, colonialist and racist' bias against African states.<sup>135</sup> This is the clearest example to date that cooperation with the Court does not flow from the gravitational pull of the legal obligation to cooperate with the Court,<sup>136</sup> notwithstanding that South Africa had the domestic constitutional obligation to arrest Al Bashir having implemented the Rome Statute in 2002. This denotes that the Court and its processes involve a perpetual political contest and that an ideological approach to legalism in seeking cooperation will falter between apology and utopia.<sup>137</sup> What this implies is that, because the former Prosecutor failed to build the necessary level of official international support for the arrest warrant against Al Bashir and because an extraordinary level of international political commitment is required to pursue criminals beyond state borders,<sup>138</sup> cooperation with the request for execution of the Al Bashir arrest warrant will be extended on terms that target states and the wider international community dictate. The consequence is that, because the decision to issue the warrant was made in pursuance of the rigid distinction between law and politics, when behaviour of states

<sup>131</sup> J Snyder and L Vinjamuri, 'Trials and errors: Principle and pragmatism in strategies of international justice' (2003) 28 *International Security* 5, 6.

<sup>132</sup> Ryngaert (n 75) 699.

<sup>133</sup> Compare, V Peskin, *International justice in Rwanda and the Balkans: Virtual trials and the struggle for state cooperation* (Cambridge University Press 2008) 12.

<sup>134</sup> C Lamont, *International criminal justice and the politics of state compliance* (Ashgate 2010) 164.

<sup>135</sup> D Tladi, 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 *South African Yearbook of International Law* 57, 58.

<sup>136</sup> Compare, Goldsmith and Posner (n 27) 116.

<sup>137</sup> Nouwen and Wouter (n 48) 964.

<sup>138</sup> Greenwalt (n 105) 660.

such as South Africa fail to conform to legal rules because of outright refusal to accept certain standards for any number of reasons, then this failure is ascribed to politics, as an *apology* for politics.<sup>139</sup> In that event, the uncompromising approach to rule-following inherent in legalism constrains legalists to emphasise that despite the changes in state behaviour and interests out of a desire to escape the constraining effect of international law in any particular situation,<sup>140</sup> the legal rules are still binding on states. To the extent that the political party in the majority in South Africa is seriously considering withdrawal from the Rome Statute, it is possible that this state and possibly others in the regional bloc, have declined to modify their behaviour to comply with the law of the Rome Statute, which then become disconnected from state behaviour and connotes *utopia*.<sup>141</sup>

The lesson for the Prosecutor with reference to Sudan, however, lies not in the failure to convince the target state to cooperate with the Court by arresting and surrendering Al Bashir, which is nakedly contrary to its own interests where the accused remains a serving head of state, but in the failure to engage other state parties,<sup>142</sup> third states,<sup>143</sup> the Security Council<sup>144</sup> and even the United Nations<sup>145</sup> to apply consistent, sustained international pressure to execute outstanding arrest warrants issued by the Court even after referral by the Security Council.<sup>146</sup> Hence, the

<sup>139</sup> Koskenniemi (n 29) 17-18.

<sup>140</sup> Ibid 19-21.

<sup>141</sup> Ibid.

<sup>142</sup> *Prosecutor v Al Bashir*, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest, ICC-02/05-01/09-139 (12 December 2011); *Prosecutor v Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the State Parties to the Rome Statute about Omar Al Bashir's recent visit to the Republic of Chad (27 August 2010) ICC-02/05-01/09109; *Prosecutor v Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, ICC-02/05-01/09-129 (12 May 2011); *Prosecutor v Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107 (27 August 2010).

<sup>143</sup> *Prosecutor v Al Bashir*, Decision regarding Omar Al Bashir's potential travel to the United States of America (18 September 2013) ICC-02/05-01/09. See also G Thompson, 'White House's new Sudan strategy fits envoys pragmatic style' *The New York Times* 19 October 2009.

<sup>144</sup> See ICC-OTP, 19<sup>th</sup> Report (n 10) para 8.

<sup>145</sup> Ibid para 9. Compare UN OCHA, 'Briefing to the Security Council by Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Jan Egeland' (15 September 2006) <[http://www.iccnw.org/documents/OCHA\\_Egeland\\_SCBriefing\\_15Sept06.pdf](http://www.iccnw.org/documents/OCHA_Egeland_SCBriefing_15Sept06.pdf)> accessed 17 August 2014.

<sup>146</sup> A De Waal, 'Darfur, the Court and Khartoum: The politics of non-state cooperation' in N Waddell and P Clark (eds) *Courting conflict? Justice, peace and the ICC in Africa* (Royal African Press 2008) 35. See also W Burke-White, 'Bargaining for arrests at the International Criminal Court: A response to Roper and Barria' (2008) 21 *Leiden Journal of International Law* 477, 481.

outstanding arrest warrants in the Darfur referral is attributable not only to the ambivalence of the international community, but also to the failure of the exercise of political intelligence by the former Prosecutor.<sup>147</sup> It is also worth noting that there are credible reports to lead to the conclusion that the ICC processes were adopted as one among many of a series of solutions and that consequently, the referral has been overreached by other conflict resolution alternatives.<sup>148</sup> The practical implication of this is that until the Darfur process is resolved by political means, there will be little or no interest or incentives on the part of surrogate enforcers, particularly those with overarching interests in conflict with those of the Court, to ensure the implementation of the arrest warrants.<sup>149</sup> Note also that international pressure to cooperate with the Court, if at all, is not applied in a 'domestic political vacuum,'<sup>150</sup> but interacts with conducive domestic political conditions in order to frame compliance.<sup>151</sup> The implications for the Prosecutor are that at least with regard to securing arrest and surrender, which is crucial to the Court's existence and functioning,<sup>152</sup> the Court is as much a political actor as a legal one.<sup>153</sup>

Conversely, consider how different the situation may have been if the former Prosecutor had rather sought to obtain a critical mass in support of an indictment against Al Bashir by engaging in dialogue and persuasion with member states and leveraging the moral authority of the Security Council referral to prod state parties and the members of the Security Council for support. Pursuing dialogue with target states and actively persuading states and the wider international community to exact compliance with the Court constitutes strategic legalism, which belies the need for the Prosecutor to exercise legal discretion but requires the Prosecutor to gauge political sensitivities before proceeding, which is illustrative of political intelligence. This is necessary because the Rome Statute created a legal paradigm shift in respect of the old architecture of state sovereignty.<sup>154</sup> The paradigm shift was intended to replace the sovereignty-centred rules by holding individuals, irrespective of office or station, criminally accountable.<sup>155</sup> The apparent revolution at Rome

<sup>147</sup> Rodman (n 10) 445.

<sup>148</sup> Ibid.

<sup>149</sup> De Waal (n 146) 35.

<sup>150</sup> J Subotic, 'The paradox of international justice compliance' (2009) 1 *International Journal of Transitional Justice* 1, 4.

<sup>151</sup> Ibid.

<sup>152</sup> Rome Statute, art. 63.

<sup>153</sup> Burke-White (n 146) 482.

<sup>154</sup> Rodman (n 10) 440.

<sup>155</sup> Ibid.

was however incomplete, because state parties did not concomitantly transfer enforcement powers to the Court. As denoted by the enforcement problem in international institutions, these enforcement powers are traditionally the jealous preserve of states. That is the sole reason why the Prosecutor exercises legal discretion but is still encumbered by the need to proceed on the basis of political sensitivities to ensure the broad, and sometimes extraordinary, level of international commitment and support necessary to discharge the OTP's mandate.

## 6 Conclusion

The opening quote of this chapter used the tale of Frankenstein to capture the fraught agency relationship between the ICC and state parties that enacted its existence under the Rome Statute in addition to pertinent international political actors such as the Security Council and non-state parties. This is because the Court's underpinnings of equal justice and ending impunity and the specific target audience of top military and political leaders represent an unprecedented challenge to state sovereignty. Recognising the sword of Damocles effectively dangling over them, states enacted self-preservation measures into the Statute, leading to structural compromises between legalism and realism, which in turn pervades the regime governing how states and other actors cooperate with the Court. One of the structural compromises referred to above is the non-existent enforcement regime under the Rome Statute, which state cooperation provisions, although present, are rather feeble.

Frankenstein created a beast of whose potential he was oblivious, and thus could not contain. The *ad hoc* international criminal tribunals might have escaped their creators, but definitely did not escape their environment.<sup>156</sup> The deliberate omission of the framers of the Rome Statute to include enforcement mechanisms to frame compliance with orders and judgments of the Court *in* the Rome Statute constitutes a realist betrayal of the legalist ambitions and aspirations within it, in themselves a considerable feat, but nevertheless subjected to the prerogatives of those ultimately called upon to support and implement the Court's processes.

The lack of enforcement mechanisms directly speaks to the competing compulsions by states to make normative commitments to international criminal justice, but to also contain the development and growth of these institutions. The ICC was not crafted to escape its creators and may not be doing so any time soon.

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<sup>156</sup> L. Côté, 'Independence and impartiality' in Reydams *et al.* (n 75) 370.

In the case of the arrest warrant issued against Al Bashir, the book *Rough Justice* details the exchange between the ICC Prosecutor and a diplomat in which the diplomat advised the Prosecutor that pursuing the head of state at first instance would undercut all other options and would ultimately hurt the image of the very institution the Prosecution was intent on building. Judging by the blaring headlines whenever both member and non-member states defiantly and openly flout the ICC arrest warrant by failing to arrest Al Bashir when it is within their power to do so, it would appear that the particular diplomat was right and that the damage wrought to the Court has been considerable.

It is important to note that political judgment or intelligence is not appeasement by another name. This paper does not presume that Al Bashir will not be arrested in the fullness of time. Instead, it draws from the experience of the ICTY and the International Criminal Tribunal for Rwanda to conclude that all factors remaining constant, in terms of the relations between the AU and the Court, the execution of the arrest warrant against Al Bashir by his arrest and surrender to the Court will happen when he loses all and any political capital that he presently holds.

Where the Court does not make intelligent interventions, state cooperation with the Court will vacillate between apology and utopia. Such is the nature of the beast galvanised by the compromises, bargains and commitments of the Rome Conference.



# PROSECUTING CRIMES RELATED TO THE 2007 POST-ELECTION VIOLENCE IN KENYAN COURTS: ISSUES AND CHALLENGES

EVELYNE OWIYE ASAALA\*

## Abstract

*As Kenya grapples with questions regarding its social, legal, economic and political transition, the issue of the local prosecution of alleged perpetrators of past crimes has taken centre stage. It is argued that for member states to the Rome Statute of the International Criminal Court (Rome Statute), like Kenya, any transitional justice measures must address the issue of impunity for past atrocities through prosecution. Thus, while the International Criminal Court (ICC) is designed to exercise jurisdiction over those who bear the greatest responsibility, municipal courts are expected to hold to account mid- and lower level perpetrators or those who do not bear the most responsibility for the commission of international crimes. This contribution underscores the importance of accountability through prosecution as a cardinal component of transitional justice. It critically analyses the challenges facing effective prosecutions of international crimes in Kenyan courts. By doing so, this chapter seeks to answer the questions: how should local courts effectively prosecute perpetrators of international crimes who may not necessarily bear the greatest responsibility? In other words, how should local criminal law systems and legislations effectively respond to international crimes?*

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## 1 Introduction and background

On 27 December 2007, Kenya held its ninth general election since independence.<sup>1</sup> The outcome of the presidential elections was, however, contested on several fronts. Rigging allegations marred by scores of violence led to the commission of international and other serious crimes in several parts of the country.<sup>2</sup> These events necessitated the establishment of mechanisms to help Kenya address its past and forge a way forward on a path of peace, justice and prosperity. The Kenya National Dialogue and Reconciliation Committee (KNDRC) was established to spearhead the process.<sup>3</sup> It is this committee that laid a foundation for the subsequent transitional justice mechanisms. The committee agreed on several initiatives, including: the establishment of a truth, justice and reconciliation commission;<sup>4</sup> the adoption of comprehensive constitutional, legal and institutional reform processes;<sup>5</sup> and the establishment of a commission of inquiry to investigate the violence and make recommendations on any probable legal redress.<sup>6</sup> Some scholars deemed this agreement the most comprehensive way of addressing the salient objectives of the transitional justice process.<sup>7</sup> Some of these initiatives are ongoing, while others have completed their work with varying degrees of success.<sup>8</sup> Other initiatives came to a

<sup>1</sup> A general election combines the presidential, parliamentary and civic elections.

<sup>2</sup> European Union Election Observation Mission, *Final report on Kenya, General Elections 27 December 2007* (3 April 2008) 36; Internal Displacement Monitoring Centre (IDMC) 'Speedy reforms needed to deal with past injustices and prevent future displacement' (10 June 2010) <<http://www.internal-displacement.org/countries/Kenya>> accessed 26 October 2011; Commission of Inquiry into the Post-Election Violence (CIPEV) *Final Report* (15 October 2008) 472-475 <<http://www.dialoguekenya.org/index.php/reports/commission-reports.html>> accessed 1 May 2012.

<sup>3</sup> This was an *ad hoc* committee established during the post-election violence (PEV). It comprised of members drawn from the then ruling Party of National Unity, the then opposition party Orange Democratic Party and a panel of eminent African personalities: Benjamin Mkapa, Graca Machel and Jakaya Kikwete. The former United Nations Secretary General, Kofi Anan, chaired the committee.

<sup>4</sup> Kenya National Dialogue and Reconciliation Committee (KNDRC) *Agreement on agenda item three: How to resolve the political crisis* (14 February 2008) 3 <<http://www.dialoguekenya.org/index.php/agreements.html>> accessed 1 May 2012.

<sup>5</sup> *Ibid.*

<sup>6</sup> KNDRC *Agreement: Commission of Inquiry into Post-Election Violence* (2008).

<sup>7</sup> TO Hansen, 'Kenya's power-sharing arrangement and its implications for transitional justice' (2013) 17 *The International Journal of Human Rights* 307.

<sup>8</sup> CIPEV concluded its mandate in 2008. Its investigations and findings have been hailed to be most comprehensive. In fact, the ICC prosecution has often times relied on these findings in the ongoing trials. The Truth Justice and Reconciliation Commission (TJRC) equally concluded its mandate in 2013 and its final report handed over to the President on 23 May 2013 for implementation. The report was subsequently tabled before Parliament on 24 July 2013 exceeding the deadline stipulated under Section 48(4) of the TJRC Act, which requires that the final report be tabled in Parliament within 21 days after its publication. Since then, nothing has been done towards implementation the TJRC's report. On



pre-mature end having hardly achieved their objectives.<sup>9</sup>

Kenya therefore continues to grapple with questions regarding its social, legal, economic and political transition. The understanding that prosecution is critical to the success of any transition resonates with legal-philosophical thinking that underlies transitional justice processes.<sup>10</sup> Although this contribution acknowledges that some scholars emphasize the prioritization of alternative accountability mechanisms like truth-telling, healing and peace building during transition,<sup>11</sup> it underscores the importance of accountability through prosecution for transitional societies.<sup>12</sup> This contribution also takes note of an international duty to prosecute for countries, like Kenya, which are not only party to the Rome Statute of the ICC (Rome Statute),<sup>13</sup> but also have a similar duty under other international instruments<sup>14</sup> and customary international law.<sup>15</sup> It is argued that for states like Kenya,

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the other hand, local prosecution of international crimes have been overshadowed by the ongoing ICC trials. There is hardly any reporting on these cases. On constitutional reforms, a commendable job was done leading to the promulgation of a new constitution on 27 August 2010. This Constitution embodies principles on numerous institutional reforms. Related institutional reforms include reforms of the electoral body, police reforms and judicial reforms that called upon the legislators to enact legislation providing for vetting of judicial officers. This process is still ongoing.

<sup>9</sup> See (n 8) (with a specific focus on local prosecution of international crimes).

<sup>10</sup> R Teitel, *Transitional justice* (Oxford University Press 2000). Teitel acknowledges that trials are commonly thought to play the leading foundational role in the transition to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule. See also D Orentlicher, 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 25. See also M Osiel, *Mass atrocity, collective memory and the law* (Transaction Publishers 1999) 15-22 as cited by J Rowen, 'Social realities and philosophical ideals in transitional justice' (2008) 7 *Cardozo Public Law Policy and Ethics Journal* 98. L Huyse, 'Justice after transition: On the choices successor elites make in dealing with the past' (1995) 20 *Law and Social Inquiry* 55. Huyse points out the importance of prosecutions for a young democracy in transition not only as a tool that legitimizes the new government, but also as a means to foster respect for new democratic institutions.

<sup>11</sup> L Keller, 'Achieving peace without justice: The International Criminal Court and Ugandan alternative justice mechanisms' (2008) 23 *Connecticut Journal of International Law* 261.

<sup>12</sup> Teitel (n 10); Orentlicher (n 10); Osiel (n 10).

<sup>13</sup> Para 5 of the preamble to the Rome Statute of the International Criminal Court underscores that the philosophy underlying the Rome Statute is to put an end to impunity for the perpetrators of crimes of concern to the international community thus contributing to their prevention. Article 5 of the Rome Statute further enlists these crimes to include genocide, war crimes and crimes against humanity. See K Obura, 'Duty to prosecute international crimes under international law' in C Murugu and J Biegon (eds) *Prosecuting international crimes in Africa* (Pretoria University Law Press 2011) 11.

<sup>14</sup> For example, Kenya has an express mandate under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). CAT was ratified by Kenya on 8 March 1996. Article 4 of the Convention calls upon member states to ensure that torture or attempt to commit torture are offences punishable by appropriate penalties under criminal law.

<sup>15</sup> T Meron, *Human rights and humanitarian norms as customary law* (Clarendon Press 1989) 210. Though scholars have disagreed on the range of human rights protected by international customary law,

any transitional justice measures must address the issue of impunity for past atrocities through prosecution. Indeed, there exists both local and international consensus on the importance of prosecuting international and other serious crimes in Kenya following their commission in the Post-Election Violence (PEV) of 2007. Furthermore, the Commission of Inquiry into the PEV<sup>16</sup> (CIPEV) suggested the establishment of a prosecution mechanism to eradicate impunity.<sup>17</sup>

While the International Criminal Court (ICC) is only exercising jurisdiction over those who bear the greatest responsibility for PEV,<sup>18</sup> municipal courts were/are expected to hold to account mid and lower level perpetrators or those who do not bear the most responsibility for the commission of international crimes. This is because the ICC only complements the jurisdiction of local courts.<sup>19</sup> In fact, the ICC only exists to reinforce efforts of national systems to combat impunity; therefore relying principally on states to investigate and prosecute persons accused of ICC crimes.<sup>20</sup> Thus, the ICC and state parties to the Statute have a mutual responsibility to bring to justice perpetrators of the worst crimes.

This chapter therefore critically analyses the challenges facing effective prosecutions of international crimes in Kenyan courts. How should local courts effectively prosecute perpetrators of international crimes who may not necessarily bear the greatest responsibility? In other words, how should local criminal law systems and legislations effectively respond to international crimes? To this end, this chapter seeks to inform better criminal law processes in respect of the prosecution of international crimes in national courts.

This chapter is divided into three main parts. Following a brief introduction, part two examines the key challenges facing effective local prosecutions as well as

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there is general agreement that customary law prohibits torture, genocide, extra judicial executions and disappearances.

<sup>16</sup> KNDRC Agreement: Commission of Inquiry of Post-Election Violence (2008) 1.

<sup>17</sup> CIPEV Report (n 2) 472.

<sup>18</sup> **Initially, ICC investigations were launched against six individuals: William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Husein Ali.** After confirmation hearings, proceedings were confirmed against three: William Samoei Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta. While Ruto and Sang continue to face trial before the ICC today, the case against Uhuru Kenyatta was withdrawn due to insufficient evidence. ICC Trial Chamber V(B), Situation in the Republic of Kenya in the case of *Prosecutor v Uhuru Muigai Kenyatta*, Decision on withdrawal of charges against Kenyatta (13 March 2015) ICC-01/09-02/11.

<sup>19</sup> Rome Statute, art. 17(1)(a).

<sup>20</sup> H Steiner and P Alston, *International human rights in context: Law, politics, morals* (Oxford University Press 2007) 1299; EO Asaala, 'The International Criminal Court factor on transitional justice in Kenya' in K Ambos and O Maunganidze (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (Universitätsverlag Göttingen 2012) 124.

the impact of these prosecutions on transitional justice in Kenya. The essence of this section is to discuss Kenya's experience in prosecuting international crimes. Part two considers the jurisprudence put forth by the Kenyan courts regarding prosecution of PEV-related crimes. However, because of the limited scope of this contribution, only a selected number of the PEV-related cases are reviewed. The Kenyan cases that were confirmed by the ICC and the geographical coverage of their charges are the criterion that this chapter has used in selecting the cases under discussion. A discussion of the challenges also adopts a thematic approach, which highlights the following aspects: jurisdiction, investigations, local ownership and legitimacy and political will. Finally, the chapter draws various conclusions and suggests the way forward.

## 2 Challenges to effective prosecution of international crimes in local courts

Local prosecutions of crimes against humanity in Kenya have faced a vast range of challenges. Key among them include the jurisdictional question, inadequate investigations by police (inadequate competencies and human and technical resources), lack of legitimacy and local ownership, lack of political will and the influence of international politics informed by the ICC-related cases. This has deeply compromised local prosecutions.

### 2.1 *The question of jurisdiction*

Kenya is a state party to the Rome Statute<sup>21</sup> that has domesticated the Statute under its International Crimes Act (ICA). The ICA adopts the Rome Statute definition of crimes against humanity.<sup>22</sup> This law however came into force on 1 January 2009 after the alleged PEV crimes were committed. According to the principles of legality (*nullum crimen, nulla poena sine lege*),<sup>23</sup> this statute cannot apply retrospectively. Similarly, although the Kenyan Constitution makes a mandatory re-

<sup>21</sup> Kenya ratified the Rome Statute on 15 March 2005.

<sup>22</sup> ICA, art. 6(4).

<sup>23</sup> This requires that all criminal behaviour is criminalized and all punishment established under the law before any prosecution. See Rome Statute, art. 22 (no person can be held criminally responsible unless such conduct constitutes a crime under the law). For further reading on this see, I Crisan, 'The principles of legality, "*nullum crimen, nulla poena sine lege*" and their role' *Effectius Newsletter* (2010) 5 <[http://effectius.com/yahoo\\_site\\_admin/assets/docs/The\\_principles\\_of\\_legality\\_nullum\\_crimen\\_nulla\\_poena\\_sine\\_lege\\_and\\_their\\_role\\_\\_Iulia\\_Crisan\\_Issue5.16811416.pdf](http://effectius.com/yahoo_site_admin/assets/docs/The_principles_of_legality_nullum_crimen_nulla_poena_sine_lege_and_their_role__Iulia_Crisan_Issue5.16811416.pdf)> accessed 14 October 2015.

quirement of general rules of international law and any treaties ratified by Kenya to form part of the laws of Kenya,<sup>24</sup> it was promulgated on 27 August 2010. Until the promulgation of the 2010 Constitution, Kenya traditionally ascribed to the dualist philosophy of applying international law in domestic courts.<sup>25</sup> Prosecuting PEV related international crimes under Kenyan laws was therefore not possible, as it would have amounted to an infringement of the established international law principle of *nullum crimen sine lege*. This deficiency in the legal framework then explains why local mechanisms chose to prosecute ordinary municipal crimes instead of international crimes such as crimes against humanity for those not indicted by the ICC. Local prosecution of PEV related crimes therefore involved crimes ranging from petty crimes to capital offences: murder,<sup>26</sup> handling stolen goods,<sup>27</sup> burglary,<sup>28</sup> rape and defilement,<sup>29</sup> which offences potentially comprise the *actus reus* of crimes against humanity.<sup>30</sup>

Given this scenario, there has been no instance when local courts conceptualized the notion of crimes against humanity. This option of prosecuting alleged perpetrators under ordinary crimes in domestic courts has meant that it is only those prosecuted at the ICC that faces the charges of international crimes. While Kenyan courts did not hear cases of crimes against humanity as such, the punishment for capital conduct nevertheless attracts a death sentence. However, the maximum punishment for crimes against humanity under international law is a life sentence.<sup>31</sup>

<sup>24</sup> Constitution of Kenya (2010), arts. 2(5) and (6).

<sup>25</sup> JO Ambani, 'Navigating past the "Dualist Doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (Pretoria University Law Press 2010) 25, 30. According to the dualist approach, an international treaty does not become binding at the domestic level upon ratification thereof, but only once the terms of the treaty have been transformed into domestic law.

<sup>26</sup> *R v Stephen Kiprotich Leting and others*, Nakuru High Court Criminal Case No 34 of 2008 (in this case the accused were charged, jointly with others not before the court, with the murder of about 35 people who were burnt in a church at Kiambaa, Uasin Gishu District, Rift valley Province); see also *R v John Kimita Mwaniki*, Nakuru High Court Criminal Case No 116 of 2007; see also *R v Eric Akeyo Otieno*, Criminal Appeal No 10 of 2008; see also *R v Peter Kipkemboi Rutto alias Saitoti*, Nakuru High Court Criminal Case No 118 of 2008.

<sup>27</sup> *R v James Wafula Khamala*, Bungoma High Court Criminal Appeal No 9 of 2010.

<sup>28</sup> *R v Paul Khamala*, Kakamega High Court criminal Appeal No 115 of 2008.

<sup>29</sup> *R v Philemon Kipsang Kirui*, Kericho High Court Criminal Appeal No 59 of 2009.

<sup>30</sup> Rome Statute, art. 7(1). Crimes against humanity has been defined as acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, enforced disappearance of persons, apartheid and other inhuman acts committed as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack.

<sup>31</sup> Rome Statute, art. 77; see also Penal Code of Kenya (Cap 63 Laws of Kenya), Sections 204 and 296(2), which stipulates that murder and robbery with violence respectively attract death sentences.

This is despite the fact that the ICC requires a higher and stringent threshold in proving crimes against humanity. The end result is that those with highest responsibility are treated more leniently by international law as opposed to those who did not bear the highest responsibility and facing prosecution before municipal courts. Although the doctrine of complementarity would dictate that those who do not bear the most responsibility are prosecuted for international crimes in municipal courts, the lack of a legal framework leading to prosecution of PEV crimes as ordinary crimes in Kenyan courts has so far not attracted any scholarly criticism.

The ICC Pre-Trial Chamber's authorization of the Prosecutor to launch investigations into the Kenyan cases<sup>32</sup> triggered a local case challenging the ICC's involvement in Kenyan PEV-related cases. In the case of *Joseph Kimani Gathungu v The Attorney General and Others*,<sup>33</sup> the applicant sought *inter alia* court orders declaring ICC's involvement in Kenyan PEV cases unconstitutional and therefore invalid. It was the applicant's further submission that the ICC was not provided for under the Constitution as an organ capable of investigating crimes committed in Kenya. The respondents, however, lodged a preliminary objection questioning, *inter alia*, whether the High Court of Kenya had jurisdiction in respect of the jurisdiction of the ICC and whether the ICC was amenable to judicial proceedings before the High Court of Kenya.

This application paved the way for Kenyan courts to canvass the salient issues on the role played by international criminal justice systems *vis-à-vis* municipal systems in the prosecution of international crimes. The fact that Kenya had not at that stage domesticated the ICC Statute as a dualist state then posed a real challenge necessitating the court's intervention. In this case, the court observed that:

... international tribunal such as the ICC is well recognized to have *compétence de la compétence* – an initial capacity to determine whether or not it has the jurisdiction to hear and determine a case coming up before it... the ICC, acting within the terms of the Rome Statute, has already determined that it indeed has jurisdiction. The ICC has gone further to determine the second jurisdictional question: whether the special facts of post-election violence in Kenya (2007-2008) render the matter justiciable before that Court. The ICC has determined that, on the facts, it has jurisdiction to investigate, hear and determine the cases arising from the post-election violence.<sup>34</sup>

<sup>32</sup> Pre-Trial Chamber II, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya (31 March 2010) ICC-01/09.

<sup>33</sup> Constitutional Reference Number 12 of 2010, High Court of Kenya at Mombasa, 23rd November 2010; (2010) eKLR <<http://kenyalaw.org/caselaw/cases/view/72570/>> accessed 15 May 2014.

<sup>34</sup> Constitutional Reference Number 12 of 2010, para h.

According to the Court, the ICC has inherent capacity emanating from the Rome Statute to determine whether or not it has got jurisdiction to hear and determine a matter. It is through the exercise of this power that the Court determined its jurisdiction over the Kenyan cases. More so, ‘Kenya was a member of the community of nations and subject to the governing law bearing upon states as members of that community.’<sup>35</sup> Obligations arising from this governing law are embodied in treaties and conventions to which states were parties and the Rome Statute was one such convention. The act of ratifying international treaties by a state therefore allows limitations on its sovereignty regarding the stipulated legal obligations. It cannot therefore be argued that the ICC in any way infringes on Kenya’s constitutional sovereignty when Kenya voluntarily ratified the Rome Statute binding itself to its provisions. The applicant’s reliance on Kenya’s new constitution as excluding the ICC’s operations in Kenya was therefore not convincing since:

... the Constitution of 2010 is not to be regarded as rejecting the role of international institutions such as the ICC. Indeed, from the express provisions of the Constitution, “the general rules of international law shall form part of the law of Kenya”; and Kenya remains party to a large number of multilateral international legal instruments: and so, by law, Kenya has obligations to give effect to these. One of such Conventions is the Rome Statute which establishes the International Criminal Court.<sup>36</sup>

To this end, the Court dismissed the application on grounds that it neither had such jurisdiction nor were the orders being sought justiciable.

## 2.2 *Poor investigations and laxity by police officers*

The quality of local investigations conducted in PEV-related cases has also raised concerns. Poor investigations have allowed many perpetrators of serious crimes to evade accountability<sup>37</sup> resulting in very few prosecutions, and even fewer convictions.<sup>38</sup> Regrettably, there has not been a continuous and up to date cataloguing of the progress in all the PEV-related cases. According to a report by the Director of Public Prosecutions (DPP), a total of 6081 PEV-related cases were reported to the local authorities for investigations.<sup>39</sup> Out of all these cases, only 366 had been

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Human Rights Watch, *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011) 4.

<sup>38</sup> Human Rights Watch (n 37) 3.

<sup>39</sup> The Multi-Agency Task Force on the 2007/2008 PEV, ‘Report on the 2007/2008 PEV Related cases’ (2012) 1.

taken to Court by the year 2012. Of these, 23 cases were still pending in court, 78 cases had resulted in acquittals, 77 cases had been withdrawn and only 138 convictions achieved.<sup>40</sup> A study by Human Rights Watch however confirms that only a few of these convictions were for serious crimes directly related to the PEV.<sup>41</sup> These included two murder cases, three cases of robbery with violence, one for common assault and another for assault causing grievous harm.<sup>42</sup> In fact, the DPP's report has been criticized for lacking precision. For example, four of the alleged 49 convictions in sexual and gender based violence (SGBV) were actually acquittals and two of these cases had nothing to do with PEV as they involved unnatural sexual offences.<sup>43</sup> Only one of all these cases was a clear SGBV case related to PEV and the same had resulted in an acquittal on the charges of sexual offences, but a conviction on robbery with violence.<sup>44</sup>

It is also alarming that some of the 'hot spot' areas with high casualties for PEV victims recorded no subsequent convictions. In Uasin Gishu, for example, there was no single conviction despite the killing of 230 people. Similarly, there were no convictions of police officers despite an estimated 962 cases of police shootings, which resulted in 405 deaths.<sup>45</sup>

The laxity displayed by police officers in the investigation of sexual offences related to PEV has also been condemned.<sup>46</sup> Despite recommending a list of 66 complaints to the DPP for prosecution, the police subsequently endorsed a closure of almost all these cases due to lack of evidence.<sup>47</sup> According to the DPP, the majority of these files contained nothing more than complainants' statements.<sup>48</sup> Although the DPP sent the files back for further investigations, these were never returned.<sup>49</sup> The dismal performance in prosecution can therefore be closely associated to poor investigations by the police officers.

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<sup>40</sup> The Multi-Agency Task Force on the 2007/2008 PEV (n 39) 2.

<sup>41</sup> Human Rights watch (n 37).

<sup>42</sup> Ibid 4.

<sup>43</sup> Ibid 25.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid; CIPEV report (n 1).

<sup>46</sup> CIPEV report (n 1) 399-404; Human Rights Watch (n 37) 20. This report condemns the failure of police to investigate sexual offences committed during the post-election violence. Following these criticisms, the police established a Police Task Force to investigate rape cases during the post-election violence. This Task Force was however criticised by FIDA, one of the major stakeholders who later withdrew its membership citing lack of credibility on the part of the Task Force.

<sup>47</sup> Human Rights Watch (n 37) 21.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

Having ascribed to the adversarial system of dispute resolution, it has become increasingly difficult, and almost impossible for Kenyan courts to make any meaningful engagement with PEV cases where investigations are conducted dismally. For example, most of the occurrences upon which those facing trial before the ICC were charged for crimes against humanity attracted a charge of murder for the alleged actual perpetrators in the municipal courts.<sup>50</sup> Yet, the outcome of local prosecutions remains questionable over allegations of poor investigations. A critical review of two of these cases is worth considering.

### 2.2.1 R v Stephen Kiprotich Leting and three others<sup>51</sup>

The facts of this case were as follows: On 30 December 2008, following eruption of PEV, some Kikuyu families in Uasin Gishu District within Rift Valley Province sought refuge at Kenya Assemblies of God Church, Kiambaa. The number of those seeking refuge at the church increased the following day by an additional 160 people whose houses had been torched joining those already at the church. On the night of 1 January 2008, a gang of about 4000 people armed with bows and arrows attacked the church. While those seeking refuge scattered, some locked themselves inside the church. The gang then surrounded the church and set it ablaze, killing about 35 people.

Whereas the High Court in this case condemned the crimes committed, it underlined the importance of the state proving PEV cases beyond a reasonable doubt in order to secure convictions. According to the Court, the state failed to prove three cardinal components essential to proving the crime of murder: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased; and (c) that the accused had the malice aforethought. It was the Court's observation that the prosecution failed to call some crucial witnesses and as a result failed to establish that some of the deceased persons were actually dead or that it was the accused persons who actually murdered them. The first, second and fourth accused persons in this case raised the defence of *alibi*. In so far as the third accused person admitted being at the scene of crime, it

<sup>50</sup> *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, ICC-01/09-01/11*, 10–11; *Prosecutor v Francis Karimi Muthaura, Uhuru Muigai and Mohammed Hussein Ali, Decision on the Confirmation of Charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II, ICC-01/09-02/11*, 11–13.

<sup>51</sup> For the entire referencing below on the facts and court decision in this case, see High Court Criminal case no 34 of 2008 at Nakuru <http://kenyalaw.org/caselaw/cases/view/55195> accessed 30 January 2015.



was his submission that he had only rushed there to rescue the victims. The police was unable to produce evidence to dismiss these claims beyond reasonable doubt.

The Court further observed that the prosecutor ought to have called into action the doctrine of ‘common intention’<sup>52</sup> in order to secure the conviction of the accused persons. In the Court’s wisdom, the doctrine of common intention was deemed essential given the manner in which the attack was orchestrated. For instance, all the attackers had painted their faces; were chanting war dirges; were armed with crude weapons, including machetes, *pangas*, spears, clubs, arrows and bows; were systematic in the manner in which they launched their attacks against Kimuli, Rehema and Kiambaa farms; and were systematic in the manner they followed their victims, slashing and hacking them to death and then finally setting the church a blaze. This was adequate proof of common intention. According to the Court, the evidence narrows down to prove a preconceived plan to commit these atrocities. The court however decried the level of evidence produced by the police:

One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act... I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered. In this case there is absolutely no evidence of the raiders and/or any of the accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents... In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be... I have to point out the shoddy police investigations in this case so that blame is placed where it belongs... The judiciary is being accused of acquitting criminals and unleashing them to society... I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them. In our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to

<sup>52</sup> This simply means a premeditated plan to act in concert. In order to secure a conviction under common intention, the prosecution must prove that the Accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.

convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person.<sup>53</sup>

Having expressed its frustration over the quality of investigations and prosecutions in this case, the Court proceeded to acquit all the accused persons on the basis that the prosecution had failed to prove their case.

### 2.2.2 Republic v Edward Kirui<sup>54</sup>

This case portrays the direct role of the then Kenyan Government in the PEV of 2007. Aggrieved by the declaration of Mwai Kibaki as the elected president of the 2007 general elections, the Orange Democratic (Movement) Party (ODM) contested the elections and gave notice of their intention to hold peaceful demonstrations to express their displeasure. The police responded to this notice by declaring the planned demonstrations illegal. Consequently, the Government intensified police presence all over the country, especially in ODM's strongholds. Despite declaring the meetings illegal, ODM demonstrations went ahead as planned. At Kondele, in Nyanza, displeased crowds continued with the demonstrations despite warnings to disperse. It was in this context that two persons were shot dead by the accused police officer. These events were captured on video camera and displayed during trial.

While the Court found that the offence of murder had been committed, the major issue for determination remained the question whether it was the accused person who had shot the deceased. One of the central issues in the case was the identification of the accused person. This was shrouded in uncertainty as a result of contradicting evidence from some of the witnesses. The Court did not, however, fault the police for failing to hold an identification parade since the identifying witnesses were well known to the accused person even before the incident. The other key issue that arose was whether it is the accused that fired the shots that killed the deceased persons. The sergeant in charge of the armoury testified that on that material day he issued the accused with an AK47 serial number 23008378. The Firearms Examiner and the then Acting Senior Superintendent, however, testified that the firearm that killed the accused bore the serial number 3008378. This cast some doubt on whether the accused's rifle was employed to kill the deceased.

<sup>53</sup> See (n 51).

<sup>54</sup> For the entire referencing below on the facts and court decision in this case see, Nairobi High Court Criminal Case No 9 of 2008; (2010) eKLR <<http://kenyalaw.org/caselaw/cases/view/68555/>> accessed 15 May 2014.

According to the Court, the prosecution had not only failed to produce before the court the rifle with serial number 3008378, but also failed to make any attempts to link the firearm to the accused. As a result the accused was acquitted. Certain civil society actors have however argued that the police tampered with this evidence.<sup>55</sup> A notable trend among these cases is mass acquittals as a result of the failure on the part of local prosecutors to prove their cases according to the required standard of proof. Thus, corruption within the police investigating agencies, incompetence and the unwillingness of police officers to hold their colleagues accountable are some of the factors that largely contributed to massive premature dismissal of PEV cases.

Relatedly, a review by a Task Force<sup>56</sup> revealed that some victims hardly knew their perpetrators and only identified them as ‘neighbours’ or ‘members of a particular ethnic group.’<sup>57</sup> This contributed to several acquittals especially in sexual and gender-based crimes (SGB crimes).<sup>58</sup> Despite numerous efforts by victims of SGB crimes identifying the police as their perpetrators, no single police officer was charged with sexual offences.<sup>59</sup>

### 2.3 *Lack of legitimacy and local ownership*

Like any other transitional justice mechanism, local prosecutions must be relevant to the local communities. As such, they must take into account the priorities of the local communities in the identification and prosecution of alleged perpetrators. Thus, not only should the elites declare such process legitimate, but the local population also.<sup>60</sup>

Local prosecution of PEV cases has suffered from a lack of legitimacy and local ownership at two levels: First, the distrust between investigating police officers and the general public and, secondly, the distrust between the judicial arm of government and the general public.

<sup>55</sup> Human Rights Watch (n 37) 33.

<sup>56</sup> In 2012, through Gazette Notice No 5417 of 20 April 2012, the Director of Public Prosecutions established a Multi-Agency Task Force to undertake a national review, re-evaluation, and re-examination of all cases arising out to the 2007-2008 PEV.

<sup>57</sup> The Multi-Agency Task Force on the 2007/2008 PEV (n 39) 3. CIPEV report (n 2) 400.

<sup>58</sup> *Republic v Julius Cheruiyot Kogo, Republic v Erick Kibet Towett and Simion Kipyegon Chepkwony*. In both these cases, although the victims could identify the perpetrators, they failed to identify their names. This caused the court to doubt the accuracy of the identification process, which lead to acquittals.

<sup>59</sup> Human Rights Watch (n 37) 38.

<sup>60</sup> This is the position favoured by both scholars and human rights organisations. See, for example, Human Rights Watch (n 37) 4; E Lutz, ‘Transitional justice: Lessons learned and the road ahead’ in N Roht-Arriaza and J Mariezcurrena (eds) *Transitional justice in the twenty-first Century: Beyond truth versus justice* (Cambridge University Press 2006) 325-342.

One major reason contributing to poor investigations by the police officers is their perceived lack of legitimacy by the locals who are a crucial component of the process. The Kenyan public lacks trust of police officers.<sup>61</sup> This was exacerbated by the tribal tension that prevailed in the country during and after the PEV period. For example, the public wanted nothing to do with the police in areas where they were perceived to be Government.<sup>62</sup> A police officer has previously observed that ‘in Western [province] and Nyanza [province], people don’t give information about crime. People are used to being in the opposition, and they receive Government officials negatively.’<sup>63</sup> In some exceptional cases, the police have been accused of being partial in their investigations especially where they had ethnic solidarity with accused persons.<sup>64</sup> This was a particular challenge in the PEV investigations in Rift Valley, where police officers have confessed that some of their colleagues were in synch with some suspected local perpetrators.<sup>65</sup> Under these circumstances, it becomes a challenge for the police to carry out effective investigations because those who possess such knowledge may not be willing to freely pass it on to the authorities.

A negative public perception of Kenya’s Judiciary further distances the local population from local prosecution of PEV related cases. Historically, the Judiciary has had a reputation of lacking independence,<sup>66</sup> being too untrustworthy to dispense any form of justice<sup>67</sup> and as extremely corrupt.<sup>68</sup> It is this mistrust of the local judicial system that informed the excitement among Kenyans upon learning of the possibility of alleged perpetrators being prosecuted at the ICC.<sup>69</sup> Notably, however, the

<sup>61</sup> Human Rights Watch (n 37) 47.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> CIPEV report (n 2) 460.

<sup>67</sup> Africa Policy Institute, *Breaking Kenya’s impasse: chaos or courts?* Africa policy brief, page 3 as cited in Ongaro and Ambani ‘Constitutionalism as a panacea to ethnic divisions in Kenya: a post 2007 election crisis perspective’ in G Mukundi (ed) *Ethnicity, human rights and constitutionalism in Africa* (Kenya Section of the International Commission of Jurists 2008) 29. This prompted the then ODM presidential candidate, Raila Odinga, to publicly decline having the disputed elections of 2007 resolved by local courts.

<sup>68</sup> Report of the Task Force on Judicial Reforms (2009) 74-77.

<sup>69</sup> ‘It’s The Hague, Kenyans tell violence suspects’ *Daily Nation* (Nairobi, 19 July 2009) 8 and 9. See also ‘Hopes for justice high among Kenyans as Ocampo arrives’ *Daily Nation* (6 November 2009) 4. See ‘MPs vow to defy Kibaki and Raila’ *The Standard* (7 July 2009) <<http://www.standardmedia.co.ke/?inc=comments&id=1144018708&cid=&articleID=1144018708>> accessed 3 July 2012, pursuant to which the Members of Parliament vowed to block the Bill seeking to try post-poll offenders locally for fear of manipulation from the executive.

Judiciary has undergone some fundamental reforms. Significant in this regard, was the adoption of stringent measures of appointing judicial officers and the vetting of current judges and magistrates.<sup>70</sup> Unfortunately, despite these reforms, a similar attitude is slowly and steadily pervading the public perception regarding prosecution of the actual perpetrators of PEV. This attitude has been informed by what some commentators perceive to be erroneous jurisprudence on key judicial decisions revolving around the ‘real power wielders.’<sup>71</sup> As a result, there has been less focus on those few cases that have been successfully prosecuted at the local level.

## 2.4 Lack of political will

Government political commitment to the entire process of transitional justice, including prosecution, is fundamental to it. However, domestic efforts towards holding alleged perpetrators of international crimes accountable for past atrocities in Kenya has been largely characterized by a lack of political will. A report by Human Rights Watch, for instance, labels domestic prosecution efforts as a ‘half-hearted’ effort at accountability, with the result that ‘hundreds of [...] perpetrators of serious crimes continue to evade accountability.’<sup>72</sup> According to Asaala and Dicker, this deficiency can be attributed to a host of challenges, including a distinct lack of political will at two levels.<sup>73</sup> First, at the local level, a study has confirmed that the police, the Attorney General and all state prosecutors succumbed to negative local political pressure against prosecution.<sup>74</sup> In several instances, local politicians as well as the then Police Commissioner, Mohammed Ali, telephoned his officers instructing them to release suspected perpetrators of PEV.<sup>75</sup> Consequently, despite overwhelming evidence that the police may have gathered against suspected perpetrators, they had no option but to discard it and release the suspects without fur-

<sup>70</sup> Vetting of Judges and Magistrates Act of 2011.

<sup>71</sup> See generally E Asaala and N Dicker, ‘Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?’ (2013) 13 (2) *Africa Human Rights Law Journal* 351; see also *International Centre for Policy and Conflict and 5 Others v the AG and 4 Others* Constitutional and Human Rights Division Petition 552 of 2012 (2013) eKLR, <[http://kenyalaw.org/CaseSearch/view\\_preview1.php?link=11903065891756192934559](http://kenyalaw.org/CaseSearch/view_preview1.php?link=11903065891756192934559)> accessed 4 April 2014. See generally Supreme Court of Kenya Petitions 3, 4 and 5 of 2013; Reports on re-tally of 22 polling stations in Petition 5 of 2013 and Report of the scrutiny of 33 400 polling stations. These reports are as a result of the Supreme Court’s own *suo moto* motion.

<sup>72</sup> Human Rights Watch (n 37) 4.

<sup>73</sup> Asaala and Dicker (n 71).

<sup>74</sup> Human Rights Watch (n 37) 53.

<sup>75</sup> *Ibid* 54.

ther prosecution. Furthermore, despite the CIPEV report implicating several local leaders for having funded and facilitated the violence, the police never bothered to follow-up and investigate such claims.<sup>76</sup> It is therefore not surprising that the Government has displayed a lot of laxity towards effective local prosecution of some of the crucial cases it dubbed ‘priority cases.’<sup>77</sup> In most of these cases, the authorities closed their investigations without any arrest, claiming that there were no identifiable suspects.<sup>78</sup> As a result, none of the cases that were prosecuted involved suspected local politicians despite allegations of their involvement in organizing, financing and directing the local violence.<sup>79</sup> Although this contribution is aware of the fact that prosecuting PEV under national laws would not cover all the elements of crimes against humanity (like deportation), acts like organizing and financing would sufficiently be covered under the notion of ‘accessories before the fact’<sup>80</sup> that essentially apports criminal liability.

Secondly, at the international level, the Government has displayed general reluctance to effectively cooperate with the ICC regarding the Kenyan cases.<sup>81</sup> For example, despite Government’s reluctance to establish a tribunal to prosecute those who bare the greatest responsibility for international crimes,<sup>82</sup> Parliament has on

<sup>76</sup> CIPEV (n 1) 225. For example, the report implicates a member of Parliament from the Coast province in funding the youth to burn all businesses belonging to ODM supporters.

<sup>77</sup> These included, for example, the burning of a house in Naivasha that killed 9 people.

<sup>78</sup> *Republic v Jackson Kibor*, Nakuru Magistrate’s Court, CR 96/08. Mr Kibor, an ODM politician was arrested and charged with inciting violence. According to an interview with BBC on 31 January 2007, Kibor had declared war against Kikuyus and advocated for their eviction from the Rift Valley as follows: ‘People had to fight Kikuyus because Kibaki is a Kikuyu [...]. We will not sit down and say one tribe lead Kenya. We will fight. This is a war. We will start the war. One tribe cannot lead the other 41 tribes. This is a war. Now we’re fighting for power[...]. We will not let [Kikuyus] come back again, because they are thieves. We will never let them come back [...]. We will divide Kenya.’ A Kalenjin youth interviewed in the same broadcast, who confessed to have participated in the Kiambaa church burning, told the journalist that perpetrators of violence were taking cues from the elders: ‘We as young men, our culture, we don’t go over what somebody [...] an elder tells us. If the elder say no, we step down, but if our elders say yes, we will proceed [...]. I do it because it is something that has been permitted from our elders.’ Human Rights Watch (n 37) 29 citing P Harter, ‘Assignment’ BBC World Service, January 31, 2008. This prosecution never proceeded to the end as the then Attorney General withdrew the charges by entering a *nolle prosequi*.

<sup>79</sup> Human Rights Watch (n 37) 29.

<sup>80</sup> Under Kenyan practice, an accessory before the fact has been used interchangeably with aiders, abettors and procurers. This is covered under Section 20 of the Penal Code and includes aiders, abettors and those who counselled or procured (assisted or encouraged) the principle offender into this category. In terms of responsibility and punishment, aiders, abettors, counsellors or procurers are all held responsible in the same manner as though they were the actual perpetrators.

<sup>81</sup> Asaala and Dicker (n 71) 346.

<sup>82</sup> CIPEV called upon Government to establish a special tribunal comprising both national and international judges and prosecutors to prosecute international crimes committed during the PEV.

several occasions unanimously resolved to have Kenya withdraw from the Rome Statute.<sup>83</sup> Subsequently, in January 2011, the Government announced its intention to establish a special division within the High Court to deal with all PEV cases.<sup>84</sup> This was a laudable step, since such local initiatives have the potential to assuage related fears in future.<sup>85</sup> While recommending the establishment of an International Crimes Division (ICD) modelled on the ICC within the High Court, a Task Force has highlighted that ICD should be conferred jurisdiction over PEV cases in order to try international crimes under the ICA.<sup>86</sup>

The timing of this announcement, however, raised questions about its real motive. This is especially so given that on 26 November 2009; the ICC had authorized the Office of the Prosecutor (OTP) to investigate the Kenyan situation. The intention of establishing a special division within the High Court was therefore largely misconstrued by Government officials, who viewed it as a way of referring ICC cases back to local mechanisms and not as a means of complementing ICC processes.<sup>87</sup> Thus, it is feared that the ultimate objective of these effort may have been to undermine the ICC process.<sup>88</sup>

Immediately after the said announcement, on 31 March 2011, the Government made an application to the Pre-Trial Chamber of the ICC challenging the admissibility of the six Kenyan cases on the basis that there were ongoing local investigations, which application failed. While confirming the admissibility of the Kenyan cases, the ICC dismissed claims by Kenya that there were ongoing investigations as being hypothetical promises and not investigations within the context of Article 17(1)(a).<sup>89</sup> According to the Court, ‘the failure to specifically mention the suspects before the ICC as some of the people under the Government’s investigation, rendered the information given by the Kenyan Government inadequate to sustain the

<sup>83</sup> Motion 144 in Kenya National Assembly, Motions 2010 (22 December 2010).

<sup>84</sup> See generally ICTJ ‘Prosecuting international and other serious crimes in Kenya’ (2013) 2 <<https://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>> accessed 6 March 2013.

<sup>85</sup> Judicial Service Commission, Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in the High Court of Kenya (Oct. 30, 2012).

<sup>86</sup> The Multi-Agency Task Force on the 2007/2008 PEV (n 39) 4-5.

<sup>87</sup> KPTJ and KHRC ‘Securing justice: establishing a domestic mechanism for the 2007/08 post-election violence in Kenya’ (2013).

<sup>88</sup> KPTJ and KHRC ‘Securing justice (n 87) 14.

<sup>89</sup> *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to Article (19)(2)(b) of the Statute, Pre-Trial Chamber II (30 May 2011) ICC-01/09-02/11-96, 6. See also *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to Article 19(2)(b) of the Statute Pre-Trial Chamber II (30 May 2011) ICC-01/09-01/11-101, 19.

application.<sup>90</sup> The Court was emphatic that an investigation within the meaning of Section 17(1) must encompass the same conduct in respect of the same persons as at the time of the proceedings concerning the admissibility challenge.<sup>91</sup> It is indeed very doubtful as to whether any local prosecutions would seek to prosecute the same individuals before the ICC.

Kenya's fight against the admissibility of PEV-related cases before the ICC followed several failed attempts to establish a special tribunal, coupled with absurd requests by the East African Court of Justice and the African Court on Human and Peoples' Rights to undertake the prosecutions.<sup>92</sup> The declaration by the Kenya's Government that no further prosecutions of PEV-related cases was tenable due to a lack of sufficient evidence<sup>93</sup> supplemented the numerous failed attempts to get rid of the ICC process. While Government's declaration may be true, in fact, it illustrates Kenya's discomfort regarding the ongoing ICC cases. It is submitted that the essence of this statement was to convey a message to the international community that there were no crimes against humanity committed in Kenya's PEV after all. This view is informed, first, by the persistence of calls by Kenya in collaboration with regional and sub-regional institutions that the then ongoing ICC cases against Kenya's President and Deputy President be withdrawn.<sup>94</sup> Again, in a bid to undermine the ICC, Kenya refused to arrest Omar Al Bashir when he visited the country on 27 August 2010, despite a High Court decision calling upon it to do so.<sup>95</sup> Secondly, is the reluctance by the DPP's office to initiate investigations and/or prosecutions of a total of 255 alleged perpetrators of PEV as recommended by the Truth Justice and Reconciliation Commission (TJRC) of Kenya.<sup>96</sup> Instead, Parliament has enacted legislation allowing it to make amendments to the TJRC report, which would effectively amount to a re-writing of the report.<sup>97</sup>

<sup>90</sup> *Prosecutor v Muthaura, Kenyatta, Ali* (n 89) 25. See also *Prosecutor v Ruto, Kosgey, Sang* (n 89). See a detailed discussion of this decision in EO Asaala, 'The International Criminal Court factor on transitional justice in Kenya' in O Maunganidze and K Ambos (eds) *Power and prosecutions: Challenges and opportunities for international criminal justice in sub-saharan Africa* (2012) 133-134.

<sup>91</sup> *Prosecutor v Muthaura, Kenyatta, Hussein Ali* (n 89) 21, 26.

<sup>92</sup> On 12 February 2009, a 'Constitution of Kenya (Amendment Bill) 2009' allowing the creation of a local tribunal was shot down by the Kenyan Parliament. See also ICTJ, 'Prosecuting international and other serious crimes in Kenya' (2013) 2.

<sup>93</sup> 'CID report says no charge can hold for PEV perpetrators' *The Standard* (15 February 2014).

<sup>94</sup> Extraordinary Session of the Assembly of the African Union, Decision on Africa's relationship with the International Criminal Court (12 October 2013) Ext/Assembly/AU/Dec 1, 2-3.

<sup>95</sup> *The Kenya Section of the International Commission of Jurists v the Attorney General, The Minister of State for Provincial Administration and Internal Security*, Final Judgment, eKLR; 28 November 2011.

<sup>96</sup> See generally chapter IV of Vol 4 of the TJRC Kenya Report.

<sup>97</sup> Section 49 of the Truth Justice and Reconciliation Act provided that upon the publication of the TJRC's



The tension between Kenya and the ICC can thus be cited as a central reason for the lack of political will towards ensuring effective local prosecution of perpetrators of PEV-related crimes in Kenya. This, coupled with the general elections of 2013, shifted much of the focus away from local accountability measures through prosecution.

### 3 Conclusions and recommendations

This chapter set out to discuss the real challenges facing the effective prosecution of international crime in Kenya's PEV-related cases and how these have influenced the transitional justice process in Kenya. It has established that a majority of the cases reported to authorities during the PEV period were hardly investigated and/or prosecuted. For example, out of the 6081 cases that were reported, the police prosecuted only 366 cases. The majority of the few cases that were pursued ended up in acquittals, with only six successful convictions. Although the police blame this on resource constraints, the absence of a forensic laboratory with trained personnel and inadequate equipment, this contribution has established the following as the main contributing factors: poor investigations, corruption and incompetence within police, lack of legitimacy and local ownership and lack of political will.

As such, subsequent prosecution of PEV-related cases cannot be said to have contributed in a positive way towards Kenya's transitional justice objectives. In fact, it cannot be said that local prosecution of PEV-related cases guarantee the prevention of similar crimes in the future. Related tribal clashes silently continue to ravage the country without any respect for human life.<sup>98</sup> Yet, the perpetrators are hardly held to account. This continued impunity is evidence that the rule of law remains elusive in Kenya. The general lack of political will coupled with the absence of local ownership and inept investigations have denied the local prosecution of international crimes in Kenya's PEV the much-needed legitimacy, thus compromising its ability to influence Kenya's transitional justice process in a positive manner.

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report, the Minister of Justice and Constitutional Affairs was required to 'operationalise' the implementation mechanism as would have been proposed by the TJRC within six months. The Truth Justice and Reconciliation (Amendment) Act No 44 of 2013, Kenya Gazette Supplement No 178, however introduces an interesting twist. It provides that 'The Minister shall, *upon consideration of the report of the Commission by the National Assembly*, set in motion a mechanism to monitor the implementation of the report in accordance with the recommendations of the National Assembly.'

<sup>98</sup> D Miriri and H Malalo, 'Second Kenyan minister charged with inciting violence' *Reuters* (27 September 2012). See also J Gondi, 'Bridging the impunity gap in Kenya requires a holistic approach to transitional justice' International Centre for Transitional Justice (19 July 2012).

Consequently, effective prosecutions in the ongoing transitional process in Kenya remains a mirage. Regardless of the initial misunderstandings, this chapter calls upon the Judiciary to re-visit the discourse on establishing the International Crimes Division within the High Court as a specialised prosecutorial unit to deal with these kinds of crimes. This will not only enhance Kenyan cooperation with the ICC in future, but also guarantee special attention to international crimes on the domestic level. Government should facilitate this initiative by providing the necessary financial resources, training of personnel and relevant stakeholders (including the police) and the establishment of a forensic laboratory with trained personnel and adequate equipment.

# INTERNATIONAL CRIMINAL JUSTICE AS INTEGRAL TO PEACEBUILDING IN AFRICA: BEYOND THE 'PEACE V JUSTICE' CONUNDRUM

OTTILIA ANNA MAUNGANIDZE\*

## Abstract

*The need to reconstruct and rebuild post-conflict societies through transitional and long-term mechanisms complements traditional diplomacy, peacemaking and peacekeeping. At the same time, responding to human rights violations that occurred during the conflict demands the rule of law and justice. The promotion and sustenance of peace, together with the delivery of justice, are arguably mutually reinforcing. On a purely conceptual level, justice forms part of peacebuilding, with the latter being more of a long-term process than the former. Thus, justice may be viewed as an element of peacebuilding. It is unsurprising therefore that several commentators include justice as a core component of peacebuilding.*

*This chapter will demonstrate that the two emerging paradigms of “peacebuilding” and “international criminal justice,” while often treated as separate, are inextricably linked. An understanding of their interconnectedness can help inform ways of*

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*engaging going forward. From the outset, it should be clarified that this chapter's main concern is justice and how it can contribute and/or already contributes to peace. While it is appreciated that justice is not limited solely to international criminal justice, the discussion on justice will be limited to international criminal justice for the purposes of this paper.*

*Specifically, this chapter will examine the contribution of international criminal courts (in their various forms) to building sustainable peace in post-conflict societies that have experienced mass atrocities. In so doing, this chapter will posit that international criminal justice (as part of a set of justice processes) will serve to ensure long term peace in contexts where it is necessary and properly executed. While necessary and important, a fuller discussion of national justice processes geared towards international criminal justice is beyond the scope of this chapter.*

## **1 Introduction**

*Little progress can be made by merely attempting to repress what is evil; our great hope lies in developing what is good.<sup>1</sup>*

In the aftermath of the Cold War, two new paradigms emerged, both arguably informed by the emerging dynamics of intrastate conflict in place of interstate conflict. The first, immediately after the end of the Cold War, was the need to reconstruct and rebuild post-conflict societies through transitional and long-term mechanisms. This 'peacebuilding' served to complement traditional diplomacy, peacemaking and peacekeeping. The second, largely in response to the gross human rights violations committed during the course of violent conflicts such as those in the former Yugoslavia and Rwanda, was a legalistic response. This legalistic response centred on the rule of law and justice, and positioned itself at the convergence between international humanitarian law, international human rights law and criminal law.

This chapter will demonstrate that the two emerging paradigms of 'peacebuilding' and 'international criminal justice,' while often treated as separate are inextricably linked. The chapter seeks to show that both are equally important. An understanding of their interconnectedness and relevance in promoting international peace can help inform ways of engaging going forward.

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<sup>1</sup> Calvin Coolidge

From the outset, it should be clarified that this chapter's main concern is justice and how it can contribute and/or already contributes to peace. While it is appreciated that justice is not limited solely to international criminal justice, for the purposes of this chapter, the discussion on justice will restrict itself to international criminal justice.

Specifically, this chapter will examine the role of international criminal tribunals (in their various forms) in contributing to building sustainable peace in post-conflict societies that experienced mass atrocities. In so doing, this chapter will posit that peacebuilding is not in the shadow of international criminal justice, but rather that international criminal justice (as part of a set of justice processes) will serve to ensure long term peace in contexts where it is necessary and properly executed. While necessary and important, a fuller discussion of national justice processes geared towards international criminal justice and peacebuilding is beyond the scope of this chapter.

## 2 Understanding peacebuilding and international criminal justice

Peacebuilding has a variety of definitions, all of which commonly regard it as a range of measures targeted to reduce the risk of lapsing or relapsing into conflict through the strengthening of national capacities at all levels. These measures, serve not only to manage conflict, but also serve to lay the foundation for sustainable peace and development.<sup>2</sup> The concept, developed in the years following the Cold War, was introduced in 1992 by then Secretary General of the UN, Boutros Boutros Ghali, in his *Agenda for Peace* report.<sup>3</sup> In this report, the concept of 'peacebuilding' is defined as a multidimensional *political* project involving many activities and actors.<sup>4</sup> The report went further to define the concept as a set of tasks and goals facing UN agencies operating in post war contexts distinct from peacemaking and peace-keeping that occur during the conflict and seek a cessation of hostilities. Thus, the aims of peacebuilding are broad and longer term. In the *Supplement to An Agenda for Peace*,<sup>5</sup> peacebuilding was thus defined as aiming to 'create structures for the institutionalisation of peace.'

<sup>2</sup> United Nations Secretary General Policy Committee, 2007.

<sup>3</sup> An agenda for peace: Preventive diplomacy, peacemaking and peace-keeping UN Doc A/47/277 - S/241111, 17 June 1992.

<sup>4</sup> Own emphasis. It is interesting to note that, conceptually peacebuilding was initially regarded as a political process.

<sup>5</sup> *Supplement to An agenda for peace*: Position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations, 3 January 1995, UN A/50/60-S/1995/1.

Today, the UN clusters these measures into five core categories. These are economic revitalisation, inclusive politics, public administration or basic service, justice, and basic safety and security.<sup>6</sup> The World Bank limits the measures to three: economic measures, security and justice.<sup>7</sup> Peacebuilding has ‘short-term as well as long-term objectives aimed at ensuring sustainability in the security, political, economic and justice spheres.’<sup>8</sup> Specifically on its long-term goals, Lambourne defines peacebuilding as ‘strategies designed to promote a secure and stable lasting peace in which the basic human needs of the population are met and violent conflicts do not recur.’<sup>9</sup>

International criminal law is the ‘body of laws, norms, and rules governing international crimes and their repression, and the rules addressing conflict and cooperation between national criminal law systems.’<sup>10</sup> ‘International criminal justice’ is the result of the use of international criminal law to prosecute alleged perpetrators of specific human rights violations, which fall into the broad categories of war crimes, crimes against humanity, genocide and the crime of aggression.<sup>11</sup>

According to Galbraith, international criminal justice aspires to achieve three idealistic goals.<sup>12</sup> Firstly, international criminal justice aspires to bring perpetrators to justice and to provide retribution for victims.<sup>13</sup> Secondly, international criminal

<sup>6</sup> UN, *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict*, A/63/881–S/2009/304.

<sup>7</sup> World Bank, *World Development Report* 2011.

<sup>8</sup> W Lambourne, ‘Transitional justice and peacebuilding after mass violence’ (2009) 3 *International Journal of Transitional Justice* 28–48.

<sup>9</sup> W Lambourne, ‘Post-conflict peacebuilding: Meeting human needs for justice and reconciliation’ (2004) 4 *Peace, Conflict and Development* 3.

<sup>10</sup> WA Schabas, ‘International criminal law’ *Encyclopaedia Britannica* (2011).

<sup>11</sup> **For the purposes of this chapter, these crimes shall be understood as they are defined in existing international humanitarian law treaties and conventions. Further, the crimes shall be understood as they are defined in the founding treaties of international criminal tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), internationalised/hybrid courts such as the Special Court for Sierra Leone (SCSL), and as contained in the Rome Statute of the International Criminal Court (ICC). See R Cryer, *An introduction to international criminal law and procedure* (Cambridge University Press 2007) 18.** It should be noted that at present, jurisdiction over the crime of aggression will only be activated after 1 January 2017 after 30 states parties to the Rome Statute of the International Criminal Court ratify amendments to the Statute that pave way for such prosecution. The crime of aggression was previously prosecuted at post-World War II International Military Tribunals as the crime against peace.

<sup>12</sup> J Galbraith, ‘The pace of international criminal justice’ (2009) 31 *Michigan Journal of International Law* 79–155, 83.

<sup>13</sup> *Ibid.* Included in the retributive function of international criminal justice is the aim to deter. See Cryer (n 11) 18.

justice seeks to create an historical record of mass atrocities.<sup>14</sup> Lastly, international criminal justice helps societies in transition to achieve peace and reconciliation.<sup>15</sup> It is within the scope of Galbraith's third aim of international criminal justice that the link with peacebuilding is clearest. Indeed, international criminal justice can be viewed as a means to restore the rule of law and provide accountability and redress for the victims of international crimes. This can be done at the international level through the various international criminal tribunals. It can also be achieved at national level through domestic prosecutions or other accountability processes. However, especially for domestic prosecutions and other accountability process, this is not without its practical hurdles and political challenges. Thus, while the ideal is for international criminal justice to ensure accountability, this is not always realised.

A mix of solutions can be adopted to effectively ensure that international criminal justice contributes to the rule of law, and thus serves to promote long-term peace. In this respect, it is worth noting that instruments promoting international criminal justice, such as the Rome Statute of the International Criminal Court (Rome Statute), contain clear statements on the role of judicial institutions in promoting 'peace and security.' It would not be remiss therefore, on a purely conceptual level, to maintain that justice forms part of peacebuilding, with the latter being a longer-term process than the former. It is unsurprising therefore that several commentators include 'justice' as a core component of peacebuilding.<sup>16</sup>

### 3 False dichotomy of 'peace versus justice' in international criminal justice

... [I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...<sup>17</sup>

<sup>14</sup> Galbraith (n 12) 83.

<sup>15</sup> Ibid.

<sup>16</sup> Lambourne (n 8); J Herman, O Martin-Ortega and CL Sriram, 'Beyond justice versus peace: Transitional justice and peacebuilding strategies' <<http://ecpr.eu/Filestore/PaperProposal/6e3e3742-d3fb-405e-aa53-56d810f1b4b2.pdf>> accessed 19 August 2015; L Davis and T Unger, 'Justice in Peacebuilding: Towards a policy framework for the European Union' (2008) *ICTJ Discussion Paper*; LJ Laplante, 'Transitional justice and peace building: Diagnosing and addressing the socioeconomic roots of violence through a human rights framework' (2008) 2 (3) *International Journal of Transitional Justice* 331-355. See too, United Nations Assistant Secretary General for Peacebuilding, Judy Cheng Hopkins' definition of peacebuilding in which she includes justice under "healing."

See generally the website of the Peacebuilding Commission at <<http://www.un.org/peace/peacebuilding/>> accessed 19 August 2015.

<sup>17</sup> Universal Declaration of Human Rights G.A. Res. 217A (III) U.N. Doc A/810 Preamble, (1948).

Increasingly, in conversations about international criminal justice, and also in those about global peace and security, peace and justice are discussed as if they are mutually exclusive, sometimes as competing, concepts.<sup>18</sup> In the same vein there are differing views on the importance of peace and justice in conflict and post-conflict societies.<sup>19</sup> On the one hand, there are those who believe justice should not be foregone for peace. On the other, there are those who contend that justice can and does undermine peace. In both these camps, peace is seemingly understood in the short term and as that simply attained by the cessation of hostilities. Thus, peace is arguably not understood as it is broadly defined in long-term peacebuilding. In understanding peace as ‘sustainable peace’ and thus long-term, justice (which includes international criminal justice) and reconciliation should be seen as preconditions. This viewpoint regards peace and justice as two sides of the same coin.

In his report on the rule of law in post-conflict societies, then UN Secretary-General Kofi Annan stated, ‘justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.’<sup>20</sup> This is an important point of departure and is a view that the UN maintains.<sup>21</sup> Indeed, since 2004, the UN has developed and continues to develop policy guidelines<sup>22</sup> and toolkits dealing with different transitional justice approaches and justice-related issues that appreciate these linkages. Similarly, campaigns such as ‘no peace without justice’<sup>23</sup> are rooted in the belief that peace and justice should not be seen in isolation from or in competition with each other. These campaigns move from the point of departure that these processes are mutually reinforcing and much more effective together than apart.

<sup>18</sup> See generally Human Rights Watch, *Seductions of “sequencing”: The risks of putting justice aside for peace*, (2010).

<sup>19</sup> CL Sriram, *Confronting past human rights violations: Justice vs. peace in times of transitions* (Frank Cass 2004); MJ Aukerman, ‘Extraordinary evil, ordinary crime: A framework for understanding transitional justice’ (2002) 15 *Harvard Human Rights Journal* 39-97. On the role of the ICC in light of the peace vs. justice debate, see L Davis, ‘The ICC: a straw man in the peace-versus-justice debate?’ (2013) <<https://www.osloforum.org/sites/default/files/Africa-Mediators-retreat-BP-ICC.pdf>> accessed 19 August 2015.

<sup>20</sup> UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, S/2004/616 (23 August 2004).

<sup>21</sup> UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, S/2011/634 (11 October 2011).

<sup>22</sup> See, for example, United Nations, ‘Guidance note of the Secretary-General: United Nations approach to transitional justice’ (2010) and OHCHR, *Analytical study on human rights and transitional justice* (United Nations) 2009.

<sup>23</sup> *No Peace without Justice* website, <<http://www.npwj.org/About-NPWJ/Overview.html>> accessed 19 August 2015.



Within the African Union (AU) context, Article 4(h) of the AU Constitutive Act is often cited as reflective of a commitment by Africa to end impunity and thus promoting peace through responding effectively to international crimes. Article 4(h) provides for African states to intervene in respect of war crimes, crimes against humanity and genocide. Article 4(h) can also be interpreted as showing that the protection of human rights is central to the AU.<sup>24</sup> While the intervention contemplated in Article 4(h) is arguably a political or military one, it is worth stating that both justice and peacebuilding could be mechanisms of dealing with these crimes *after* and perhaps even during the fact. Significantly, such interventions could later deter would be perpetrators.<sup>25</sup>

Also, the AU at the 2010 Review Conference of the Rome Statute reaffirmed its 'unflinching commitment to combating impunity' and has in the past acknowledged the link between accountability and lasting peace.<sup>26</sup> In addition, in 2013 the AU Panel of the Wise argued for an integrated approach to peace and justice that is rooted in transitional justice.<sup>27</sup> In this regard, the Panel recommended that the AU develops a Transitional Justice Policy Framework and strengthen instruments for justice and reconciliation.<sup>28</sup> At the time of writing, development of the policy was at an advanced stage, with the AU having already hosted a validation workshop in August 2014.<sup>29</sup>

Thus, at least in theory and rhetoric, policymakers and their advisors see peace and justice as processes that are mutually reinforcing – particularly for societies in transition – and much more effective together than apart. The problem arises in

<sup>24</sup> D Kuwali, 'The conundrum of conditions for intervention under article 4(h) of the African Union Act' (2008) 17(4) *African Security Review* 92. For a discussion of Article 4 of the AU Constitutive Act in general, see T Murithi, 'The responsibility to protect as enshrined in Article 4 of the Constitutive Act of the African Union' (2007) 16(3) *African Security Review* 14–24.

<sup>25</sup> Principle 8 and 27; Centre for Human Rights, *Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union*.

<sup>26</sup> AU Statement by Ben Kioko, Legal Counsel of the African Union Commission on behalf of the AU Commission at the Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, 31 May to 11 June 2010.

<sup>27</sup> African Union Panel of the Wise, 'Peace, justice, and reconciliation in Africa: Opportunities and challenges in the fight against impunity' The African Union Series, New York: International Peace Institute, February 2013.

<sup>28</sup> Here, it is worth noting that the AU Panel of the Wise made reference to the finding of the October 2009 Report of the African Union Panel on Darfur, 'Darfur: The quest for peace, justice and reconciliation.'

<sup>29</sup> Validation Workshop on the Draft African Transitional Justice Policy Framework (ATJPF), Johannesburg, South Africa <<http://pa.au.int/en/content/validation-workshop-draft-african-transitional-justice-policy-framework-atjpf-johannesburg-s>> accessed 15 August 2015.

For comment, see J Brankovic and N Roht-Arriaza, 'African Union Transitional Justice Policy Framework in practice', Centre for the Study of Violence and Reconciliation (2014).

practically implementing both peace and justice, none at the expense of the other. It is essential therefore to examine ways in which international criminal justice can help contribute to peacebuilding.

#### **4 International criminal tribunals: Promoting peace through meting out justice?**

To assess the role of international criminal justice in peacebuilding, it is essential to examine the work of international criminal tribunals that are synonymous with international criminal justice. The primary focus of the reflections in this chapter is on the present and future role of the International Criminal Court (ICC or the Court). However, given that the Court remains a young judicial institution (the ICC began its work in 2003, but its first prosecution was not until 2009), a brief discussion of the role of other international criminal tribunals in peacebuilding is necessary. This is also important because past tribunals have operated largely during the post-conflict phase. In this regard, the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) will be covered.<sup>30</sup> The potential role of the ICC in this regard will then ensue.

##### *4.1 The ICTY and the ICTR*

The ICTY and the ICTR were established as judicial institutions founded on the need to promote and ensure ‘international peace and security.’ Thus these tribunals can be seen to contribute to peace, but not necessarily as having a primary responsibility of peacemaking, peacekeeping and/or building peace. The ICTY, for example, has a fourfold mandate.<sup>31</sup> First, the ICTY aims to bring to justice persons allegedly responsible for serious violations of international humanitarian law. Second, the ICTY aims to render justice to the victims. Third, the ICTY aims to deter further crimes. Last, but certainly not least, the ICTY aims to contribute to the restoration of peace by holding persons responsible for serious violations of international humanitarian law accountable.

<sup>30</sup> The SCSL similarly was a post-conflict internationalised tribunal that prosecuted those it regarded as most responsible for crimes committed during the conflict. Though primarily a judicial body, the SCSL can also be regarded as an integral element of the peacebuilding process during the country’s transition.

<sup>31</sup> G Boas and WA Schabas (eds), *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff 2003). See also ICTY Website, ‘ICTY at a glance’ <<http://www.un.org/icty/glance-e/index.htm>> accessed 15 August 2015; see also ‘The Tribunal’s accomplishments in justice and law’ <[http://icty.org/view\\_from\\_hague/jit\\_accomplishments\\_en.pdf](http://icty.org/view_from_hague/jit_accomplishments_en.pdf)> accessed 15 August 2015.

That the tribunals were established by the UN Security Council 'externally' (as it were) to deal with grave crimes committed during the internal conflicts in the former Yugoslavia and Rwanda, makes them arguably a form of humanitarian intervention, albeit a justice-driven one. During the war in Bosnia, the ICTY had a working relationship with peacekeeping forces in Bosnia-Herzegovina, which illustrates a critical link between those seeking justice and the peacemakers.<sup>32</sup> However, the fact that international crimes were still being committed in the former Yugoslavia even after the establishment of the ICTY suggests that while idealistic, this remains as difficult task. The extent of the tribunal's contribution to the peacebuilding process should thus not be overstated.

With regards to the ICTR, one of its stated additional objectives is national reconciliation. This national reconciliation, if achieved, as with justice, can serve as an important precondition to lasting peace. Indeed, according to Bangamwambo, at the time the ICTR was established, the international community hoped that the ICTR would contribute, not only to national reconciliation in Rwanda, but also to restore peace and stability in the Great Lakes region.<sup>33</sup> While it can be argued that the ICTR has indeed contributed to reconciliation in Rwanda, it is difficult, if not impossible, to empirically measure this impact. Suffice it to say that Rwanda has benefitted from a multitude of interventions – some of which (like the ICTR, the *gacaca* processes and domestic processes) were characteristically judicial mechanisms.

It can be argued that by breaking down conflicts into individual crimes, judicial intervention by international criminal tribunals can contribute to peace.<sup>34</sup> Judicial intervention would thus be seen as aiming for peace by not focusing on conflicts between groups, but rather on individual criminal responsibility. This was the case when the ICTY indicted Slobodan Milošević and Radovan Karadžić. Similarly, the SCSL was lauded for its indictment and later conviction, amongst others,

<sup>32</sup> H Shinoda, 'Peace-building by the rule of law: An examination of intervention in the form of international tribunals' (2001) Paper presented at the 2001 Annual Convention of International Studies Association, Chicago, and at the Centre of International Studies, University of Cambridge, UK <[http://www.gmu.edu/programs/icar/ijps/vol7\\_1/Shinoda.htm](http://www.gmu.edu/programs/icar/ijps/vol7_1/Shinoda.htm)> accessed 15 August 2015.

<sup>33</sup> F Bangamwambo, 'International criminal justice and the protection of human rights in Africa' in A Bost and J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (McMillan Education Namibia 2009) 107. It should be noted that prior to and during the mass massacres, the international community failed to prevent what was clearly genocide in Rwanda, only acting after the fact.

<sup>34</sup> L Davis, 'The ICC: A straw man in the peace-versus-justice debate?' (2013) Briefing Paper, Oslo Forum Africa Mediators Retreat <<https://www.osloforum.org/sites/default/files/Africa-Mediators-retreat-BP-ICC.pdf>> accessed 9 November 2015.

of former Liberian President Charles Taylor who had played a central role in the Sierra Leonean conflict.

However, this detachment of individuals can also be a double-edged sword. On the one hand, it ensures that the society does not view the crimes committed as a societal malaise, but rather as acts committed by individuals seeking to undermine societal peace and stability. Thus, judicial intervention is seen as the eradication of evil elements within a society by arresting suspected criminals and bringing them to justice in a way that would contribute to future peace. On the flipside, where an indicted individual exerts influence on the ground or was (or is) regarded as ‘central’ to establishing peace, processes against such a person can be regarded as undermining peace. This has been the argument often raised in respect of indictments of senior politicians, particularly heads of state. The debate on this is ongoing.

## 4.2 *The ICC*

The issue of prosecuting senior government officials, particularly heads of state, is one that the ICC has had to contend with in several of the situations currently before it.<sup>35</sup> Given that the ICC is tasked with addressing crimes by those allegedly ‘most responsible’ and that oftentimes in a time of conflict, these individuals can be quite senior in government, this was anticipated. Indeed, in negotiating the Rome Statute, the issue of immunity came up. The final Statute, in Article 27, does away with immunity from prosecution on the basis of official capacity. However, this Article should be read with Article 98, which creates an opt-out clause for countries that have made bilateral agreements to the contrary.

The ICC’s role, while significantly similar to that of *ad hoc* international criminal tribunals, is somewhat and understandably different. Unlike the *ad hoc* tribunals that were created for particular situations and established during the post-conflict phase or transition from conflict, the ICC’s jurisdiction is permanent and current.<sup>36</sup> What this means is that the ICC will often have to deal with cases arising from ongoing conflicts, even before efforts towards peacekeeping or peace-making have commenced. Thus, justice would inevitably precede cessation of hostilities and could potentially serve as a forerunner to peacebuilding.

<sup>35</sup> *Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 and *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

<sup>36</sup> F Lafontaine and A Tachou Sipowo, ‘The contribution of international criminal justice to sustainable peace and development’ in S Jodoin and MC Segger (eds) *Sustainable development, international criminal justice, and treaty implementation* (Cambridge University Press 2013).

In Uganda, the Government referred the situation in the North of the country to the ICC at a time when the Lord's Resistance Army (LRA) was still active in that region.<sup>37</sup> The situation related to the LRA's criminal activities and the inability of the Government to quell the rebellion. The Government had been negotiating peace with the LRA in vain. The threat of prosecution arguably forced the LRA to flee Uganda paving way for peace in the country. Of course, the LRA is now a threat to stability in neighbouring countries such as South Sudan<sup>38</sup> and the Central African Republic.<sup>39</sup> Despite arrest warrants, only one of the individuals indicted by the ICC in this situation has been arrested and surrendered to the ICC. However, at the time of writing, the case against Dominic Ongwen, whose surrender was in early 2015, was slated to commence in January 2016.<sup>40</sup> In the absence of actual proceedings against the LRA, one can only hypothesise that if the LRA commanders indicted by the ICC had been captured and prosecuted, arguably the LRA would not be a threat to regional peace today.

Interestingly, at a domestic level, Uganda continues to recognise the importance of justice in security and stability (and thus in long term peace). To this end, in 2008, further to the Juba Agreement between the Government of Uganda and the LRA, the Government established a War Crimes Division (now the International Crimes Division (ICD)) of the High Court.<sup>41</sup> 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.'<sup>42</sup> Pros-

<sup>37</sup> ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' ICC-20040129-44; ICC Press Release, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda' ICC-OTP-20040729-65; *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.

<sup>38</sup> *Enough*, 'The LRA in Congo, CAR, and South Sudan' <<http://www.enoughproject.org/conflicts/lra/congo-car-south-sudan>> accessed 19 August 2015]; UN OCHA, 'LRA Regional Update: Central African Republic, DR Congo and South Sudan' (July-September 2014).

<sup>39</sup> UNSC Press Release, 'Security Council concerned by grave security, humanitarian situation in Central Africa, encourages greater support from United Nations Regional Office' SC/11925 (11 June 2015); See also *Small Arms Survey*, 'Lord's Resistance Army Update' <<http://www.smallarmssurveysudan.org/facts-figures/south-sudan/lra.html>> accessed 19 August 2015.

<sup>40</sup> *Prosecutor v Dominic Ongwen, Decision postponing the date of the confirmation of charges hearing* ICC-02/04-01/15.

<sup>41</sup> First established as the WCD, this special division of the High Court of Uganda was renamed the International Crimes Division (ICD) on June 8 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.

<sup>42</sup> M du Plessis, A Louw and OA Maunganidze, 'African efforts to close the impunity gap: Lessons for

ecutions 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.’<sup>43</sup> 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.<sup>44</sup> Today the ICD has jurisdiction over war crimes, genocide and crimes against humanity. It also has jurisdiction over other serious international and transnational crimes, including, terrorism, human trafficking and piracy.<sup>45</sup>

In Sudan, in respect of the situation in Darfur, peace was also initially preferred over international justice. However, in the absence of noted efforts to end the crisis and re-establish peace, the United Nations Security Council (UNSC) referred the situation to the ICC for justice to be served.<sup>46</sup> In 2009, the AU High-level Panel on Darfur included in its recommendations the importance of justice in the peace process.<sup>47</sup> To this end, the Panel made several recommendations including that the role of the ICC as a court of last resort be recognized. Further the Panel recommended that there be national justice processes, in the form of a hybrid Special Criminal Court on the Events in Darfur.<sup>48</sup> Efforts to establish peace in the country continue, as do efforts to bring to justice those considered most responsible.<sup>49</sup> To date neither has been achieved, notwithstanding international and regional efforts.

Important questions arise from these two examples. First, whether peacemaking hinged on certain people – those regarded as politically necessary to negotiate

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complementarity from national and regional actions’ (2012) *ISS Paper* 241.

<sup>43</sup> Agreement on accountability and reconciliation (between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement), para 7 <[http://www.amicc.org/docs/Agreement\\_on\\_Accountability\\_and\\_Reconciliation.pdf](http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf)> accessed 11 November 2015.

<sup>44</sup> *Ibid* para 10.

<sup>45</sup> 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.

<sup>46</sup> United Nations Security Council, UN Doc S/RES/1593 (2005). See generally MT Reynolds, ‘Legitimizing the ICC: Supporting the Court’s prosecution of those responsible in Darfur’ 2010 (30) *Boston College Third World Law Journal* 179. See also P Kastner, ‘The ICC in Darfur: Savior or spoiler?’ (2007) 14 *ILSA Journal of International and Comparative Law* 146.

<sup>47</sup> ‘Darfur: The quest for peace, justice and reconciliation’ Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2(CCVII) (October 2009).

<sup>48</sup> This special court was never established, owing in large part to a lack of political will on the part of the Sudanese Government.

<sup>49</sup> It should be noted that one of the indictees is Sudanese President Omar Hassan Al Bashir who has vowed to cling to power and has received some support from fellow African leaders who believe that as president he should be immune from prosecution. Issues of immunity are beyond the scope of this paper.

peace accords – does not in itself compromise peace *and* justice. Further, whether in pursuing justice, to what extent such political considerations should be made. The second relates to the scope of responsibility of international justice institutions like the ICC in peacebuilding. In essence, should justice, as a precondition to peace, be the sole responsibility of the ICC? The Rome Statute is clear on both these issues. First, the Rome Statute recognises that grave crimes threaten peace and security,<sup>50</sup> ergo that addressing these crimes will serve to promote peace and security. Second, the Rome Statute provides wide prosecutorial discretion.<sup>51</sup> The Prosecutor, while having taken into account the gravity of the crime and the interests of victims, can refuse to investigate or prosecute where s/he has substantial reasons to believe that proceeding would not serve the interests of justice. The Prosecutor may make several considerations in this regard. Third, the Rome Statute allows for cases to be deferred by the UNSC if the interests of international peace and security so demand.<sup>52</sup> Any such deferral will be for an initial period of 12 months and must be because proceeding with the investigation or prosecution would undermine international peace. To date, no request for deferral has been granted.<sup>53</sup> Last, and certainly not least, the Rome Statute makes the ICC a court of last resort that may only intervene (or be called on to intervene) to bridge a gap where national courts are either unable or unwilling to do so.<sup>54</sup> The challenge, as anticipated, is in implementation.

Rodman suggests a way forward – at least for the ICC.<sup>55</sup> In his view, the ICC cannot and should not be independent of politics. He suggests that the Court needs to operate within, rather than above, international strategies of conflict resolution. He contends that in most, if not all of its cases, the ICC will inevitably confront a 'peace versus justice' dilemma in which 'insistence on prosecution could criminalise those whose cooperation is necessary for a political solution.' Thus, in his view, the exercise of prosecutorial discretion should be central to the ICC's engagement with stakeholders involved in conflict management and peacebuilding. In essence, he argues that having these discussions early on will help maximise the prospects for accountability while at the same time minimise the risks to peace and human security. Rodman's arguments notwithstanding, if followed, this could exacerbate

<sup>50</sup> Rome Statute, preamble.

<sup>51</sup> Rome Statute, art. 53.

<sup>52</sup> Rome Statute, art. 16.

<sup>53</sup> Requests have been made in respect of the situation in Darfur, Sudan and that in Kenya.

<sup>54</sup> Rome Statute, art. 17.

<sup>55</sup> KA Rodman, 'Justice as a dialogue between law and politics: Embedding the International Criminal Court within conflict management and peacebuilding' (2014) 12 *Journal of International Criminal Justice* 437.

the pre-existing challenge of allegations of selective prosecution that the ICC's has been accused of. Particularly, as a judicial body, it could be argued that such process could serve to undermine the Court's legitimacy as an independent court that operates within the parameters set out in the Rome Statute.

This latter proposal suggests that bridging the gap between rhetoric and reality requires that those promoting international criminal justice (not limited to the ICC) and stakeholders involved in conflict management and peacebuilding must constructively engage. Doing so may well aid in ensuring that international criminal justice plays its important role as a measure contributing to peacebuilding.

The creation of the ICC raised high expectations that justice would be done for gross human rights violations and that, as a result of this justice, there would be an end to impunity.<sup>56</sup> However, the ICC cannot reach these goals by itself. Mindful of the complementarity envisaged in the Rome Statute, domestic jurisdictions must also have this underlying aim to ensure justice and, as a result, promote peace. However, while ability and willingness to prosecute crimes can be assumed of functioning criminal justice systems, the same cannot be done in respect of conflict-stricken and post-conflict societies. When it comes to issues of building sustainable peace, it is this latter category of countries that is in question. Davis and Unger note that post-conflict societies are marked by a plethora of victims of serious crimes and many perpetrators.<sup>57</sup> Addressing these crimes is crucial; however, post-conflict societies often have extremely weak and compromised judicial systems that are not well equipped and/or capable of delivering the required justice.<sup>58</sup> Davis and Unger add that an (often unintended) impunity gap results.<sup>59</sup>

The No Peace without Justice (NPWJ) campaign proposes that efforts at national level be geared towards meeting four key objectives.<sup>60</sup> First, efforts must contribute to broad support for accountability as a systematic response to massive violations of human rights and international criminal law. Second, there should be a reduction of the expectation of impunity and a removal of the perception of rewards for violence on the part of parties to the conflict, potential perpetrators, victims and affected populations. Third, it is necessary to increase the impact, effectiveness,

<sup>56</sup> L Davis and T Unger, 'Justice in peacebuilding: Towards a policy framework for the European Union' (2008) *ICTJ Discussion Paper*.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *No Peace without Justice*, 'Strategy on international criminal justice' <<http://www.npwj.org/ICC/NPWJ-strategy-international-criminal-justice.html>> accessed 19 August 2015.



transparency and accountability of mechanisms to stakeholders. Last, the universality of the Rome Statute should be promoted through encouraging its ratification and effective implementing legislation.

The reason why it is important to contribute to broad support for accountability is because, it can be argued that, countries that have implemented accountability processes after periods when human rights were grossly violated are more likely to achieve sustainable peace and development. To achieve this, there must be buy-in from key stakeholders, including policymakers, civil society and affected communities. Significantly, there needs to be an institutionalisation of accountability. In respect of international crimes, this would be through the criminal justice system – domestically and, where possible, regionally and internationally. This ties in closely with the need to reduce the perception that crimes will go unpunished and that impunity will prevail.

If the expectation of impunity was reduced, this could potentially discourage or deter would be perpetrators, while reinforcing support in the system from victims and others in society. However, it remains imperative to manage expectations on the scope and ability of international criminal trials to deter the commission of mass atrocities.<sup>61</sup> Indeed, Cronin-Furman argues that while part of the intentions of the ICC, the current prosecutorial policy is not well targeted at producing a deterrent effect.<sup>62</sup>

This will be best achieved if the accountability mechanisms are seen also as effective, transparent and accountable. In this regard, it is imperative that institutions be held to a high standard and called to account as and if they falter. Last, beyond promoting ratification of the ICC so as to ensure universality of international criminal justice, countries must be encouraged to actively pursue domestic justice processes. All four of these can contribute to the process of long-term peacebuilding. Indeed, as Lambourne notes, justice as part of peacebuilding is more than *just* transitional; 'justice' must set up structures, institutions and relationships to promote sustainability.<sup>63</sup>

<sup>61</sup> K Cronin-Furman, 'Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity' (2013) 7(3) *International Journal of Transitional Justice* 434-454.

<sup>62</sup> *Ibid.*

<sup>63</sup> Lambourne (n 8) 28-48. Own addition and emphasis.

## 5 Conclusion: Towards inclusive justice and sustainable peace

With the aforementioned in mind, justice should thus be understood as going beyond a narrow definition of criminal justice, which seeks only to punish the perpetrators of crime.<sup>64</sup> Justice should be seen also as strengthening the rule of law and accountability more generally. Further, justice should be seen to also seek to acknowledge the impact of the crimes on the victims and their wrongfulness and thus begin a process of reconciliation. In this regard, justice should be seen as aiming to restore the dignity of victims and to pave a way for long term healing. It has been argued that these processes will help build ties between population groups and potentially ensure that societies are more conflict-resilient as a result.<sup>65</sup> This inclusive justice is clearly important in efforts to build sustainable peace.<sup>66</sup>

It should also be understood that not all post-conflict contexts going through a process of peacebuilding would call for prosecutions of international crimes. In those contexts where it is necessary to do so, international criminal justice, together with other measures, can serve to ensure long-term peace. It is worth reemphasising that international criminal justice is only one of several processes that should form part of peacebuilding.

Indeed, ‘peacebuilding’ and ‘international criminal justice’ are mutually reinforcing and, if carried out, properly, are beneficial in ensuring accountability and sustainable peace. However, these two are not only intricately connected, but are also equally important in promoting and sustaining peace. Justice – in its various forms – is increasingly recognised as a necessary element in contributing to peace. In this regard, it should be underscored that other forms of justice not explored in this chapter are also invaluable and should complement international criminal justice efforts. Lessons in this regard can be drawn from experiences in Rwanda, Uganda and Sierra Leone. Further afield, the experiences of dealing with peace and justice issues arising from the conflict in the former Yugoslavia are particularly useful and relevant.

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<sup>64</sup> Davis and Unger (n 56).

<sup>65</sup> Ibid.

<sup>66</sup> Beyond prosecutions, this broader understanding of justice could potentially ensure that hostilities do not resume.

# FOREIGN AID TOWARD EXTRAORDINARY RENDITION: AN AFRICAN PERSPECTIVE

JEANNE-MARI RETIEF\*

## Abstract

*After September 11, 2001 it was uncovered that states, especially the US, used illegal methods to bring suspected terrorists within the jurisdiction of certain countries as part of the Global War on Terror. Although the US seemed to be the biggest culprit, other governments assisted in the capture, detention, interrogation and torture of these suspected terrorists, to which end secret facilities known as “black sites” were used. Among the participating governments are various African states. This chapter aims to shed light on the principles of extraordinary rendition, the international law issues created by it and, specifically, African participation in this practice and the difficulties in attributing accountability to the various role players under international law.*

## 1 Introduction

A connecting flight lands and a passenger disembarks the plane and enters the airport. He is halted by security and taken to an interrogation room. His whole world is about to change. He is escorted to a dark room where he is interrogated about every aspect of his life. His numerous requests for legal representation are denied. He’s injected with an unknown substance that will render him immobile and incoherent. Blindfolded, he is escorted to a desolate airport with a single jet engine that will deliver him to an unknown country and foreign legal system, where torture is the order of the day. No press, no legal representation, no judicial procedure — and no mercy. An innocent man has just been extraordinarily rendered to torture.

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Post September 11, 2001, and under the George W. Bush Administration, extraordinary rendition truly gained momentum and the execution of renditions escalated to what we know today as extraordinary renditions.<sup>1</sup> President Bush signed directives authorising extraordinary rendition without the prior approval of the White House or the Departments of State and Justice.<sup>2</sup> Condoleeza Rice<sup>3</sup> vehemently defended these renditions, contending that they served a crucial purpose in curbing terrorism.<sup>4</sup> However, she failed to mention the significant expansion of these renditions and that captured suspects were being rendered to foreign governments.<sup>5</sup>

Although the United States of America (US) may be the main perpetrator in extraordinary renditions, they are largely reliant on the participation of foreign governments to ensure successful execution of this phenomenon. These participating governments include various governments from the African continent, such as, Algeria, Djibouti, Egypt, Ethiopia, the Republic of Gambia, Malawi, Somalia, South Africa and Zimbabwe.<sup>6</sup>

This chapter is based on a doctoral thesis which focused on the US practice of extraordinary rendition. However, for purposes of this chapter the focus will shift to the participation of foreign governments in extraordinary rendition and attributing accountability to the aiders and abettors, with specific focus on Africa. In order to achieve this, a basic introduction to the US practice of extraordinary rendition is required. However, due to editorial constraints, an in-depth discussion on the entire practice of extraordinary rendition and all it entails will not be possible for purposes of this chapter.

<sup>1</sup> LN Sadat, 'Extraordinary rendition, torture, and other nightmares from the war on terror' (2007) 75 *George Washington Law Review* 1200, 1215.

<sup>2</sup> D Jehl and D Johnston, 'Rule change lets CIA freely send suspects abroad to jails' (6 March 2005) *The New York Times Online*. Compare S Grey, *Ghost plane: The true story of the CIA rendition and torture program* (1<sup>st</sup> edn, Saint Martin's Griffin 2007) 149; A Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition' (2013) *Open Society for Justice Initiative* 15.

<sup>3</sup> Condoleeza Rice was the U.S. National Security Advisor from 2001-2005 under the George W. Bush administration, and the U.S. Secretary of State from 2005-2009 under the same administration.

<sup>4</sup> **After the media published the article accusing the U.S. Government of maintaining secret detention facilities she held a press conference to mount a public defence against the accusations.** She addressed the matter as follows: 'For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they are captured to their home country or to other countries where they can be questioned, held or brought to justice... In conducting such renditions, it is the policy of the United States, and I presume of any other democracies that use this procedure, to comply with its laws and comply with its treaty obligations.' See C Rice, *No higher honour: A memoir of my years in Washington* (Crown Publishing 2011) 499-500.

<sup>5</sup> Singh (n 2) 15.

<sup>6</sup> Ibid 6.

The chapter will therefore focus on the basic explanation of extraordinary rendition, the problems created by it and the effect of participation by foreign governments. Special attention will be given to African countries and the aid they have given to the US Government in the extraordinary rendition of various individuals.

## 2 Extraordinary rendition explained

Since the charge of resorting to extraordinary rendition as an anti-terror measure after the 9/11 attacks was mainly levelled at the Bush Administration, a famous Donald Rumsfeld remark – which can shed some light on the phenomenon of extraordinary rendition discussed below – is truly ironic, coming from the US Defence Secretary during the Ford and George W. Bush administrations.<sup>7</sup>

There are known knowns; there are things we know that we know. There are known unknowns; that is to say, there are things that we now know we don't know. But there are also unknown unknowns – there are things we do not know we don't know.<sup>8</sup>

Rumsfeld explains that there are certain things in this world that are clearly evident to us as incontrovertible fact, things we absolutely know to be true<sup>9</sup> (for example: the sky is blue, the sun rises in the East and sets in the West). Then there are things of which we have conscious knowledge and things of which we consciously lack knowledge, and yet other things whose existence we are not aware of and are not aware of our ignorance about them.<sup>10</sup> Until recently extraordinary rendition fell into this last category, being an unknown unknown, which is to say that the world at large was unaware of its existence and had no inkling that such a phenomenon might even exist, let alone what its consequences might be.

Growing public awareness of extraordinary rendition has changed its status from third category – that of an unknown unknown - to the second category – that of a known unknown. The existence of the practice and its use for the illegal capture, detention and torture of suspected terrorists is common cause at this juncture.<sup>11</sup>

<sup>7</sup> Donald Rumsfeld served as the 13<sup>th</sup> and the 21<sup>st</sup> U.S. Secretary of Defence. During the Ford Administration he served as the U.S. Secretary of Defence from 1975 – 1977.

<sup>8</sup> D Rumsfeld, *Known and unknown: A memoir* (Penguin Group 2011) 12-14.

<sup>9</sup> He states that these are known knowns such as laws, rules and the fact that we all know gravity will surely cause something to fall to the ground, see Rumsfeld (n 8) 12.

<sup>10</sup> He explains that this is the most difficult category since there are gaps in our knowledge but we don't know that these gaps exist, see Rumsfeld (n 8) 12.

<sup>11</sup> D Weissbrodt and A Bergquist, 'Extraordinary rendition: A human rights analysis' (2006) 19 *Harvard Human Rights Journal* 123; ICRC report on the treatment of fourteen 'high value detainees' in CIA custody (200) *International Committee of the Red Cross Regional Delegation for United States and*

However, since the practice is largely shrouded in secrecy,<sup>12</sup> given its known purpose to huddle captives away from public scrutiny and the oversight of the law, little is known and understood about it, with the result that a severe paucity of conclusive evidence about the phenomenon further aggravates the conditions under which the struggle against it has to be waged.<sup>13</sup>

Exploratory reading shows that academics, writers and legislatures are not handling extraordinary rendition appropriately.<sup>14</sup> There is a general tendency to try and fit its characteristics into the definitions of other forms of illegal expulsion, such as disguised extradition, abduction and other forms of irregular rendition. The reason for this misrepresentation is that the nature of the phenomenon and its implications are not understood, not least because no formal definition has been generated in law to shape and authenticate its meaning. Various writers have attempted to describe or define extraordinary rendition for purposes of their own work, but they never fail to stress that there is no formal definition.<sup>15</sup>

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*Canada*; Sadat (n 1) 1200; LN Sadat, 'Ghost prisoners and black sites: Extraordinary rendition under international law' (2006) 37 *Case Western Journal of International Law* 309; D Weissbrodt and A Bergquist, 'Extraordinary rendition and the humanitarian law of war and occupation' (2007) 47 *Virginia Journal of International Law* 295; D Weissbrodt and A Bergquist, 'Extraordinary Rendition and the Torture Convention' (2006) 46 *Virginia Journal of International Law* 585, 586; M Satterthwaite, 'Rendered meaningless: Extraordinary rendition and the rule of law' (2007) 75 *The George Washington Law Review* 1333.

<sup>12</sup> M Satterthwaite and J Huckerby, 'Torture by proxy: International and domestic law applicable to "extraordinary renditions"' (2004) *Center for Human Rights and Global Justice New York University School of Law* 15.

<sup>13</sup> **The entire purpose of extraordinary rendition is to place the suspected terrorists outside the legal framework.** This ensures that the perpetrators can avoid accountability and any other legal repercussions, but lack of accountability and transparency complicates investigations into extraordinary rendition which leads to a severe lack of evidence.

<sup>14</sup> Instead of speaking directly of extraordinary rendition academics seem to 'talk around the subject' by referring to irregular rendition, disguised extradition, kidnapping or abduction. Dugard discusses the return of fugitives by means other than extradition, including deportation and disguised extradition (as a singular and interchangeable term which could lead to confusion regarding the distinct difference between disguised extradition and deportation) as well as abduction. Certain possible phases of extraordinary rendition are identifiable in abduction or even perhaps disguised extradition, but extraordinary rendition cannot be placed in the same category as either of these. Furthermore, Dugard describes the alternatives to extradition as 'the return of fugitives by means other than an extradition treaty to their country of origin.' Compare J Dugard, *International law: A South African perspective* (Juta 2011) 231-237. Extraordinary rendition is not concerned with fugitives that need to be returned to a specified state. The individuals captured and illegally rendered are only suspected terrorists in the eyes of their captors since no appropriate evidence regarding the captive individual's connection to terrorism can be gathered, which is why such individuals are not arraigned before a court. The UN General Assembly also enacted the Declaration on the Protection of All Persons from Enforced Disappearances Resolution 47/133 of 1992 (hereafter referred to as "the Declaration on Enforced Disappearances"), but this declaration is not comprehensive enough to include all the intricacies of extraordinary rendition.

<sup>15</sup> Sadat stresses that the definition of extraordinary rendition seems to change depending on the source

Extraordinary rendition is a breed apart from all other illegal expulsion and/or rendition methods and is informed by a hybrid theory,<sup>16</sup> which needs to be thoroughly perused and taken into account in formulating a cogent definition of the phenomenon. In light of the unconscionable range of consequences arising from extraordinary rendition, it is submitted that this practice needs to be criminalised under international law. However, in the absence of a formal definition of the practice that will stand up in court, the criminalising process would have no leg to stand on, so to speak. The first step towards understanding and defining extraordinary rendition would be to elaborate a detailed description of the phenomenon with all its ramifications.

Extraordinary rendition<sup>17</sup> entails willfully taking suspected terrorists into custody through illegal means such as abduction, followed by forcible detention and transportation under the induced influence of drugs<sup>18</sup> to facilities that are well-nigh untraceable at undisclosed destinations<sup>19</sup> where torture will be used as an interrogation technique<sup>20</sup> and where public scrutiny and the oversight of the law cannot

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and cites the New York City Bar Association Report as an example (see Sadat (n 1) 1248). Satterthwaite comments that the concept of extraordinary rendition has not stabilised into a firm definition and therefore remains fluid and controversial, with the result that interpretations of what it entails proliferate (Satterthwaite (n 11) 1335). She defines extraordinary rendition as ‘the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture.’ Yet, she stresses that even her definition of extraordinary rendition for purposes of this specific paper is not quite the same as definitions given in her other works (Satterthwaite (n 11) 1336). In Satterthwaite and Huckerby (n 12) 13, the authors aver that ‘extraordinary rendition appears to be an unauthorised version of rendition.’ The use of the word “appears” again underscores the lack of a definitive description.

<sup>16</sup> Weissbrodt and Bergquist (n 11) 127; P Johnston, ‘Leaving the invisible universe: Why all victims of extraordinary rendition need a cause of action against the United States’ (2007) 16 *Journal of Law and Policy* 381.

<sup>17</sup> This is my detailed description of extraordinary rendition for the purposes of this chapter and the arguments and statements it contains. I acknowledge that there are various descriptions, definitions and interpretations of it, as pointed out in footnote 15 above.

<sup>18</sup> The word “suspected” is definitely apposite here, given the scant evidence that would certainly not persuade a court to prosecute. Many suspects have such tenuous links to terrorism that legal process could not provide grounds for arrest, let alone detention, which is why torture is used as an aid to interrogation.

<sup>19</sup> Numerous articles refer to the existence of “black sites,” which are secret facilities maintained for the purposes of torture, illegal detention and the like. The existence of these facilities and the disappearance of detainees from them have led to the detainees being dubbed “ghost prisoners.” See E Sepper, ‘The ties that bind: How the Constitution limits the CIA’s actions in the war on terror’ (2006) 81 *New York University Law Review* 1807; Sadat (n 1) 1215; Weissbrodt and Bergquist (n 11) 588; Sadat (n 11) 315.

<sup>20</sup> Extraordinary rendition is also referred to as “torture by proxy” because torture seems to go hand-in-hand with extraordinary rendition. See in general Satterthwaite and Huckerby (n 12); A Hasbargen, ‘Appropriately rendering disappearances: The despair between extraordinary renditions and forced disappearances’ (2012) 34 *Hamline Journal of Public Law and Policy* 71, 89-90.

reach them, with no assurances required from the receiving state.<sup>21</sup> The suspected terrorists are captured by state agents, or agents acting under the guise of pseudo-legality (i.e. purporting to act under the aegis of the US, but hailing from a variety of countries whose governments have invested them with powers of dubious legality to capture, detain, hold for questioning,<sup>22</sup> transfer and/or torture the suspects thus detained)<sup>23</sup> without following due legal process (e.g. allowing suspects to access legal counsel).<sup>24</sup>

After transfer the suspects are detained indefinitely without trial, while the governments involved deny their involvement and any knowledge of the state of well-being of the detainees.<sup>25</sup> No access to humanitarian aid groups or legal representation is allowed throughout and after such detention.<sup>26</sup> The last phase of extraordinary rendition is the lack of justice for released victims as states that are sued take refuge behind the defense of state secrecy.<sup>27</sup>

<sup>21</sup> D Marty, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report' (2007) *Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights*.

<sup>22</sup> Ibid 49. This is a twenty-minute period commonly referred to as the "twenty minute take-out" or the CIA "security check." A detainee can be fully prepared for transportation within these twenty minutes by rendering him immobile and incoherent. The detainee is blindfolded, brutalised and shackled by highly trained operatives wearing masks. His clothes are taken and he is photographed naked. Tranquillisers are inserted in his anus and he is strapped with a diaper. Finally he is blindfolded with a hood that provides nearly no holes for breathing, and transferred to a plane where he is strapped to a stretcher or bound in a very uncomfortable position for the entire course of the flight (which can be up to a full day). Again, this entire process takes twenty minutes; see Johnston (n 16) 357-360.

<sup>23</sup> Johnston (n 16) 357-359; Singh (n 2) 6.

<sup>24</sup> S Wolf, 'An emerging paradigm for the enforcement of human rights: How the courts' recent refusal to prosecute U.S. agents for extraordinary rendition may create a new reinforcement model' (2007) 59 *The State University of New Jersey Rutgers Law Review* 917.

<sup>25</sup> These detainees are naked when they are placed in cells that are temperature controlled to produce temperature extremes from freezing to extreme humidity and heat. They will also likely go through a "four month isolation regime" during which they are denied contact with human beings and their cells are under constant surveillance; see Johnston (n 16) 358-362; JR James, 'Black letter abuse: the U.S. legal response to torture since 9/11' (2007) 89 *International Review of the Red Cross* 562.

<sup>26</sup> M Satterthwaite, 'Extraordinary rendition and disappearances in "the war on terror"' (2006-2007) 10 *Gonzaga Journal of International Law* 72.

<sup>27</sup> A good example is the case of Khaled El-Masri. It was proved that the CIA participated in the abduction and transfer of El-Masri from Skopje to a secret detention facility in Kabul Afghanistan. He was held for a period of four months before the CIA realised they could not bring any charges against him. He was subjected to solitary confinement for several weeks. He was eventually blindfolded and flown to Europe, where the captors drove around with him for several hours in order to confuse his sense of location. They eventually stopped and instructed him to get out of the vehicle and walk down an unpaved road in the dark in mountainous terrain. He was also instructed not to look back. He feared for his life and thought he would be shot in the back, but the captors merely drove off and left him there. Three years after his ordeal his case was still being investigated extensively (see Marty (n 21) 51). El-Masri's civil suit against the U.S. was eventually rejected on grounds of state secrecy, with the result that he



In light of the above, extraordinary rendition is clearly not just a singular term to define one illegal act, but rather an entire process comprising a concatenation of interlocking phases that individually and collectively contribute to the illegal nature of extraordinary rendition as a whole, that is to say, each phase is fraught with illegality in its own right and confirms and compounds the illegality of the whole. It cannot be reduced to a single act, but is a process comprising of a complex series of illegal acts.

The difference between traditional expulsion (e.g. deportation) and rendition is that the latter is entirely beyond the pale in a dark underworld where the protective framework of the rule of law, international or domestic, and respect for human rights in the international sphere does not apply. This is in contrast to traditional methods, which are clearly defined and subject to legal process.

### 3 General issues created by extraordinary rendition

#### 3.1 Accountability and transparency

In their actions as part of the Global War on Terror (GWOT) the US aimed to manipulate the legal system in order to create a law-free zone where no perpetrator can be held accountable for its actions.<sup>28</sup> The US has captured, detained and subjected persons to torture on vapid to non-existent evidence beyond bland claims that they were suspected of terrorist activity and had been detained as part of the GWOT.<sup>29</sup>

Purported diplomatic assurances are without legal substance because the nefarious actions of extraordinary rendition are conducted in secrecy.<sup>30</sup> The individual's interests are disregarded because the sending and receiving states both have a vested interest in keeping the rendition secret.<sup>31</sup> The US wants to keep its illegal activities *vis-a-vis* putative suspected terrorists secret while the receiving state does not want its collusion with the US and its violation of its non-refoulement obligations to become public knowledge.<sup>32</sup>

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cannot hold anyone accountable for the ordeal he suffered (see further Marty (n 21) 54). The writer agrees with Rapporteur Marty's statement that to continue to invoke state secrecy doctrine years after the event is unacceptable in a democratic society (implies an adversarial relationship between the state and its subjects). He also argues that state secrecy cannot conceal criminal acts or acts of gross human rights violations (see further Marty (n 21) 55).

<sup>28</sup> Sadat (n 1) 1226.

<sup>29</sup> Ibid 1211.

<sup>30</sup> Satterthwaite (n 11) 1393.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

### 3.2 *Secret facilities and arbitrary detention*

After 9/11, the Central Intelligence Agency (CIA) was given the authority to transport individuals suspected of being terrorists to foreign governments for interrogation without the prior approval of the US Department of Justice.<sup>33</sup> Since 2006, reports have circulated that detainees captured in the GWOT were being held at Guantanamo Bay, Abu Ghraib prison in Iraq, Bagram Air Force base in Afghanistan and that some were even being held at sea.<sup>34</sup> It has also been reported that 70%-90% of the detainees at the Abu Ghraib facility in Iraq were arrested in error.<sup>35</sup>

### 3.3 *Disrespect for the rule of law*

The purpose of the rule of law is to ensure that no individual or entity, public or private (including a state) is above the laws publicly promulgated and enforced, and these laws are consistent with international human rights.<sup>36</sup> Extraordinary rendition violates international laws and international human rights by creating an extra-legal means of capturing, detaining and subjecting suspected terrorists to torture.<sup>37</sup> It is clearly unlawful, but manages to escape active sanction by exploiting legislative *lacunae* and taking action that circumvents and prevents the administration of justice as would happen in the normal course.<sup>38</sup> Various international instruments exist that enunciate the rules of international law.<sup>39</sup> Some of these instruments embody rules of customary international law (i.e. the Geneva Conventions<sup>40</sup> and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment

<sup>33</sup> Ibid 1344.

<sup>34</sup> Sadat (n 11) 309.

<sup>35</sup> Sadat (n 1) 1245; M Eppinger, 'Reality check: Detention in the war on terror' (2013) 62 *Catholic University Law Review* 325, 355-356.

<sup>36</sup> Compare definition in J Scholtes, 'Smart power in action - A rule of law Judge Advocate's reflections from Basrah, Iraq' (2011) 44 *Creighton Law Review* 1091, 1096.

<sup>37</sup> Sadat (n 1) 1205.

<sup>38</sup> Satterthwaite (n 11) 1333.

<sup>39</sup> For example: the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions (GCs) consisting of Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II), Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT).

<sup>40</sup> Hereafter referred to as "the GCs".

or Punishment (CAT)).<sup>41</sup> Infringements of these rules therefore constitute a grave breach of the rule of law irrespective of the status or identity of the perpetrator.

### 3.4 Torture

The prevalence of torture<sup>42</sup> in cases of extraordinary rendition has earned it the alternative ominous labels of ‘outsourcing torture’<sup>43</sup> and ‘torture by proxy.’<sup>44</sup> It is important to note that the US does not refer to interrogation techniques practised by its operatives as torture, ill treatment or even cruel, inhuman or degrading treatment, but euphemistically as ‘enhanced interrogation techniques.’<sup>45</sup> Torture is prohibited by CAT, which was also signed and ratified by the US and various African states that aided the US.

### 3.5 Further issues created by extraordinary rendition

In extraordinary rendition cases people are sometimes captured in a state other than the US and transferred to a third state.<sup>46</sup> The state in which the individual is captured is either aware or unaware of the event (but perhaps they just do not publicly admit to such knowledge).<sup>47</sup> However, should the state be unaware of the capture this would be an infraction on state sovereignty.<sup>48</sup>

A further issue is that the US has argued that the GWOT is a new kind of war and therefore international humanitarian law and other international human rights instruments do not apply to it. International scholars do not agree that the GWOT

<sup>41</sup> Sadat (n 11) 320.

<sup>42</sup> The term ‘torture,’ in this context, refers to ill treatment of such severity that, in the writer’s opinion, it constitutes torture. However, there are various opinions as to what degree of severity of ill treatment would actually constitute torture and what would merely constitute cruel, inhumane and degrading treatment and/or punishment. The case law will be discussed in this paragraph, and these issues will be addressed.

<sup>43</sup> Weissbrodt and Bergquist (n 11) 593.

<sup>44</sup> Satterthwaite and Huckerby (n 12) 15, Hasbargen (n 20) 90.

<sup>45</sup> M Garcia, ‘Interrogation of detainees: Requirements of the Detainee Treatment Act’ (2009) *Congressional Research Report for Congress* 1-2.

<sup>46</sup> Sadat (n 1) 1225.

<sup>47</sup> Ibid.

<sup>48</sup> **State sovereignty is protected by international law, which therefore also dictates the conditions, including the limits, which rule its existence.** According to the principle of state sovereignty, a state has the right to exercise jurisdiction over its territory and its permanent population and the right to armed defence of its territorial integrity in certain circumstances. It does not, however, have the right to interfere in the internal affairs of other states, except when they violate basic human rights. Compare M Shaw, *International law* (Cambridge University Press 2008) 212.

falls in a legal vacuum and as such the US is free to act as they please.<sup>49</sup> There are four schools of thought regarding the applicability of international humanitarian law (IHL).<sup>50</sup> First, that IHL may not apply to the GWOT, but that international human rights laws still apply. Second, that although it might not be best suited, it is best to view the GWOT as a non-international armed conflict and therefore the rules applicable to non-international armed conflicts should apply. Third, that the GWOT should be judged on a case-by-case basis to ascertain which laws would be applicable to each situation. Lastly, that it is in fact a new type of war to which new rules should apply.

In view of post-9/11 events, the following descriptions seem to offer possible rationales for classification of the GWOT:

- a) It is an undeclared armed conflict in which the US and its allies are engaged in seeking out perpetrators in Afghanistan who engage in acts of terror, and in mounting retaliatory exercises calculated to neutralise said perpetrators according to military intelligence.
- b) It is an undeclared armed conflict in which the US and its allies engage in military operations against the former Taliban regime.
- c) It is a non-international armed conflict, originally waged in Afghanistan between the Taliban and its domestic rivals, but was internationalised in due course by a combined intervention mounted by the US and its allies in 2001.
- d) It is an undeclared international armed conflict in which the US and its allies conduct military operations against Al Qaeda, a non-state entity, aiding the Taliban.
- e) It is an undeclared international armed conflict in which the US and its allies conduct military operations against a range of non-state entities and individuals targeted as terrorist groups or individuals in accordance with military intelligence.
- f) It subsists in continual crime control activities conducted against international terrorists with metaphorical use of “war” rhetoric.<sup>51</sup>

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<sup>49</sup> Satterthwaite (n 11) 1404.

<sup>50</sup> Ibid.

<sup>51</sup> Fitzpatrick (2003) 249.

Scholars supporting the position that the GWOT is neither an international nor a non-international armed conflict<sup>52</sup> disagree with the general view that the GWOT by its nature cannot be subject to rules of any kind.<sup>53</sup> In contrast, the Bush administration held that extraordinary rendition could not be unlawful since it took place outside the US<sup>54</sup> and was implemented by governments that gave assurances that detainees held within their precincts would be treated humanely. The US under Bush steadfastly held immovably that the GWOT was a new kind of war entailing actions that were not readily classifiable according to received views concerning warfare.<sup>55</sup>

In other words, the US position under Bush can be summed up as a thinly veiled demand for a licence to engage in lawlessness, or put differently, to be a law unto itself. Some scholars argue that it is important not to define the GWOT as war and treat Al Qaeda operatives as combatants because this elevates them to be more than mere criminals, thereby securing elevated protections within the framework of IHL.<sup>56</sup>

The crux of the whole matter, finally, is that even if the GWOT is a new type of war and the traditional dimensions of warfare have evolved or expanded, it is still a war. Whether it is an undeclared new type of war or an armed conflict under IHL, some basic legal principles remain in force, regardless of them being subsumed under IHL or IHRL. The advocacy of what effectively amounts to a state of licence is therefore baseless.

#### **4 Attributing responsibility to African governments for their role in extraordinary rendition**

The responsibilities of African states (as with any other state) under international law with regard to extraordinary rendition include:

- (i) **Taking care not to assist a process of extraordinary rendition knowingly or otherwise.** Since assistance will be traceable by following the cause-effect linkage to the offence in question the association thus aris-

<sup>52</sup> Satterthwaite (n 11) 1412.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 1419-1420.

<sup>55</sup> J Waldron, *Torture, terror, and trade-offs: Philosophy for the White House* (Oxford University Press 2010); Satterthwaite (n 11) 1419-1420.

<sup>56</sup> M O'Connell, 'When is a war not a war? The myth of the global war on terror' (2005-2006) 12 *International Law Student Association Journal on International and Comparative Law* 535, 538.

ing will result in acts that seem innocuous becoming punishable. For example: refuelling a plane is normally quite unremarkable, but the act, or rather those enabling or conniving at it, will attract criminal liability charges if it transpires that the state concerned knew or should have known in all conscience that the plane was carrying extraordinary rendition victims and would have been unable to make it to its final destination if it did not refuel at the assisting state's airport.<sup>57</sup>

- (ii) To assert jurisdiction over instances of torture if the charge and its pursuit is pursuable within the legitimate area of the countries jurisdiction.<sup>58</sup>
- (iii) To take into custody, investigate and then extradite or prosecute a person who is alleged to have committed acts of torture or was complicit in or participated in such acts.<sup>59</sup>

African governments<sup>60</sup> have been involved in extraordinary rendition in various ways:

- a) Detaining, interrogating, torturing and abusing victims;
- b) Rendering assistance in dealing with the transport and capture of victims;
- c) Permitting the use of domestic airspace and airports for secret flights transporting victims of extraordinary rendition;
- d) Providing intelligence leading to the extraordinary rendition of victims;
- e) Interrogating individuals secretly held in the custody of other governments;
- f) Failure to protect individual persons from extraordinary rendition within the bounds of their territory; and

<sup>57</sup> All Parliamentary Group on Extraordinary Rendition *Briefing: Torture by proxy: International law applicable to 'extraordinary renditions'* (December 2005) 13. African countries that assisted with refuelling and use of airspace and/or airports included South Africa, Algeria, Libya, Egypt and Malawi. See Singh (n 2) 65-100.

<sup>58</sup> All Parliamentary Group on Extraordinary Rendition (n 58) 13.

<sup>59</sup> Ibid.

<sup>60</sup> Although the focus here is on African governments, a total of 54 foreign governments have been identified as participating in extraordinary renditions and these include: Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Iceland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, UK, Uzbekistan, Yemen and Zimbabwe. See further Singh (n 2) 6.

- g) Failure to conduct effective investigations critically aimed at the conduct of officials and agencies that have participated in extraordinary renditions.<sup>61</sup>

Human rights organisations have tried to create a diligent list of persons who have disappeared as a result of extraordinary renditions, but the numbers remain a mystery.<sup>62</sup> These numbers remain undocumented because victims are forced into silence by threats, brutality, torture, and fear for their own and their families' safety.<sup>63</sup> Many have been silenced by death at the hands of their captors.<sup>64</sup> To date only one case has been brought against an African government for its part in the extraordinary rendition of a Pakistani national, Khalid Rashid, from the Waterkloof Air Force Base in South Africa.

Khalid Mehmood Rashid was arrested at his home in Kwazulu-Natal, South Africa, on charges of being an illegal alien, whereupon he was handed over to putative Pakistani officials.<sup>65</sup> The South African Government did not obtain assurances of compliance with international human rights conventions with regard to his possible treatment in captivity in the receiving country.<sup>66</sup> The High Court upheld the irregular transfer of Khalid Rashid and declared that the Government could not be expected to gain assurances for all transfers.<sup>67</sup>

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<sup>61</sup> Singh (n 2) 6, 65-95.

<sup>62</sup> Hasbargen (n 20) 81.

<sup>63</sup> Ibid 82.

<sup>64</sup> Ibid.

<sup>65</sup> *Jeebhai v Minister of Home Affairs and another* 2007 (4) ALL SA 773 (T) at 774. 'A story of extraordinary rendition from South Africa' (March 14 2006) <<http://www.indymedia.ie/article/74841>> accessed 21 July 2014; see also Strumpf and Dawes, 'Khalid Rashid: Govt's cover is blown' *Mail and Guardian* (9 June 2006).

<sup>66</sup> Pakistan is a country known to be amenable and inclined to the practice of torturing persons in captivity (including children); therefore assurances should have been secured. Pakistan is included among the 'torture countries' identified by Human Rights Watch. Pakistani police officials are known for abducting individuals and resorting to torture to extract information, for example, to secure a confession in criminal investigations, but certainly also as a routine measure to gain military intelligence. Children have been tortured in order to obtain confessions or information from their parents. During 2003, hundreds of children were detained in torture cells where they were stripped and whipped in order to coerce information. See also A Hasan, 'Soiled hands: The Pakistan army's repression of the Punjab farmers' movement' (2004) 16 *Human Rights Watch* 28.

<sup>67</sup> The Court held that '...[t]he prayer sought, namely, that the South African Government be ordered to intervene as Rashid could be facing a death sentence, cannot be granted if the authorities were not aware of those facts. It cannot be that the duty arises in respect of every person deported without such prior knowledge; this would be unworkable. All the authorities knew that he was being taken back to his own country. As it is, it can be argued that on Mohamed's judgment, all that a person anywhere in the world facing capital crimes in their country need to do is to come to South Africa, even illegally, and receive insurance against the death penalty. It follows that Rashid's deportation cannot be declared invalid for

This High Court decision was overturned by the Supreme Court of Appeal,<sup>68</sup> which held that Rashid's detention and deportation was in fact unlawful,<sup>69</sup> but that his illegal deportation was not a crime against humanity as it did not suit the definition given by the Rome Statute.<sup>70</sup> Although the appeal judgment addresses some issues created by the High Court judgment, it does not grant satisfactory relief to the victim.

Rashid was rendered to Pakistan on 6 November 2005. On 6 June 2006, his whereabouts was still unknown. Later it became known that he was released from custody during December 2007. This is two years after his arrest and disappearance. The appeal judgment was only handed down in March 2009, which is more than three years after the incident occurred and more than two years after his release.

Contrary to the African example, some countries believe that perpetrators of extraordinary rendition should be held accountable for the varying degrees in which they participated in this phenomenon. Sweden, for example, conducted an investigation into extraordinary rendition and found that the European security services colluded with the US to execute extraordinary renditions and gave the US full discretion to act at will within the bounds of European territory despite total prohibition by the Council of Europe of the activities perpetrated there with the full knowledge of the said services.<sup>71</sup>

Shortly after the above, Germany launched an investigation into extraordinary renditions and requested the extradition of thirteen CIA officials, but pressure from the US ended the inquiry.<sup>72</sup> Italy also convicted 21 CIA officials and imposed five-year sentences for the extraordinary rendition of Abu Omar. Charges against three others were dropped due to their diplomatic immunity. On being convicted these individuals fled the country and are fugitives from Italian law.<sup>73</sup> This is the

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the reason that the South African authorities did not extract an undertaking from the Pakistani Government that his life would not be in danger. Such a duty cannot routinely exist in respect of every deportee. Rashid was sent back to his own country.' See *Jeebhai* (2007) (T) 773.

<sup>68</sup> *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) handed down 31 March 2009.

<sup>69</sup> *Ibid* para 53.

<sup>70</sup> *Ibid* para 50.

<sup>71</sup> R Bejesky, 'Sensibly construing the "more likely than not" threshold for extraordinary rendition' (2013-2014) 23 *Kansas Journal of Law and Public Policy* 221, 256-257.

<sup>72</sup> *Ibid* 257.

<sup>73</sup> I Fisher and E Povoledo, 'Italy seeks indictments of CIA operatives in Egyptian's abduction' (5 December 2006) *The New York Times* Sabrina de Sousa who was one of the CIA operatives convicted *in absentia* stated the following: 'Clearly we broke the law, and we're paying for the mistakes right now of whoever authorised and approved this... I was a representative of this Government, and I should have



only known example of a conviction of officials by a state for their involvement in extraordinary rendition. It should be noted too in this regard that Canada is the only country to issue a public apology to a victim of extraordinary rendition, namely Maher Arar.<sup>74</sup>

Australia, Canada and the UK have all settled claims with former Guantánamo Bay detainees rather than risk divulging state secrets of their own, or of the US.<sup>75</sup> It should be borne in mind here that an element of coercion helped to persuade the UK authorities to join the US in settling claims. The coercive measure, emanating from the US, was its threat to reduce intelligence sharing with the UK if courts in that country were to ‘spill the beans’ by revealing US State secrets in any way.<sup>76</sup> In *US v Khadr*<sup>77</sup> a Canadian court refused to extradite a suspected terrorist to the US due to the treatment he suffered at the hands of the US in Pakistan.<sup>78</sup>

In 2012, the European Court of Human Rights handed down the landmark judgment concerning the extraordinary rendition of Khalid El-Masri.<sup>79</sup> The Court found that El-Masri established his version of events beyond reasonable doubt<sup>80</sup> and further found the Government of Macedonia guilty of several violations of the European Convention on Human Rights (ECHR). The Court held that the Macedonian Government was responsible for his abduction and transfer to the CIA when there was good cause to believe he would be tortured.<sup>81</sup> The Court also held that

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been protected.’ See further Bejesky (n 72) 258.

<sup>74</sup> Singh (n 2) 6.

<sup>75</sup> Australia and the UK in the context of confidential settlements. See further Singh (n 2) 62; K Roach, ‘Substitute justice? Challenges to American counterterrorism activities in non-American courts’ (2013) 82 *Mississippi Law Journal* 907, 910.

<sup>76</sup> Roach (n 76) 910.

<sup>77</sup> *US v Khadr* (2011) ONCA 358 *Court of Appeal for Ontario*.

<sup>78</sup> *Ibid* para 24.

<sup>79</sup> *El-Masri v The Former Yugoslav Republic of Macedonia* (13 December 2012) European Court of Human Rights Application no 39630/09.

<sup>80</sup> *Ibid* para 167.

<sup>81</sup> It found that the applicant had been tortured and ill-treated and that the burden of responsibility would therefore have to be borne by the respondent state for having transferred him deliberately to the custody of the CIA despite substantial reasons to believe that he might be subjected to treatment contrary to Article 3 of the Convention. It also found that the applicant was detained arbitrarily, contrary to Article 5. The respondent State also failed to carry out an effective investigation as required under Articles 3 and 5 of the Convention. In addition, the Court found that the applicant’s rights under Article 8 had been violated. Lastly, it found that responsibility devolved on the respondent state for having failed to provide an effective remedy within the meaning of Article 13 of the Convention for the applicant’s grievances on grounds submitted in terms of Articles 3, 5 and 8, in consideration whereof the Court found that the applicant had suffered non-pecuniary damage that could not be made good on grounds of a violation alone. See further *El-Masri* (n 80) para 269.

El-Masri's treatment at the Skopje hotel was a violation of Article 30 of the ECHR. The treatment of El-Masri when he was handed over to the CIA was a violation of Article 7. The treatment was imputable to Macedonia as it was carried out in the presence of its representatives who failed to prevent the action and was therefore held responsible in the matter.<sup>82</sup>

This is a landmark ruling because it is the first international ruling to the effect that extraordinary rendition amounts to torture.<sup>83</sup> The further fact that the Court held Macedonia responsible for the ill treatment of El-Masri at the hands of the CIA has definite implications for other governments that connive at or aid and abet extraordinary rendition.<sup>84</sup>

The scope of this thesis does not allow a comprehensive account of foreign governments' involvement in extraordinary rendition. Hence, the account presented here will be confined to a select few.

## 5 Brief case studies from the African continent

### 5.1 Algeria

Algeria permitted the use of its airspace and airports in aid of US extraordinary rendition flights.<sup>85</sup> It was also implicated in the detention of former CIA detainees Jamaldi Boudra and Abu Nahr Muhammed Boulghiti.<sup>86</sup> Stopovers were also made at Algerian airports during the illegal transfers of infamous extraordinary rendition victims Binyam Mohamed and Khaled El-Masri.<sup>87</sup>

### 5.2 Egypt

The first notable agreement the US concluded with a foreign government was to enlist Egypt's assistance in capturing and rendering terrorist suspects on

<sup>82</sup> 'The respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring.' See further *El-Masri* (n 80) para 211.

<sup>83</sup> Orpizewska M, '*El Masri v Former Yugoslav Republic of Macedonia*: Implications for the CIA extraordinary rendition program' (2014) 39 *North Carolina Journal of International Law and Commercial Regulation* 1165, 1167.

<sup>84</sup> *Ibid.*

<sup>85</sup> Singh (n 2) 67.

<sup>86</sup> *Ibid.*

<sup>87</sup> Grey (n 2) 81, Singh (n 2) 67.

behalf of the US.<sup>88</sup> It is believed, too, that Egypt may have been made the ally of choice in this nefarious scheme on grounds of its reputation for subjecting its subjects to torture.<sup>89</sup> It is alleged that Egypt embraced the idea as the US could apparently assure the capture and transportation of the suspects to Egypt, at its expense.<sup>90</sup> Considering these alluring benefits, and since Egypt was eager to capture Egyptians implicated in Al Qaeda activities,<sup>91</sup> the authorities in that country seemed eager to participate. Although US law requires an assurance that suspects will not be subjected to torture in the country they are being rendered to,<sup>92</sup> no written evidence to this effect exists.<sup>93</sup> Individuals extraordinarily rendered to Egypt included Mohammed Omar Abdel-Rahman, Ahmed Agiza, and Abu Omar.<sup>94</sup>

### 5.3 Ethiopia

Mohammed Ali Isse was extraordinarily rendered to Ethiopia by the CIA and subsequently detained and subjected to electric torture by Ethiopian interrogators.<sup>95</sup> Other African governments involved in US extraordinary renditions include Kenya, Libya, Malawi, Gambia, Somalia, Zimbabwe, and Djibouti.<sup>96</sup>

## 6 General issues with accountability of states

Due to the hybrid nature of extraordinary rendition, it has proven to be difficult to hold states accountable for their various roles in this practice. At this point

<sup>88</sup> Singh (n 2) 14.

<sup>89</sup> Johnston (n 16) 364.

<sup>90</sup> J Mayer, 'Outsourcing torture: The secret history of America's "extraordinary rendition" program' *The New Yorker* (14 February 2005) 106 at 109.

<sup>91</sup> Mayer (n 90) 109.

<sup>92</sup> Section 2242 of the *Foreign Affairs Reform and Restructuring Act* of 1998, Public Law 105-277, which states that: 'It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.' Also see Mayer (n 91) 107.

<sup>93</sup> Former CIA counter-terrorism agent, Michael Scheuer, told reporter Jane Mayer that the assurances were sought, but he was "not sure" whether any documents confirming the arrangement were signed. See Mayer (n 90) 109.

<sup>94</sup> Singh (n 2) 77.

<sup>95</sup> P Salopek, 'Nobody is watching, America's hidden war in Somalia' *Chicago Tribune* (24 November 2008); Singh (n 2) 78.

<sup>96</sup> Singh (n 2) 65-105.

it is important to consider that there is no official legal definition for extraordinary rendition in international law.<sup>97</sup> As already explained, extraordinary rendition is clearly not conformable to a unitary concept of a clear-cut, indivisible illegal act; rather it comprises a concatenation of interlocking phases that individually and collectively contribute to the illegal nature of extraordinary rendition as a whole; that is to say, each phase is fraught with illegality in its own right and confirms and compounds the illegality of the whole.<sup>98</sup> It cannot be reduced to a single act but is a process comprising a multi-stranded, multi-phased fabric of illegality.

There is also the further issue of applicable legal regimes. Which legal regime should be taken as definitive in formulating a description of and criminalising extraordinary rendition?<sup>99</sup> At this stage it is common cause that the actions and procedures constituting extraordinary rendition infringe various international laws and principles, but that the complex nature of the phenomenon and the various intricate legal arguments adduced by the US on the applicability of legal regimes cast a cloud of uncertainty over the issue and thus leave it unresolved.

The gist of the latest argument regarding legal regimes is that the GWOT is a new kind of war requiring new rules and conformity to new parameters of warfare, thus voiding at once whatever legal regimes were hitherto applicable. In light of the above, the fundamental question is: Can extraordinary rendition be criminalised and should contributing state actors be held accountable? An act has to be duly defined to be criminalised. Defining a crime as a series of phases makes it almost impossible to even start considering prosecution. Apart from these elemental issues the more pressing issue is agreeing on a definition. Judging from the interminable wrangling over a definition of the crime of aggression, it seems likely that ‘the law’s delay’ will assert itself once more in an indefinite time lapse if the same exercise had to be repeated for a new crime.

Presupposing that the obstacles of formulating a consensual definition were overcome, would the crime thus formulated and agreed upon be a new crime, or would it be categorised under one of the existing International Criminal Court (ICC) crimes? Even if it were a viable assumption that extraordinary rendition could be classified as a crime under the Rome Statute of the ICC (Rome Statute), how would jurisdiction for its prosecution be vested? Most of the African states listed in this chapter are state parties to the Rome Statute. However, if the recent events concern-

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<sup>97</sup> See (n 15).

<sup>98</sup> See paragraph 2 in general.

<sup>99</sup> See paragraph 3.5.

ing Omar Al Bashir are any indication of African commitment to international laws and policy, this argument is moot.

Furthermore, should extraordinary rendition be properly defined as a crime and participating government actors were to be held accountable before the ICC, how would the ICC prosecute the crime? There is no clear line of evidence due to the smokescreen behind which this crime is committed. How will it pass the gravity test of the ICC if there is no evidence to present?

Consideration should also be given to the multi-phased, multi-stranded nature of the illegalities comprising extraordinary rendition. Would the various elements of criminality be prosecuted as separate crimes? Would this procedure unduly strain the legal process? Even so, how would the *nexus* and the *actus reus* be determined for a crime that consists of various crimes and that is committed over an extended period of time? There is no causal link, no crime scene and no evidence.

In light of all the above and counting the many variables and uncertainties involved, it would clearly be a formidable task to seek and obtain legal redress for extraordinary rendition.

## 7 Conclusion

African government participation in extraordinary rendition directly contributes to the host of international legal issues created by this practice which includes torture, detention without trial, denial of legal representation, enforced removal from public view and normal surrounds, forcible transfer, arbitrary arrest, and the absence of assurances from receiving states, to name but a few. Therefore African governments are just as responsible for the effects of extraordinary rendition as the main culprit, the US.

However, as mentioned above in paragraph 4, only a handful of states have taken responsibility for their part in extraordinary rendition. Most of the African governments involved have made no effort to hold anyone accountable for the atrocities committed.

Referring to paragraph 6, it is clear that there is a multitude of difficulties to be addressed in order to attribute accountability to states for the practice of extraordinary rendition and to hold their government actors accountable under international law. Furthermore, due to all the challenges discussed in paragraph 6, subjecting state actors to the jurisdiction of the ICC seems to be impossible at this stage.

Africa stands to learn a valuable lesson from Sweden, Italy, Canada and the UK and should proceed to handle these matters within its own jurisdiction. In this regard there are two possible options that may grant interim solutions to vesting individual criminal responsibility in Africa.

The first option would be to consider the Malabo Protocol.<sup>100</sup> This Protocol provides for the creation of a criminal jurisdiction within the existing African Court of Justice and Human Rights, thus providing for jurisdiction over a host of international crimes as well as important regional and transnational crimes. Therefore, the Court will have jurisdiction over the four core crimes in the Rome Statute<sup>101</sup> as well as other crimes specifically provided for in articles 28A through 28M.<sup>102</sup>

Article 28C deals with crimes against humanity and includes the crime of enforced disappearances.<sup>103</sup> Although it is not recommended that extraordinary rendition be pulled under the blanket of enforced disappearances<sup>104</sup> this may be a temporary means of attributing individual criminal responsibility to African citizens guilty of assisting in one or more facets of extraordinary rendition.

The issue here would be the fact that this Protocol requires ratification from fifteen member states of the African Union in order to enter into force.<sup>105</sup> Therefore, the actual prosecution through this means would have to wait until the Protocol enters into force.

A further issue would be Article 46*Abis*, which effectively grants immunity to heads of government and senior government officials during their tenure of office. Taking the nature of extraordinary rendition into account the guilty parties would more often than not be either senior government officials or, at least in some capacity, heads of government. Therefore, this would make attributing individual criminal responsibility difficult.

<sup>100</sup> The 23<sup>rd</sup> Ordinary Session of the African Union Malabo *Press Release 18/23<sup>rd</sup> AU Summit* at <[http://summits.au.int/ar/sites/default/files/PR%2018%20-%2023rd%20AU%20Assembly%20ends%20in%20Malabo%20\(3\).pdf](http://summits.au.int/ar/sites/default/files/PR%2018%20-%2023rd%20AU%20Assembly%20ends%20in%20Malabo%20(3).pdf)> accessed 28 September 2015).

<sup>101</sup> Rome Statute of the International Criminal Court (1998). The crimes are: genocide, war crimes, crimes against humanity and the crime of aggression.

<sup>102</sup> Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights (15 May 2014) *First Meeting of the Specialised Technical Committee on Justice and Legal Affairs 15-16 May 2014 Addis Ababa Ethiopia* at <[https://www.iccnw.org/documents/African\\_Court\\_Protocol\\_-\\_July\\_2014.pdf](https://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf)> accessed 29 September 2015).

<sup>103</sup> Draft Protocol (n 103), art. 28C(1)(g).

<sup>104</sup> See (n 15).

<sup>105</sup> Draft Protocol (n 103), art. 11(1).

The second option would be to consider domestic jurisdictions. Most of the African countries discussed in this chapter have ratified a number of important international instruments dealing with issues such as torture, safety and security of persons, abduction etc. The individuals responsible for assisting in extraordinary rendition could be held accountable by their governments through domestic judicial systems. Although extraordinary rendition is a multi-phased and multi-stranded phenomenon that combines various crimes,<sup>106</sup> those aiding and abetting could be prosecuted for the specific elements of extraordinary rendition they are accused of aiding in. This may range from torture to aiding in abductions.

The difficulty with this option is the risk that the gravity and severity of extraordinary rendition as a hybrid theory<sup>107</sup> may be undermined by breaking it up into singular crimes. Therefore, this approach would not be advised as a permanent global solution to extraordinary rendition. The US as the main culprit, and some governments assisting with various facets of extraordinary rendition, must still be held fully accountable for it once a proper definition has been drafted and it has been properly criminalised. This option is merely explored as a temporary solution to attributing individual criminal responsibility to those governments that have assisted the US in one way or another. Pending the establishment of a solid means to prosecute guilty parties under the jurisdiction of the ICC, African states should, in the meantime, hold true to their commitments to promote and enforce international laws by holding those within their jurisdiction accountable for their crimes, either through domestic enforcement or through exploring possible options in the context of the Malabo Protocol.

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<sup>106</sup> See paragraph 2 of this chapter.

<sup>107</sup> See paragraph 2 of this chapter.





# THE INTERNATIONAL CRIMINAL COURT AND THE FIGHT AGAINST IMPUNITY IN AFRICA: CURRENT CHALLENGES\*

EUGÈNE BAKAMA BOPE\*\*

## Abstract

*By establishing the International Criminal Court (ICC), the member state parties to the Rome Statute of the ICC (Rome Statute) were determined to end impunity for perpetrators of the most serious crimes of concern to the international community and thus to contribute to the prevention of such crimes. In order to measure the impact of the ICC, particularly in Africa, it is necessary to consider the current and concrete obstacles faced by the Court in its mission to put an end to impunity. This paper addresses this question by focusing on the Office of the Prosecutor (OTP). It investigates the OTP's work on the ground and specifically in the Democratic Republic of the Congo (DRC) and compares the results of the OTP's work with the expectations and needs of African victims.*

*Following initial investigations, prosecutions and trials, the strategy adopted by the OTP has elicited several criticisms. Consequently, the Prosecutor reviewed and adapted its strategy. However, further efforts are needed in order to make the Court effective. It must also be remembered that the efficiency of the ICC is dependent on the support of states parties and the relationship with other actors in the region.*

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\* This contribution has been translated from the original French.

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## 1 Introduction

The International Criminal Court (ICC or the Court) was established to fight impunity<sup>1</sup> and to contribute to the prevention of the most serious crimes of international concern. Within the ICC, the Office of the Prosecutor (OTP) is the real linchpin in the fight against impunity, to the extent that it holds the responsibility of conducting investigations and initiating prosecutions.<sup>2</sup>

The coming into force of the Rome Statute of the ICC (Rome Statute), on 1 July 2002, raised several expectations, especially in Africa, where 34 states accepted this permanent court charged with trying ‘the most serious crimes of international concern.’<sup>3</sup> The jurisdiction of the Court is based on the principle of complementarity. This is one of the unique features of the ICC, which entrusts member states with the primary responsibility of conducting investigations and instituting proceedings for international crimes committed within their territories.

The intention of the ICC is not only to reduce impunity in respect of international crimes, but also to act on behalf of victims by enabling them to participate in judicial proceedings and by way of reparations. The Trust Fund for Victims<sup>4</sup> was created for purposes of implementing orders for payment of reparations issued by the Court and also to assist victims and their families.

In 2004, Kofi Annan noted that ‘the Court already has a big impact by playing the role of a catalyst in the adoption of national laws against serious international crimes.’<sup>5</sup> It is clear that by virtue of its existence the Court has encouraged the member states to incorporate the crimes falling under the ICC’s jurisdiction into their national laws. The recourse to these national laws – even before the Court opens its first investigation – constitutes a decisive step in the path towards bringing the perpetrators of atrocities to justice.<sup>6</sup>

<sup>1</sup> Impunity may be defined as ‘the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to make reparations to their victims.’ See D Orentlicher, ‘Report of the independent expert to update the set of principles to combat impunity’ E/CN.4/2005/102/Add.1 of (8 February 2005) 6.

<sup>2</sup> J Mbokani, ‘L’impact de la stratégie de poursuite du Procureur de la CPI sur la lutte contre l’impunité et la prévention des crimes de droit international’ (2008-2009) 7 *Droits Fondamentaux*.

<sup>3</sup> Rome Statute, arts. 1 and 5(1).

<sup>4</sup> Rome Statute, art. 79.

<sup>5</sup> Rapport du Secrétaire général des Nations Unies, S/2004/616 (23 August 2004) 16.

<sup>6</sup> ‘Communication relative à certaines questions de politique générale concernant le BDP’ (September 2003).

All these observations lead to one question: what are the current and concrete obstacles the Court is facing in its mission to put an end to impunity? This paper will try to answer this question in two parts. Part 2 focuses on the strategy of the OTP and its implementation, while Part 3 investigates the work of the OTP in the Democratic Republic of the Congo (DRC).

## 2 Prosecution strategies of the OTP in Africa

As a prosecutorial office within an international legal institution, the OTP faces the reality that it must carry out its investigations abroad. This makes the OTP largely dependent on cooperation from national authorities. In these circumstances, the Prosecutor is often confronted with a lack of cooperation, not only from the national authorities in the territory where the crimes were committed, but also from the local population. Worse still, the OTP is sometimes faced with national rhetoric that is hostile to international prosecutions. It is not uncommon to see public opinion influenced by such rhetoric, which may lead to limited support from within the concerned state(s). Due to the material and political constraints facing the OTP, the issue of the feasibility of investigations and prosecutions is a cardinal factor in the exercise of its duties and responsibilities.<sup>7</sup> In light of the above, the implementation of a prosecutorial strategy that ensures coherent case selection and efficient prosecutions is vitally important.<sup>8</sup>

### 2.1 *Fundamental elements to the OTP's strategy*

#### 2.1.1 Mandate of the ICC

The mandate and jurisdiction of the ICC - as provided for in the Rome Statute – has a fundamental impact on the functioning of the OTP.

First, the Court has jurisdiction over crimes committed within the territory of a state party or by a national of a state party.<sup>9</sup> Nonetheless, the ICC acts on the basis of the principle of complementarity.<sup>10</sup> It encourages proceedings undertaken at the national level, since a matter shall be judged inadmissible before the ICC if national

<sup>7</sup> VJ Goldston, 'More candour about criteria: The exercise of discretion by the Prosecutor of the ICC' (2010) 8(2) *Journal of International Criminal Justice* 395.

<sup>8</sup> *Ibid.* 46.

<sup>9</sup> Rome Statute, art. 12.

<sup>10</sup> Rome Statute, art. 1.

investigations or prosecutions regarding the same conduct and incidents are being conducted at the national level. Thus, the Court shall have jurisdiction only if the State concerned does not have the will or the capacity to conduct these investigations or proceedings.<sup>11</sup>

The principle of complementarity has major consequences for the OTP. Initially, it is this principle that determines whether a matter is admissible to the Court.<sup>12</sup> In plain terms, the principle of complementarity prevents the OTP from choosing from a larger pool of potential situations and cases.<sup>13</sup> The application of the principle of complementarity is illustrated in the case of the arrest warrant issued against Al-Senussi, former Libyan intelligence chief and brother-in-law of Colonel Muammar Gaddafi, where the Court declared the case inadmissible because it was under national investigation by competent Libyan authorities.<sup>14</sup>

Beyond formal complementarity as entrenched in the Rome Statute, the OTP has shown support for the concept of positive complementarity. The measures taken by the Prosecutor to encourage proceedings at the national level include establishing a database and training programs for national prosecutors in order to increase their capacities on the ground.<sup>15</sup> Guinea and Colombia are two examples of the application of positive complementarity. In Colombia, preliminary analyses have played a role in undertaking national investigations and prosecutions concerning crimes committed by mainly paramilitary structures.<sup>16</sup> In Guinea, the Prosecutor's proactive measures favoured national proceedings in response to the crimes committed during the events on 28 September 2009, when Guinean security forces massacred hundreds of opposition party members.<sup>17</sup>

Secondly, the functioning of the OTP is influenced by the method of referral to the ICC. Within the Rome Statute, there are three 'trigger mechanisms'<sup>18</sup> that may activate the jurisdiction of the ICC, namely, referral by the United Nations Security Council (UNSC); referral by the State Party; and the initiation of proceedings *mero*

<sup>11</sup> Rome Statute, art. 17.

<sup>12</sup> Ibid.

<sup>13</sup> Mbokani (n 2) 1.

<sup>14</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi,' (24 July 2014) ICC-01/11-01/11, paras 297-298.

<sup>15</sup> ICC-OTP, 'Communication relative à certaines questions de politique générale concernant le BDP' (2003) 4; Mbokani (n 2) 20.

<sup>16</sup> FIDH, 'Office of the Prosecutor of the ICC - 9 years later' (December 2011), No. 5971, 5.

<sup>17</sup> ICC-OTP, 'Statement to the Guinean Press' (24 May 2010) para 5. See also FIDH (n 16) 20.

<sup>18</sup> W Schabas, 'Prosecutorial discretion versus judicial activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 5.

*motu* by the OTP itself.<sup>19</sup> In the first two cases neither the Prosecutor, nor judges have any discretionary power in respect of the Court's jurisdiction. This may be regarded as an entrenchment of respect for state sovereignty by way of the act of the state referring the matter and deference to the international community (acting collectively through the UNSC).

Experience in relation to self-referrals has shown that investigations have mostly only focused on one party to the conflict.<sup>20</sup> This represents a further *de facto* limitation as regards the scope of the OTP's activities. Some have associated this limitation with a lack of impartiality on the part of the OTP.<sup>21</sup>

In deciding whether or not to initiate an investigation, the OTP considers three factors:<sup>22</sup> whether the information in its possession provides a reasonable basis to believe that a crime falling under the jurisdiction of the Court has been committed;<sup>23</sup> whether the matter would be admissible, which involves assessing the notion of 'gravity';<sup>24</sup> and whether initiation of proceedings would serve the 'interests of justice.'<sup>25</sup> The criteria of 'gravity' and 'interests of justice,' in particular, provide the prosecution with a broad discretion in the exercise of its powers.<sup>26</sup> However, in practice the OTP is restrained by a lack of resources and also by the reality of having to operate regularly in a hostile environment, where its activities may be obstructed.<sup>27</sup> The OTP must therefore choose from among the many situations falling under the jurisdiction of the Court, those cases with a reasonable prospect of producing positive outcomes.<sup>28</sup> It is submitted, however, the OTP can-

<sup>19</sup> Rome Statute, arts. 13, 14 and 15. The prosecutor may also decide that there is simply no case and decide not to prosecute, subject to review of the decision by the Trial Chamber (see Rome Statute, art. 53).

<sup>20</sup> For example, the investigations in Kivu exclusively directed against FDLR. See in this regard Human Rights Watch, 'Un travail inabouti - Des lacunes à combler dans la sélection des affaires traitées par la CPI' (September 2011) 19.

<sup>21</sup> See, for example, Mbokani (n 2) 10, 45.

<sup>22</sup> Schabas (n 18) 6.

<sup>23</sup> Rome Statute, art. 53(1)(a).

<sup>24</sup> Rome Statute, arts. 17 and 53(1)(b).

<sup>25</sup> Rome Statute, art. 53(1)(c).

<sup>26</sup> Concerning the situation in Uganda, Prosecutor Luis Moreno Ocampo declared: "If a solution to end the violence is found and that the proceedings do not appear to serve the interests of justice, then my duty is to stop" « Le Procureur de la CPI prêt à suspendre les poursuites si la paix l'exige », *Agence France Presse*, 16 April 2005 (cited in A Poitevin, 'Cour pénale internationale: Les enquêtes et la latitude du Procureur' (2004) 4 *Droits Fondamentaux* 1).

<sup>27</sup> This was the case in Sudan for example.

<sup>28</sup> I Fassassi, 'Le Procureur de la CPI et le jeu d'échecs' (2014) 3 *Revue de droit international et de droit comparé* 382.

not function on the basis of expected positive outcomes, but rather in terms of its mandate to follow the evidence.

Undoubtedly, the method of referral has an impact on the prosecutions. In light of the principle of complementarity, the large number of crimes committed and the limited resources of the ICC, it is clear that a measure of selectivity is required. The OTP must therefore put in place a well-defined prosecutorial strategy.

### 2.1.2 Operational challenges

In order to conduct investigations and proceedings, the OTP must have access to the territory of the state in question. Though this point seems obvious, the OTP actually may find its access to the territory denied. This was, for example, the case in Darfur.<sup>29</sup> Initially, the Sudanese authorities cooperated with the ICC and authorized the OTP to carry missions in Khartoum<sup>30</sup> in order to determine whether national proceedings had been undertaken. However, when the ICC issued its first warrants of arrest against Ahmad Harun, Assistant Minister in Charge of the Interior, and Ali Kushayb, the head of security and militia leader, all cooperation ceased and the access to the territory was denied.<sup>31</sup> Worse still, after the ICC issued a warrant of arrest against President Al Bashir, he ordered the expulsion of international organisations working to improve the living conditions of the local population in refugee camps.<sup>32</sup> The Sudanese Government also expelled any organisation collecting information on the occurrence of sexual violence in Sudan.<sup>33</sup>

A second operational challenge relates to the search for, and securing of witnesses. In respect of the Sudan conflict, witnesses were often interviewed in refugee camps located in bordering states where there were hardly any structures to hear them and take their testimonies. Even if the structures were there, they were extremely limited and the health conditions were catastrophic.<sup>34</sup> Cases of arbitrary arrests in the camps for internally displaced persons were also reported.<sup>35</sup> Moreover,

<sup>29</sup> ICC-OTP, '15<sup>th</sup> ICC Prosecutor's Report to the Security Council in Application of Resolution 1553 (2005)' (2012) 2.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 10.

<sup>33</sup> The Sudanese Government expelled 13 international NGOs (INGOs) and closed down three national NGOs. See L Tonnessen, 'From impunity to prosecution? Sexual violence in Sudan beyond Darfur' *Noref Report* (February 2012) 3 <<http://www.cmi.no/file/1939-noref-report.pdf>> accessed 9 November 2015.

<sup>34</sup> 'Catastrophic conditions for Sudanese refugees in Chad' *Doctors without Borders* 11 May 2004.

<sup>35</sup> 15<sup>th</sup> ICC Prosecutor's Report (n 29) 11.

during the attempts to put in place national proceedings, threats and acts of torture against some witnesses were reported as well as interferences from security forces.<sup>36</sup>

In the case of Kenya, the issue of witness interference was also problematic and led the prosecution to withdraw the charges against President Kenyatta.<sup>37</sup> The same scenario occurred in the case of Muthaura, the former Head of Public Service and Secretary to the Cabinet,<sup>38</sup> because a key witness's testimony was withdrawn<sup>39</sup> and other witnesses were unwilling to testify for fear of possible repercussions.

A few months later, a warrant of arrest was issued against a Kenyan journalist<sup>40</sup> for perverting the course of justice. Walter Barasa was suspected of bribery or attempted bribery of three prosecution witnesses in the trial of the Deputy President William Ruto. It is said that he promised them money so that they can withdraw from testifying. More importantly, eight witnesses were unwilling to cooperate or declared that they were not ready to testify.<sup>41</sup> As a result, the Prosecutor asked the Kenyan authorities to take the necessary measures to ensure and guarantee security for the said witnesses until they appear in Court.

In the case of the DRC there have also been legal complications with respect to witnesses, particularly in the case of three defence witnesses who participated in the Katanga case and who applied for asylum in the Netherlands. The ICC secured their transfer from the DRC to The Hague, but encountered problems when a Dutch judge denied their request for asylum. This situation illustrates the remaining complications as regards state cooperation with the Court. The use of videoconference technology may be considered as a viable option, but must be done in the presence of a presiding officer for testimonies *in situ*.

Finally, it is very difficult to arrest fugitives without cooperation from governments. At present, nine suspects are still at large. The most famous among them is the current President of Sudan, Omar Al Bashir. The warrants of arrest issued against him in 2009 and 2010 did not prevent him from being elected to public office. Nor did it prevent him from travelling to more than ten states without the fear

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<sup>36</sup> Ibid 10.

<sup>37</sup> See, for example, the fears relating to the safety of witnesses cited in N Kulish and M Simons, 'Setbacks rise in prosecuting the President of Kenya' *New York Times* 19 July 2013.

<sup>38</sup> Ibid.

<sup>39</sup> ICC, 'Statement by ICC Prosecutor on the notice to withdraw charges against Muthaura' (11 March 2013).

<sup>40</sup> 'Evenson: First time arrest warrant has been issued in Kenyan case' *DW* 2 October 2013.

<sup>41</sup> ICC Press Release, 'Ruto and Sang case: Chamber V(a) calls upon eight witnesses to appear and requests the Kenyan Government's cooperation' 17 April 2014.

of being arrested, even though some of these states are parties to the Rome Statute and as such are under an obligation to cooperate with the ICC in respect of his arrest and surrender.

The leader of the Lord's Resistance Army, Joseph Kony, is another infamous fugitive before the Court. His infamy is largely the result of a popularised viral video,<sup>42</sup> which explained his alleged involvement in the enrolment of over 20 000 child soldiers. In view of the pressure from the international community it was reasonable to believe that the warrant of arrest (issued in 2005) was going to be executed. Unfortunately, the lack of cooperation from member states allows him to continue taking part in activities that may amount to war crimes and crimes against humanity.

The difficulties faced by the OTP constitute a real hurdle to international justice. It is, therefore, important that the Prosecutor continuously takes into consideration these challenges and adapts his strategy as the situation demands. However, any strategy will ultimately be ineffective without the cooperation of states.

## 2.2 *Initial strategy of the OTP*<sup>43</sup>

### 2.2.1 Principles of the initial strategy of 2003

The extent and the number of violations of international crimes is such that the OTP is continuously necessitated to make choices regarding the prosecution of crimes. As part of its mandate, the OTP also investigates ongoing conflicts. This has a significant impact on its ability to conduct investigations and obtain evidence.

Since 2003, the OTP's initial prosecutorial strategy – adopted under the first Prosecutor of the Court, Luis Moreno Ocampo – is built around three guiding principles: the principle of complementarity; the principle of targeted investigations and prosecutions; and the principle of 'maximizing the impact of the activities of the OTP.'<sup>44</sup>

<sup>42</sup> See the website of the *Invisible Children* campaign <<http://invisiblechildren.com/kony-2012>> accessed 11 November 2015.

<sup>43</sup> The content of this point is also inspired by the presentation of the Serge Brammertz, Prosecutor of the ICTY, during the third edition of intensive courses on human rights and international criminal law, held on 18 August 2014 in Kinshasa. See Serge Brammertz "Procès pénal international : Stratégies de poursuite des crimes internationaux » in *Recueil des cours intensifs sur les droits de l'homme et le droit international pénal* (March 2015).

<sup>44</sup> ICC-OTP, *Rapport relatif à la stratégie en matière de poursuites* (2006) 6.



The second principle entails that the OTP focuses its efforts only on ‘the most serious crimes and on the people bearing the greatest responsibility.’<sup>45</sup> Accordingly, the OTP selects a limited number of incidents and a limited number of witnesses.<sup>46</sup> This aspect relates to the ‘gravity’ of the crimes that constitutes a condition of admissibility as mentioned above.<sup>47</sup> As such, the OTP has discretionary power in determining the level of gravity. The investigation and prosecution of crimes that do not measure up to the gravity threshold are left to national criminal justice systems. The purpose of this is to limit the number of prosecutions so as to avoid the long proceedings we could observe at the *ad hoc* tribunals.

Concerning the third principle, the OTP aimed to prevent the commission of international crimes. In practice, the dissemination of information in relation to the opening of investigations and the idea of monitoring a situation could play a key role in prevention, since they increase the risk of sanction even before the start of any criminal proceedings.

### 2.2.2 Critical assessment of the initial strategy of prosecution

Following the first investigations, prosecutions and judgments, several critical observations were made in respect to the second and third principles. It was argued that the policy of targeted investigations led to cases that were unrepresentative of all crimes committed. In this regard, Prosecutor Ocampo wanted to avoid long proceedings and justified this choice by highlighting the necessity of taking into consideration the implications of security and safety for the victims of investigations and prosecutions conducted during ongoing armed conflicts.<sup>48</sup>

The prosecution of Lubanga was criticised on the basis that the charges brought against him were formulated too narrowly and were thus not representative enough of the crimes committed in the DRC conflict.<sup>49</sup> In this case, the accused was only prosecuted for recruitment, enrolment and use of child soldiers,<sup>50</sup> which represented only a tiny sample of the crimes committed. The OTP had announced

<sup>45</sup> See Invisible Children (n 42).

<sup>46</sup> Ibid.

<sup>47</sup> Mbokani (n 2) 36.

<sup>48</sup> FIDH (n 16) 10.

<sup>49</sup> Human Rights Watch, ‘CPI: Procès de Bosco Ntaganda pour crimes qui auraient été commis en DRC, Questions et réponses au sujet du procès tenu à la CPI’ (27 August 2015).

<sup>50</sup> *Prosecutor v Lubanga* (14 March 2012) ICC-01/04-01/06, para 1.

that it would add extra charges, but never did.<sup>51</sup> As a result, only a small number of victims were able to participate in the case.

In the *Katanga* case, the charges covered a wider range of crimes, but related to only one incident, namely, the attack on Bogoro Village in 2003. The OTP was criticised for only focusing on this attack when many other, arguably, more serious attacks involving many more victims had taken place.<sup>52</sup> However, the Prosecutor recently<sup>53</sup> implemented a new strategy that has widened the scope of charges.<sup>54</sup>

With respect to the third principle (the goal of prevention), criticisms focused on the idea of prosecuting only those who bear the greatest responsibility for international crimes. The OTP made this part of the strategy official in its ‘Communication in relation to some general policy issues’ of September 2003, and emphasized the need to focus on ‘heads of state or organisations presumed to be responsible for the crimes.’<sup>55</sup> Some observations arising from NGOs and victims’ associations<sup>56</sup> were heard after the first investigations and prosecutions, mainly concerning the trials of *Lubanga*<sup>57</sup> and *Katanga*.<sup>58</sup>

The Rome Statute does not limit the jurisdiction of the Court only to ‘those persons bearing the greatest responsibility.’<sup>59</sup> According to Article 1 of the Statute, personal jurisdiction of the ICC is exercised over ‘the most serious crimes of international concern.’<sup>60</sup> Focusing on perpetrators bearing the greatest responsibility in respect of international crimes is a way of meeting the gravity threshold that is built into the Rome Statute.<sup>61</sup> As William Schabas observes, Pre-Trial Chamber I makes a link between the threshold of gravity and the focus on senior state officers.<sup>62</sup>

According to the Chamber, the additional factor of gravity is composed of three elements: the hierarchical position of the persons; the role they played within

<sup>51</sup> *Prosecutor v Lubanga*, Prosecutor’s information on further investigations (28 June 2006) ICC-01/04-01-06-170.

<sup>52</sup> *Ibid.*

<sup>53</sup> See mainly, *Prosecutor v Sylvestre Mudacumura* (13 July 2012) ICC-01/04-01/12.

<sup>54</sup> ICC-OTP, *Strategic Plan* (June 2012-2015) 6.

<sup>55</sup> ICC-OTP, *Communication relating to certain issues of general policy concerning the OTP of September 2003*, point 2.15.

<sup>56</sup> See, for example, FIDH (n 16) 10 and Security Council, S/Res/1534 (2004), 26 March 2004, para 5.

<sup>57</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06.

<sup>58</sup> *Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>59</sup> Mbokani (n 2) 46.

<sup>60</sup> Rome Statute, art. 1.

<sup>61</sup> Mbokani (n 2) 36.

<sup>62</sup> Schabas (n 18) 12.

the state organs, organizations or armed groups to which they belong; and the role played by these state organs or groups in the perpetration of crimes.<sup>63</sup> As we will see later on, the Appeal Chamber in *Ntaganda* dismissed these criteria without giving its own criteria for determining the gravity threshold.<sup>64</sup> In *Lubanga*, the Chamber was of the opinion that it is only by focusing on these type of individuals (senior state officers), that the deterrent effect of the Court can be maximized, since this sends out a message to other senior state officers that they can escape the attentions of the Court by preventing the occurrence of similar crimes.<sup>65</sup>

In addition to the above, there is also the issue of the compatibility of such criteria with the different modes of responsibility contained in the Rome Statute. For example, the responsibility of the commander as provided under Article 28 of the Statute constitutes a lesser form of criminal responsibility. As a result, the ‘greatest responsibility’ criterion may exclude prosecutions against some commanders.<sup>66</sup>

Additionally, the OTP has been criticised for a lack of coherence in the sense that the Prosecutor did not apply his strategy consistently. For instance, in *Lubanga* and *Katanga* it was alleged that the accused persons were not the ones bearing the greatest responsibility.<sup>67</sup> Those bearing the greatest responsibility of the crimes committed in Ituri would be those who armed and supported the militias, including politicians and soldiers from foreign governments.<sup>68</sup> In this case one is left with the impression that the Prosecutor exercised his discretion with a view to finding an accused that would be ‘accessible’ for the Court.<sup>69</sup>

Finally, the warrants of arrest issued against Bemba,<sup>70</sup> the Vice-President of the Democratic Republic of Congo and Commander-in-Chief of the Movement for Liberation of Congo; against Al Bashir,<sup>71</sup> the current President of Sudan; or even against Gadhafi, the former President of Libya, brought some credibility to the ICC. These indictments removed some of the doubts as regards the capacity of the OTP

<sup>63</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr Thomas Lubanga Dyilo (24 February 2006) ICC-01/04-01/06, para 54.

<sup>64</sup> Ruling of the Appeals Chamber, ruling of 13 July 2006, Judgment on the appeal by the prosecutor against the decision of Trial Chamber I entitled ‘Decision on the prosecutor’s request for the issuance of arrest warrants under Article 58’ para 82.

<sup>65</sup> *Ibid* paras 51-52.

<sup>66</sup> Mbokani (n 2) 36.

<sup>67</sup> See HCDH, *Rapport du projet mapping de l’ONU*, para 1025; Human Rights Watch (n 20) 13.

<sup>68</sup> FIDH (n 16) 13.

<sup>69</sup> *Ibid* 12.

<sup>70</sup> *Prosecutor v Jean Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>71</sup> *Prosecutor v Omar Hassan Al Bashir* ICC-02/05-01/09.

to pursue the most senior state officers, even if the question of their arrest remains problematic.

### 2.2.3 Reconciling the aims of peace and justice

The issue of reconciling peace and justice was raised for the first time between 2006 and 2007 during the peace negotiations in Uganda. A delegation of leaders from Northern Uganda approached the Prosecutor to express their fears that the investigation would harm the peace process. Threats of prosecutions could be an obstacle to the signing of a ‘cease-fire’ agreement.<sup>72</sup> Joseph Kony, against whom a warrant of arrest was issued in 2005, had demanded the cancellation of this warrant of arrest in exchange for signing the peace agreement with Uganda’s Government.<sup>73</sup>

According to the Rome Statute, the Prosecutor shall not initiate an investigation if it does not serve the ‘interests of justice.’<sup>74</sup> Prosecutor Ocampo, while stressing that ‘impunity is not possible,’ stated that he could suspend prosecutions if they ‘do not serve the interests of justice or of the victims,’ adding that the main interest of victims now is their life.<sup>75</sup> The question was whether the effect of prosecutions on peace negotiations is a factor that is included in Article 53, in other words, whether it affects the determination of what is in the ‘interests of justice.’ Ultimately, the OTP argued that the issues of peace and international security were not part of its mandate.<sup>76</sup>

These concerns illustrate the dilemma faced by the Court. The Court must find a way to prosecuting the ‘most serious crimes of concern to the international community’ without taking the risk of creating an environment favourable to the prolongation of conflicts, and consequently perpetuating the commission of new crimes, which goes against the Court’s mandate.<sup>77</sup> In other words, the Prosecutor faces the challenge of reducing the tension between peace and justice.

<sup>72</sup> Poitevin (n 26) 2.

<sup>73</sup> FIDH (n 16) 13.

<sup>74</sup> Rome Statute, arts. 53(1)(c) and 53(2)(c).

<sup>75</sup> Déclaration du Procureur de la CPI et de la délégation de leaders Acholi du Nord de l’Ouganda Press Release ICC-OTP 2005-042-Fr.

<sup>76</sup> ICC-OTP, Policy paper on the interest of justice (2007) 8.

<sup>77</sup> Poitevin (n 26) 2.

### 2.2.4 Sequential approach

According to the sequential approach, the OTP examines other groups to the conflict only after completion of field investigations of a particular group.<sup>78</sup> The OTP's approach of only focusing on one party to the conflict at a time, as it was the case in Ituri,<sup>79</sup> or of announcing the possibility of prosecuting some officials without doing so,<sup>80</sup> has raised questions regarding the impartiality of the ICC.

It has also been argued that such an approach would increase ethnic tensions<sup>81</sup> and the risk of destroying evidence.<sup>82</sup> However, it seems that the OTP has realized the negative impact of this approach and tried to remedy it in the Kenya case by summoning members of the two opposing parties to appear and also by conducting parallel investigations around the two parties.<sup>83</sup>

### 2.2.5 Timeline

Lastly, the excessively long time between the confirmation of charges and the trial stage as well as the extremely long duration of the preliminary examinations in some situations (particularly in Ivory Coast), have been criticized. In respect of preliminary examinations, the delay can be explained by the lack of access to information and evidence (as is the case, for example, in Afghanistan); by an effective implementation of the principle of complementarity; or due to issues related to the jurisdiction of the Court (as is the case, for example, in Palestine).<sup>84</sup> However, it remains hard to explain why the preliminary examinations in Ivory Coast took seven years.

<sup>78</sup> ICC-OTP, Draft policy paper 12-13 (cited in Human Rights Watch (n 20) 22).

<sup>79</sup> In dealing with conflict in Ituri, which had started in 1999, the OTP first arrested Lubanga in 2006. The latter was the leader of *Union des patriotes congolais* (Union of Congolese Patriots), a militia group associated with the Hema ethnic group. In 2007, Germain Katanga, the Chief of Staff of *Forces de résistance patriotiques* in Ituri and a member of Ngiti ethnic community, was arrested. In 2008, Ngundjolo, former Chief of Staff of *Front nationaliste et intégrationniste*, was also arrested. The delay in obtaining different warrants of arrest against the officials of different parties led to criticisms relating to 'selectiveness of justice.' See Human Rights Watch, 'Courting history: The landmark International Criminal Court's first years' (2008) 58.

<sup>80</sup> L Moreno-Ocampo, ICC Prosecutor, Speech to the Assembly of State Parties, New York (30 November 2007) 4. Thus, for example, while he had announced the possibility of prosecuting officials of Ugandan Army, the statement never came to pass and no explanation was given.

<sup>81</sup> Human Rights Watch (n 79) 58.

<sup>82</sup> FIDH (n 16) 23.

<sup>83</sup> *Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC 01/09-01/11 and *Prosecutor v Uhuru Muigai Kenyatta* ICC 01/09-02/11.

<sup>84</sup> *Ibid* 20-21. It is important to note that Palestine has become a state party to the ICC.

## 2.3 General policy of the OTP (2006-2009)

### 2.3.1 Guiding principles

According to the Draft Policy Paper of the OTP of 2006, it appears that there are four principles guiding the OTP in the decision to initiate an investigation, namely, independence, impartiality, objectivity and non-discrimination.<sup>85</sup>

Independence requires an absence of influence from external sources, notably, in the context of cooperation (even considering the quality of that cooperation).<sup>86</sup> The OTP's independence is also expressed through the power it has to open an investigation on its own initiative (as it did in Kenya). Nevertheless, the OTP has a policy that encourages and promotes voluntary referrals from states parties, which referrals remain the most used 'trigger mechanism.'<sup>87</sup>

The question is whether the policy of encouraging voluntary referral complies with the requirements of the principle of independence of the OTP. The answer to this question will actually depend on the choice of incidents and individuals who will be prosecuted. According to Human Rights Watch, it is clear that the 'warrants of arrest issued so far in situations related to a voluntary referral only target rebel leaders.'<sup>88</sup> It is easy to understand why a regime only refers its opponents to the ICC and is very cooperative in respect of those proceedings. In these circumstances the policy of encouraging voluntary referrals inevitably lead to discriminatory prosecutions based on political affiliation. It may violate the principle of non-discrimination.<sup>89</sup>

Impartiality and objectivity are measured not only in the OTP's ability to respect and uphold the presumption of innocence and that of resisting pressure from public opinion, media, victims and even NGOs, but also in its ability to investigate exonerating circumstances, as required by the Rome Statute.<sup>90</sup> As regards the presumption of innocence, the OTP still has work to do concerning the making of potentially prejudicial statements in the media.<sup>91</sup>

<sup>85</sup> General Policy of the OTP, First Draft 1-2 (cited in Human Rights Watch (n 79) 43).

<sup>86</sup> Ibid.

<sup>87</sup> ICC-OTP, *Rapport sur les activités mise en œuvre au cours des trois premières années (juin 2003-juin 2006)*, 12 September 2006, 7.

<sup>88</sup> Human Rights Watch (n 79) 46. Clarification that the case where voluntary referral targets leaders in power is Côte d'Ivoire (Warrant of arrest against Laurent Gbagbo after the disputed elections of 2010).

<sup>89</sup> Mbokani (n 2) 8.

<sup>90</sup> It is the spirit of Article 54(1)(a) of the ICC Statute.

<sup>91</sup> Consider, for example, the statement by Prosecutor Luis Moreno Ocampo cited by Mr. Nkwebe Advocate (Defence Counsel of Bemba): 'I have never lost a case and I don't even think how I am going to

### 2.3.2 Investigation criteria

Three criteria guide the opening of an investigation by the OTP: the existence of a legal basis, admissibility and the interests of justice. Admissibility includes two criteria: complementarity (Article 17) and gravity (Article 17(1)(d)).

The gravity standard is a statutory criterion of admissibility.<sup>92</sup> This criterion is difficult to assess and easily leads itself to subjective interpretations. In his strategy the OTP evaluates complementarity and gravity with respect to the most serious crimes allegedly committed by people who appear to bear the greatest responsibility.<sup>93</sup> The ‘interests of justice,’ as per Article 53(1)(c), consists of three elements: the exceptional nature of the context; the interpretation of Article 53 in accordance with the goals and objectives of the Rome Statute; and the distinction between the interests of justice, the interests of peace and victims’ interests.

### 2.4 Selection strategies of the OTP (2009-2012)

In a recent article, Ambos and Stegmiller critically assess the four fundamental principles at the heart of the strategy for selection of situations and trials at the OTP, namely, targeted investigations; positive complementarity; the interests of victims; and impact of the OTP activities.<sup>94</sup>

#### 2.4.1 Targeted investigations

As mentioned above, this guiding principle consists in focusing on ‘the most serious crimes’ and ‘those who bear the greatest responsibility.’ While this terminology allows for some flexibility, the ICC Prosecutor focuses mainly on those perpetrators at the top of the hierarchy in the chain of command.<sup>95</sup> The other cases are left to national criminal justice systems, encouraging territorial states and third states to take action.

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lose this.’ See also Article 34 of Rule of Procedure and Evidence.

<sup>92</sup> Rome Statute, art. 17(1)(d).

<sup>93</sup> *Décision relative à la demande d’autorisation d’ouvrir une enquête dans le cadre de la situation au Kenya*, rendu en application de l’article 15, Chambre préliminaire II, , ICC-01/09-19-corr-tFRA, para 50.

<sup>94</sup> K Ambos and I Stegmiller, ‘Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy?’ (2013) 59(4) *Crime, Law and Social Change* 415.

<sup>95</sup> *Ibid* 394.

As discussed above, the OTP initially adopted a sequential approach, investigating cases one by one and selecting them according to their gravity.<sup>96</sup> The OTP has recently adopted a more flexible approach. In the proceedings in relation to Kenya, for example, the OTP has carried out simultaneous investigations, bringing two cases to be prosecuted at the same time (*Prosecutor v William Samoei Ruto, Kiprono Henry Kosgey and Joshua Arap Sang* and *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*). The sequential approach is not explicitly contained in the 2009-2012 strategy.<sup>97</sup>

#### 2.4.2 Positive complementarity

Concerning positive complementarity, where the Court encourages states to take their own initiatives regarding the prosecution of international crimes, it is appropriate to recall that, in the Ituri, the OTP had collected several pieces of evidence against all active armed groups. This evidence may have been enough to enable national prosecutions. However, the OTP correctly invoked the absence of national legislation for protection of witnesses and victims to justify its refusal to cooperate. This is an example of where positive complementarity should intervene. However, the notion remains frustratingly inadequate.<sup>98</sup>

Although the ICC is not a developmental agency, we can blame the OTP for not having offered its cooperation with the DRC to bridge the gap of impunity. It is the first country to have cooperated with the ICC in the surrender of its nationals and the first to implement the Rome Statute in its military tribunals. Nonetheless, the approach of positive complementarity in the country remains very theoretical.

#### 2.4.3 The interest of the victims

The third principle requires the OTP to examine systematically and continuously the interests of victims within the framework of its activities. As such, victims can send information relating to the alleged crimes (called ‘communications’) to the OTP during the preliminary phase and written representations during an investigation.<sup>99</sup> This allows the OTP to address a range of crimes. The interests of victims also constitute the basis for their participation in the judicial proceedings as

<sup>96</sup> ICC-OTP, Report on Prosecution Strategy (n 44) 5.

<sup>97</sup> Ambos and Stegmiller (n 94) 395.

<sup>98</sup> For this reason, the National Assembly in DRC is considering a Bill dealing with the protection of witnesses and victims.

<sup>99</sup> Rome Statute, art. 15; Prosecution Strategy of the OTP (2009-2012) 1 February 2010, para 22.



provided for in the Rome Statute.<sup>100</sup> Furthermore, the OTP will evaluate the interests of victims when determining the interests of justice as provided in Article 53.

The judges in the *Lubanga* case pointed out that by virtue of Article 68(3) of the Rome Statute, the victims have attended the trial, asking for documents, questioning witnesses and presenting written and oral submissions (with the leave of the Chamber), with the assistance of their legal representatives. The need to take into account the interests of victims at all stages of the proceedings is a principle that forms part of the strategy of the Court regarding victims.

#### 2.4.4 Optimisation of the impact of the activities of the OTP

The fourth guiding principle of the prosecution strategy aims to optimize the impact of the OTP's activities from the preliminary analysis phase through to the trial phase.<sup>101</sup> It is possible that ICC involvement in and of itself may have a deterrent effect. As such, the fact that the ICC is known to be monitoring a situation may prevent crimes from being committed, given that it creates a threat of punishment. This effect is not limited to the situation under investigation, but applies to all states parties and perhaps even globally.<sup>102</sup>

### 2.5 *The new strategy of the OTP (2012-2015)*

In 2012, the appointment of Fatou Bensouda as the new Prosecutor brought about amendment of the OTP's initial strategy. Bensouda sought to address some of the problems with the OTP's initial strategy and also to react to the various criticisms thereto. The prosecution strategy has thus been revised on several levels<sup>103</sup> and breaks away from previously established practices.

#### 2.5.1 Perpetrators to be prosecuted

Concerning the selection of cases and perpetrators to be prosecuted, it is interesting to note that the combination of the 'top-down' and 'bottom-up' approaches as envisaged by the *ad hoc* tribunals seem to have been taken into account. The new strategy provides for prosecution with a limited number of mid-level and high ranking criminals in order to have a reasonable chance of getting a conviction for

<sup>100</sup> Prosecution Strategy of the OTP (n 99) para 22.

<sup>101</sup> *Ibid* para 23.

<sup>102</sup> *Ibid* 8.

<sup>103</sup> ICC-OTP, Strategic Plan (June 2012-2015) 11 October 2013.

the main culprits. Moreover, the Prosecutor does not exclude prosecution of lower-level crimes, especially when particular criminal conduct has gained notoriety.

### 2.5.2 Non-restrictive detailed investigations

The OTP's approach to investigations has been redefined. The initial concept of targeted investigations was replaced by the principle of 'non-restrictive detailed investigations.' Though the new principle preserves a certain aspect of the targeted approach, it nonetheless envisages the expansion of investigations in order to increase and diversify the collection of evidence. Regarding the expansion of investigations, the OTP is now applying a staged approach, making use of presumptions in the initial phase that relies on broader notions of incriminating and potentially exculpatory (defence) evidence. Obviously, such a redirection of investigations would require additional resources to be spread over a number of years.

The experience drawn from *ad hoc* tribunals also showed the need to focus on having access to quality information as well as the capability to analyse such information. The OTP should also put in place investigative standards regarding the selection of investigators and especially by encouraging the use of forensics. Recall that the quality of investigations is an issue that was raised with virulence by ICC's judges in both the *Lubanga* and *Ngudjolo* cases.<sup>104</sup> Quality investigations require adequate resources and good management. For example, the cost of sending Anglophone investigators with translators into Francophone countries, like in the *Katanga* trial, could easily have been avoided.

In respect of the collection of evidence, the Prosecutor initially favoured an approach that ensured that the evidence collected, although limited in amount, was of a high evidential standard. However, with the new objective of diversification of evidence, the OTP can address more adequately the problems associated with witnesses who were previously exposed, including their protection. Though the OTP set the new goal of being ready for trial right from the stage of the confirmation of charges, in the *Gbagbo case* the Chamber found that 'all the evidence of the Prosecutor, although apparently insufficient, does not appear to lack relevance and probative value.' Therefore, even though the judges did not drop the charges against Gbagbo they once again reprimanded the OTP for the weakness of its evidence and investigations.<sup>105</sup>

<sup>104</sup> It was the case when the Chamber in Lubanga Trial ruled that: 'The Prosecution would not have delegated its investigative powers to intermediaries despite the existing serious security problems.' See *Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 (14 March 2012) ICC-01/04-01/06, para 482.

<sup>105</sup> S Maupas, 'Faute de preuves, la CPI reporte le procès Laurent Gbagbo' *France 24* (3 June 2013).

### 2.5.3 Setting or widening a number of strategic goals

The Prosecutor created strategic objectives within the new strategy. According to the new objectives, the OTP must pay particular attention to sexual and gender-based crimes as well as crimes against children. The nature of these crimes is taken into account in the determination of ‘gravity.’<sup>106</sup> The OTP has also improved his contacts with the victims of such crimes by training its investigators to conduct interviews with victims of sexual and gender-based violence as well as to conduct psychosocial assessments to determine if the witness may be questioned without the risk of being re-traumatized.<sup>107</sup>

The new Prosecutor aligned with her predecessor by seeking to enhance complementarity and cooperation with member states in the context of situations under preliminary examination or investigation.<sup>108</sup> It must also put in place measures to strengthen cooperation between states, to assist the affected jurisdiction so as to enable it to conduct effective investigations and prosecutions. Ultimately, it should be remembered that the Prosecutor:

unlike a chess player, is engaged in an endless game. He may case after case, trial after trial, get conviction of criminals, but his real opponent, is impunity itself. It is a mobile enemy that he has to defeat, but without never get subdued by it.<sup>109</sup>

## 3 Case study: The Democratic Republic of the Congo

The African continent has experienced several armed conflicts, which are for the most part non-international armed conflicts. This is the case in Ituri (DRC),<sup>110</sup> the Central African Republic, Sudan and Uganda. In the first decade of its existence, the ICC has focused almost exclusively on African suspects, including heads of state. This situation has fuelled criticisms, prominent among which is the notion that the ICC operates on the basis of an aggressive and discriminatory prosecution

<sup>106</sup> ICC-OTP, *Strategic Plan (2012-2015)* 12.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid* 31 (objective 4).

<sup>109</sup> Fassassi (n 28) 392.

<sup>110</sup> Conclusion of Lubanga and Katanga trials but some observers believe that Ituri experienced an international armed conflict with the intervention of Ugandan and Rwandese soldiers. Indeed, initially, the Pre-trial Chamber in the Lubanga case had upheld the international character of the conflict but the Trial Chamber ruled that it was a non-international conflict. In the Katanga case, the judges had initially retained the international character but ultimately upheld the non-international character of conflict. See EB Bope, ‘Thomas Lubanga: Premier procès d’un chef de guerre devant la Cour pénale internationale’ (2012) *Ed. CAD* 14.

policy against African people.<sup>111</sup> In response to this critique, the ICC insists that it is simply following its mandate to put an end to impunity by pursuing those who bear the greatest responsibility for international crimes and, accordingly, that the Court is responding primarily in the best interest of African victims.<sup>112</sup>

### 3.1 Overview of cases

To overcome the ineffectiveness of its judicial organ in prosecuting crimes committed on its territory, the DRC - through a letter from President Joseph Kabila to the ICC - extended the competence of the ICC for the crimes described in the Rome Statute 'in the entire country since the 1st of July 2002.'<sup>113</sup>

The ICC is currently engaged with six cases relating to the situation in the DRC, namely:

- Lubanga (conviction judgment);<sup>114</sup>
- Ngunjolo (confirmation of acquittal on appeal);<sup>115</sup>
- Katanga (conviction judgment without appeal);<sup>116</sup>
- Mbarushimana (no confirmation of case);<sup>117</sup>
- Ntaganda (trial stage);<sup>118</sup> and
- Mudacumura (arrest warrant).<sup>119</sup>

<sup>111</sup> J Mbokani, 'La Cour Pénale Internationale: Une cour contre les Africains ou une cour attentive à la souffrance des victimes Africaines?' (2013) 26(2) *Revue québécoise de droit international* 44.

<sup>112</sup> It is noteworthy that it is the UN Security Council that referred the Sudanese (Darfur) and Libyan situations to the ICC while the DRC, Uganda, Central African Republic, Cote d'Ivoire and Mali referred themselves to the ICC.

<sup>113</sup> Request by DRC for opening of ICC investigations in DRC signed by President Kabila (letter dated 3 March 2004).

<sup>114</sup> See *Prosecutor v Lubanga* (n 104); see also *Prosecutor v Thomas Lubanga Dyilo*, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against his conviction (1 December 2014) ICC-01/04-01/06 A5.

<sup>115</sup> The case against of Germain Katanga and Mathieu Ngudjolo were initially joined but later severed in November 2012 in. This led to a judgment of acquittal of Mr. Ngudjolo in December 2012 and continuation of the proceedings against G Katanga. See Judgement on the Prosecutor's appeal against the decision of trial Chamber II entitled 'Judgement pursuant to Art 74 of the Statute'.

<sup>116</sup> Germain Katanga filed an appeal followed by the Prosecutor. Then Germain Katanga withdrew this appeal and the prosecutor did likewise. See Judgement pursuant to art 74 of the Statute (7 March 2014) ICC-01/04-01/07.

<sup>117</sup> *Prosecutor v Mbarushimana*, *Decision on the confirmation of the charges* (10 December 2011) ICC-01/04-01/10.

<sup>118</sup> *Prosecutor v Ntaganda*, *Decision pursuant to arts 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda* (9 June 2014) ICC-01/04-02/06.

<sup>119</sup> Warrant of arrest (13 July 2012) ICC-01/04-01/12.

In these cases, the ICC is contributing to the fight against impunity for serious crimes in the DRC. Nevertheless, some concerns remain. These concerns relate in particular to the lack of any prosecutions following the investigation of crimes in Bukavu<sup>120</sup> and also the lack of capacity building for internal justice in the context of ‘positive complementarity.’ The assessment of the effectiveness of the ICC’s actions in the DRC brings us back to the issue of the OTP’s strategy of narrowing down the charges. The hopes of the victims have not been realized, especially in the *Lubanga* case, where, consequent to limited charges, a lot of victims were neglected, while those taken into account, namely child soldiers, have committed crimes themselves (even though at a lower level of responsibility).

### 3.2 Normative impact of the ICC at the international level

The field of international criminal law is rather young and the Court’s jurisprudence contributes to the establishment and stabilisation of fundamental norms and principles. As regards the jurisprudence of the Court in cases concerning the DRC, the following may be regarded as having potentially the greatest effect on the OTP’s activities:

- The definition of the crime of participation of children in hostilities (*Lubanga* case);
- The definition of the concept of participation in the crime (*Mbarushimana* case); and
- The conditions under which the Chamber can modify the charges initially defined by the OTP (*Katanga* case).

#### 3.2.1 An indirect active participation in hostilities

It is important to stress the historic decision of the ICC finding the Congolese militia leader, Thomas Lubanga, guilty of war crimes for recruiting and conscripting children under fifteen, and using them to participate actively in hostilities in the DRC from 1 September 2002 to 13 August 2003. The Chamber concluded that active participation (of children) in the hostilities was committed because the child, despite being far from the front line, became a ‘potential target.’ To the Chamber, this ‘means that though absent from the place of hostilities, the child is still actively involved in it.’<sup>121</sup> The Chamber held that:

<sup>120</sup> It pertains to crimes committed when the town of Bukavu fell to the rebels led by Nkunda in 2004. See Human Rights Watch Report, ‘*Crimes de guerre à Bukavu RDC*’ (June 2004) 5.

<sup>121</sup> *Prosecutor v Lubanga*, Résumé du jugement (14 March 2012) ICC -01/04-01/06-2842-tFra, para 24.

The decisive factor, therefore, in deciding if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. [...] these combined factors – the child’s support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities the individual was nonetheless actively involved in them.<sup>122</sup>

For Eric David, assessing active participation of children in hostilities in the light of a risk criterion - that of becoming a target of hostilities - the Chamber clearly solved the problem of determining the notion of active participation of children in hostilities.<sup>123</sup> For the OTP, it means a clarification of the evidence needed to prove that the crime of child enrolment in the conflict has been committed. Here, the level of evidence has been lowered.

### 3.2.2 The scope of criminal participation

In the *Mbarushimana* case, the definition of criminal participation concerned the Executive Secretary of the Democratic Liberation Forces of Rwanda (FDLR), who was the fourth or fifth person in the hierarchy commanding the movement (after the President and two Vice-Presidents). However, for the majority of the Pre-Trial Chamber, he was essentially the spokesperson of the movement in Paris, and had no authority over the military leaders and soldiers of the FDLR in Rwanda.<sup>124</sup> He was therefore not able to contribute in the crimes committed by the FDLR.

On the contrary, Judge Sanji Monageng Mmasenomo held that Mbarushimana’s encouragement of crimes in press releases constituted a contribution to the crimes (material element)<sup>125</sup> committed with intention.<sup>126</sup> Eric David expressed his regret over the abandonment of the prosecution against Mbarushimana by a majority of judges in the following terms:

Law is not an exact science and the subjectivity of judges often outweighs realities that can seem rather objective. We can conclude that it lead to impunity for Mbarushimana whose crimes will forever remain unpunished.<sup>127</sup>

<sup>122</sup> See *Prosecutor v Lubanga* (n 104) para 628.

<sup>123</sup> E David, ‘CPI: Principales avancées, défis et leçons à tirer des premiers cas’ (2015) *Recueils des cours intensifs sur les droits de l’homme et le droit international pénal* 3ème édition, 2.

<sup>124</sup> *Prosecutor v Mbarushimana, Decision on the confirmation of charges* (16 December 2011) ICC-01/04-01/10, para 297.

<sup>125</sup> *Ibid* paras 105 and 112.

<sup>126</sup> *Ibid* Paras 116 and 122.

<sup>127</sup> David (n 123) 2.

### 3.2.3 Requalification of charges

Rule 55 of the Rules of Procedure and Evidence of the Court pertains to the requalification of charges against the accused and provides for the opportunity to ‘change the legal characterization of the charges so that they are consistent with the crimes provided under Articles 6, 7 or 8 and with the form of participation of the accused in the said crimes under Articles 25 and 28.’ In such cases, the Chamber shall inform the participants in the proceedings of such a possibility, and shall allow them ‘to make oral or written submission and may suspend the proceedings to ensure that participants have the time and facilities needed to prepare effectively for the consequences of this change.’<sup>128</sup>

The application of Rule 55 remained the most controversial debate over procedure in the *Katanga* case. The Chamber applied the requalification of charges to the form of responsibility. The initial form considered by the OTP was ‘direct perpetrator of the crimes’ committed in Bogoro (Rome Statute, Art. 25(3)(a)), and was modified as ‘complicity’ of these crimes (Rome Statute, Art. 25(3)(d)). The participants in the proceedings were informed of the requalification and were able to make submissions in respect of such requalified charges.<sup>129</sup>

Judge Van Den Wyngaert issued a dissenting opinion in which she held that the defence did not have enough time to prepare for the requalification of charges and that Articles 67 and 74 of the Rome Statute had been violated. The majority of the Chamber responded to these criticisms by noting that the defence did take advantage of the latitudes granted by the Chamber.<sup>130</sup> The majority justified the need for requalification on the basis of the hierarchical authority that Katanga possessed and the supply of arms to the Ngiti militia that attacked the Hemas of Bogoro, which was organized under his supervision (material elements);<sup>131</sup> combined with his acknowledgement of having wanted to attack Bogoro<sup>132</sup> as well as his personal knowledge regarding the methods of warfare used in Ituri and the ruthless reputation of the Ngiti combatants (mental element).<sup>133</sup>

<sup>128</sup> *Prosecutor v Katanga* (n 58) para 1438.

<sup>129</sup> *Ibid* para 1493 et seq.

<sup>130</sup> *Ibid* para 1587.

<sup>131</sup> *Ibid* para 1680.

<sup>132</sup> *Ibid* para 1682.

<sup>133</sup> *Ibid* para 1685 et seq.

### 3.2.4 The *Katanga* judgment: Controversies and contributions

A few points from the *Katanga* judgment are worthy of special consideration. Some have argued that the *Katanga* judgment was a small step in the right direction and also a signal to perpetrators that justice shall be done. Others saw it as a missed opportunity. As Carsten Stahn noted, ‘it is a bit unfortunate for justice that the key points and the disputed legal questions remain unanswered after several years of trial and without the possibility of appeal to resolve the outstanding issues.’<sup>134</sup>

Originally, *Katanga* was accused jointly with Mathieu Ngunjolo. The Prosecutor alleged that the two accused had a common criminal plan to ‘wipe out’ Bogoro, which resulted in the commission of crimes by Front for Patriotic Resistance of Ituri and Nationalist and Integrationist Front combatants.<sup>135</sup> Stahn noted that the Prosecution failed to establish the necessary degree of command and control either by *Katanga* or Ngunjolo to ensure a conviction.<sup>136</sup> The indictment contained important flaws, both in terms of the legal qualifications and evidence.<sup>137</sup> The Trial Chamber acquitted Ngunjolo in December 2012, arguing that ‘it could not find beyond reasonable doubt that the accused was the leader of the Lendu fighters who took part in the Bogoro attack on 24 February 2003.’<sup>138</sup> As for *Katanga*, he was convicted on the basis of the requalification of his mode of responsibility. The majority held that the contribution of *Katanga* strengthened the capacity of the militia to lead the attack on Bogoro and enabled its implementation. The main point of disagreement between the judges revolved around the interpretation of Article 25(3)(d)(ii) and the assessment of the charges and evidence. It is important to note that *Katanga* had made an admission of guilt. This was a major reason for the majority’s reliance on Rule 55 to requalify the charges.<sup>139</sup>

A notable contribution of the *Katanga* case is the application of the concept of ‘indirect co-perpetration’ in order to establish joint responsibility of the accused persons for the actions of their own fighters by virtue of Article 25(3)(a). Stahn states that this concept introduces the idea that individuals can be held responsible as indirect perpetrators for crimes committed by others, under pressure existing

<sup>134</sup> C Stahn, ‘Justice delivered or justice denied? The legacy of the *Katanga* judgment’ (2014) *Journal of International Criminal Justice* 4.

<sup>135</sup> *Prosecutor v Katanga and Ngunjolo, Ruling on confirmation of charges*, ICC-01/04-01/07-717.

<sup>136</sup> Stahn (n 134) 5; on the basis of the charges confirmed by the Pre-Trial Chamber on 21 November 2012.

<sup>137</sup> *Ibid* 26.

<sup>138</sup> *Prosecutor v Mathieu Ngunjolo Chui, Judgment Pursuant to Article 74* (18 December 2012) ICC-01/04-02/12-3, para 503.

<sup>139</sup> The Court would be criticized for not convicting someone who had pleaded guilty of the charges levelled against him.



within the structure of power. Thus, for the majority of the judges, the control of the criminal organization or group of people is not a mandatory requirement for indirect perpetration.<sup>140</sup>

It is also the first judgment dealing with the interpretation of rape and sexual slavery. This judgment affirms that rape does not necessarily require penetration by the perpetrator and that a lack of consent does not need to be demonstrated positively in cases of rape.<sup>141</sup> These two important additions clarified the definitional scope of these crimes and, in so doing, made a valuable contribution towards substantive international criminal law.

### 3.3 Normative impact of the ICC at the national level

#### 3.3.1 An impact limited by external factors

The DRC ratified the Rome Statute on 11 April 2002, thereby presenting the Court with its first cases as well as its first opportunity to apply the principle of complementarity.<sup>142</sup> The transposition of the Rome Statute's provisions into the Congolese Military Penal Code had a noticeable but small impact on the domestic level. Military courts based in some provinces were able to try cases of war crimes and crimes against humanity. However, the transposition was incomplete because the definitions of war crime, crime against humanity and genocide are not identical to those given in the Rome Statute.<sup>143</sup> The Military Penal Code confuses the definitions of 'crimes against humanity' and 'war crimes' as provided in the Rome Statute.<sup>144</sup> Consequently, there is a concern about the ICC's ability to usher in reform in national judicial sectors.

Nonetheless, the impact of the ICC on prosecutions and arrests at the national level has been limited by a number of external factors for which the Court cannot be held responsible. The main obstacle is the fact that the OTP relies on the coop-

<sup>140</sup> Stahn (n 134) 15.

<sup>141</sup> *Prosecutor v Katanga* (n 58) para 963.

<sup>142</sup> Some Congolese lawyers also consider that the ratification of the Rome Statute by the DRC is vitiated by irregularities. Balanda, for example, notes that 'lack of an enabling law consequently vitiates the procedure of ratification of this category of treaties by the Head of State.' See also JK Mpiana, 'A Cour Pénale Internationale et la République Démocratique du Congo : 10 ans après. Étude de l'impact du Statut de Rome dans le droit interne Congolais' (2012) 25(1) *Revue québécoise de droit international* 57-90. Bula Bula (cited by Mpiana) indicates that the Rome Statute was ratified by the DRC under conditions which did not guarantee 'transparency of the process.'

<sup>143</sup> M Adjani and G Mushiata, 'L'impact du Statut de Rome et de la CPI en RDC' (2010) *Rapport ICTJ* 4.

<sup>144</sup> Mpiana (n 142) 6.

eration of the national police to investigate and arrest suspects. This is an area in which there is a known lack of effectiveness and consistency in general. The underlying obstacle here is political, which explains the incomplete support of member states and the African Union for the OTP's activities. Furthermore, the Court must not be considered accountable for the difficulty of creating a proper legislative framework and the lack of judicial reform in the DRC. Thus, the normative impact of the ICC is connected to efforts made at the political level. In order to be effective, these efforts must be coordinated on both sides. Such efforts could then lead to the prosecution of warlords in Ituri, in addition to the current rebel leaders imprisoned in The Hague. Unfortunately, most of the 'big fish' still enjoy impunity.

### 3.3.2 Consequences for the search and preparation of witnesses

The *Lubanga* trial raised various questions as regards the reliability and credibility of prosecution witnesses. The first of these related to the use of intermediaries by the prosecution to find witnesses. In order to locate witnesses on the ground, the Prosecutor made use of intermediaries. The Prosecutor explain the use of intermediaries as follows:

[...] due to the difficulties in the DRC and the OTP's lack of a police force, it was necessary to rely on intermediaries. It is suggested that their role was limited, in the sense that the intermediaries were excluded from the decision-making process and, save exceptionally, when the witnesses were screened and interviewed.<sup>145</sup>

After examining the testimonies of witnesses procured by intermediaries, the Chamber criticized this method of locating witnesses on the basis that some witness statements so obtained contained notable inconsistencies and should not have been considered as evidence. The Chamber held the view that:

the prosecution should not have delegated to intermediaries its investigative responsibilities in the manner discussed in the judgment, regardless of the many security challenges it faced. This trial has seen the appearance of a series of people whose testimony cannot serve as a reliable basis for judgment, due to the fact that three of the main intermediaries acted without proper supervision.<sup>146</sup>

Furthermore, the Chamber observed that the lack of proper supervision of the intermediaries leads to another consequence of leaving them the opportunity to

<sup>145</sup> *Prosecutor v Lubanga* (n 104) para 181.

<sup>146</sup> *Ibid* para 17.

abuse the situation of witnesses with whom they developed a relationship.<sup>147</sup> The Chamber concluded that there was a risk that intermediaries could have persuaded, encouraged or assisted witnesses to give false testimony. It could be that these intermediaries are guilty of the offenses referred to in Article 70 of the Statute.<sup>148</sup>

A further question concerned the issue of ‘witness proofing.’ ‘Witness proofing’ broadly refers to the ‘coaching’ of witnesses before the hearing, rehearsing examination-in-chief and preparation for cross-examination to which these witnesses may be subjected. Some common law systems seem to allow this practice of ‘chambering’ the witness. Nonetheless, it creates an environment in which witnesses can be bribed more easily in order to commit perjury.<sup>149</sup> The ICC has excluded witness proofing on the basis that this practice was not a general principle of internal procedure. It stated that its use at other international criminal tribunals was not transposable to the ICC, where the rules of procedure are different, and that it affects the spontaneity of witness testimony. The Chamber, however, stated that this did not preclude a pre-hearing meeting with the Victims and Witnesses Unit (VWU) of the Court, but only for the purpose of familiarizing witnesses with the place of the hearing and the procedure to be followed.<sup>150</sup>

### 3.4 *Impact of the ICC on prevention and reconciliation*

In order to appreciate the prospect for prevention and reconciliation in the DRC, two observations have to be made. First, the DRC has had roughly 42 armed groups within its territory (many of which are still active). As such, the ICC alone cannot produce a deterrent effect and must be supported by the national judicial system, which must be reinforced and strengthened. The ICC’s deterrent impact is mostly non-existent in the Eastern part of the country, where most of the tensions and conflicts are concentrated. Secondly, the Court has heard only two cases, where two out of three accused were convicted. Thus, it is important to remember that the Court is still very young and its work without precedent. It will take time for international criminal justice to be legitimate and real to people. More than anything, this will require the risk of prosecution to be internalized. Accordingly, the recent discovery of two mass graves in Kibumba in Eastern DRC, the most dangerous part of the country, where the forces of M23 executed their victims, including children,

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<sup>147</sup> Ibid para 18.

<sup>148</sup> Ibid paras 482-484.

<sup>149</sup> David (n 123) 2.

<sup>150</sup> *Prosecutor v Lubanga* (n 104) paras 29-35.

women and the elderly,<sup>151</sup> is not surprising and must not be interpreted immediately as resulting from the ICC's impossibility to have an impact on prevention in the long-term.

Furthermore, the ICC's ability to prevent future crimes is difficult to determine because there are so many interrelated factors.<sup>152</sup> No national system has been able to succeed in deterring criminal conduct. Whiting stresses that the ICC will probably not be in a position to deter the next violent dictator. However, the Court may be able to limit the actions of such future perpetrators by creating standards, which will limit the space in which to commit crimes.<sup>153</sup> According to Whiting, it could take decades before a deterrent effect can be observed in the world, but there are already indications that the Court contributes to the stabilisation of international criminal norms.<sup>154</sup>

However, a number of factors will limit the ICC's impact on prevention and reconciliation in the future. As regards the goal of prevention, it is important to consider that only one or two people per conflict are arrested or brought to trial, which means that conflicts can continue or resume very easily. Furthermore, all trials and sentencing proceedings are conducted abroad (The Hague), away from the scene of the conflict in which the crimes were committed.

Accordingly, it is less likely that people will be affected psychologically in a way that will deter them from committing crimes. First, arrests are very rare, which creates an environment wherein there is little risk of being arrested. Second, if they are made, arrests are seldom immediately executed, which means that, while people may respond to an immediate threat of arrest, that threat is largely hypothetical and also unlikely to take place in the immediate future. Third, arrests are difficult since the ICC relies on the effort of national police, which makes the ICC ineffective in that it often poses no real threat to perpetrators of international crimes in the highest echelons of government. Finally, convicted perpetrators are imprisoned extra-territorially and so, the threat and stigma of imprisonment is a less tangible threat to the local populace than would otherwise have been the case.

As regards the role of the ICC in reconciliation, Siou argues that:

<sup>151</sup> Speech by the DRC before the Assembly of State Parties to the ICC on 20 November 2013.

<sup>152</sup> D Subrahmanyam, 'Whiting offers views on the International Criminal Court's impact' *Harvard Law Today* 15 October 2012.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

The mandate of the Court officially limits its range of actions to determining cases and setting the amount reparations for the victims. This leads to consider the impact of the ICC on prevention and reconciliation given a time frame. Thus, the question of *how can the ICC impact on prevention and reconciliation* translates into *when can the ICC impact on prevention and reconciliation*.<sup>155</sup>

Moreover, Siou argues that the psychological impact of the judgment and reparations on the victims lies within the framework of the particular conflict. Defining good and evil; establishing the truth; and providing the feeling that justice has been done, are three essential elements to reconciliation that international criminal justice can provide.<sup>156</sup> The fact that only a few individuals are arrested and imprisoned extra-territorially limits the potential for reconciliation via international criminal justice. Thus, the impact of the ICC is more likely to be felt in the long-term than in the short-term.<sup>157</sup>

To increase its impact in the short-term, Siou suggests that the ICC could work with local actors on the allocation of reparations for the victims. The Fund for Victims has an important role to play in this regard.<sup>158</sup> However, obstacles remain. How to distribute the money and for which projects? Does the scale of people benefiting from this project match the scale of victims defined in the judgement? How to determine such scales scientifically? How to manage the rush such funding opportunity will trigger so as to avoid further conflict and resentment?<sup>159</sup>

## 4 Conclusion

The ICC's mandate is to put an end to impunity for serious crimes of concern to the international community as a whole. As part of this mandate, the OTP is called upon, *inter alia*, to conduct quality investigations; to formulate an effective prosecution strategy; to act in the interests of the victims; and to encourage the prevention and prosecution of international crimes on the national level (positive complementarity). Having assessed the situation in the DRC, it is clear that a more concerted effort is needed in order for the ICC to be effective in Africa. The OTP's ability to meet its current challenges is vital for the credibility of the ICC. It is also

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<sup>155</sup> Interview with Emmanuelle Siou, Researcher on international criminal justice and political risk analyst, World Bank.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

vital for supporters of the Court (state parties and the United Nations); those who have not yet ratified the Rome Statute (non-state parties); and civil society to cooperate and assist the Court in the execution of its mandate.

Finally, to echo Brammertz, we may wonder whether this is the beginning of the end of the ‘naivety’ surrounding international criminal justice.<sup>160</sup> One thing is true; the Court alone should not bear all criticisms relating to the failures in the fight against impunity in Africa and elsewhere. In order to effectively fulfil its mandate, the ICC needs the support and cooperation of the international community. The latter has repeatedly declared its commitment to ending impunity for the most serious crimes. Cooperation with the ICC is a concrete way to give effect to this objective.

The long-term value of the Rome Statute system lies in both the punishment of perpetrators and prevention of future crimes. There have been some significant contributions in this regard. But as the Court enters its second decade of existence, it will have to improve its effectiveness in the fight against impunity whilst maintaining respect for the rule of law. Moreover, if African states are serious about the fight against impunity, they must demonstrate it through action at the national level. This is the price to pay in order for the fight for justice to have meaning.

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<sup>160</sup> S Brammertz, ‘International justice: Beginning of the end, or end of the beginning?’ Conference Paper, Whitney R. Harris World Law Institute, Washington University in St Louis, School of Law, 3 March 2015.

# ASSESSING THE ROLE OF INDIRECT ENFORCEMENT IN THE 'PROJECT' OF INTERNATIONAL CRIMINAL JUSTICE: SOME LESSONS FROM SOUTH AFRICA

HJ VAN DER MERWE\*

## Abstract

*The success of the project of international criminal justice is primarily vested in the willingness and ability of national courts to investigate and prosecute those most responsible for crimes under international law and to cooperate effectively with other states and international courts in respect of efforts to bring such offenders to account. It is widely anticipated that the prioritisation of indirect enforcement of international criminal law will, in the long run, offer not only a more realistic, but also a more efficient means of ending the culture of impunity in respect of international crime. However, it is becoming increasingly apparent that the prioritisation of indirect enforcement of international criminal law will raise new and unique challenges.*

*The article seeks to draw general lessons for states and domestic courts from the successes and failures of the application of international criminal law in South Africa. It explores whether domestic courts offer an effective, legitimate and credible means for securing justice in respect of the crimes contained in the Rome Statute of the International Criminal Court and reflects on some of the essential prerequisites for domestic courts to be so enabled.*

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## 1 Introduction

The success of the project of international criminal justice is primarily vested in the willingness and ability of national courts to investigate and prosecute those most responsible for crimes under international law and to cooperate effectively with other states and international courts in respect of efforts to bring such offenders to account. This movement towards indirect enforcement of international criminal law represents arguably *the* defining characteristic of the modern system of international criminal justice. It is widely anticipated that the prioritisation of indirect enforcement of international criminal law will, in the long run, offer not only a more realistic, but also a more efficient means of ending the culture of impunity in respect of international crime. Notwithstanding the optimism that generally surrounds this development, it is becoming increasingly apparent that the prioritisation of indirect enforcement of international criminal law will raise new and unique challenges.<sup>1</sup>

Recent legal developments in South Africa exemplify and offer a unique window into the political, practical and legal difficulties that may be associated with the enforcement and application of international criminal law in domestic courts. These are, first, the Constitutional Court's judgment on universal jurisdiction and the obligation to investigate international crimes committed beyond the borders of South Africa.<sup>2</sup> Secondly, South Africa's duty to arrest a (sitting) head of state subject to International Criminal Court (ICC or the Court) arrest warrants for war crimes, crimes against humanity and genocide.<sup>3</sup>

The article seeks to draw general lessons for states and domestic courts from the successes and failures of the application of international criminal law in South Africa. It explores whether domestic courts offer an effective, legitimate and credible means for securing justice in respect of the crimes contained in the Rome Statute of the ICC (Rome Statute) and reflects on some of the essential prerequisites for domestic courts to be so enabled.

<sup>1</sup> See generally N Roht-Arriaza, 'Just a "bubble"? Perspectives on the enforcement of international criminal law by national courts' (2013) 11 *Journal of International Criminal Justice* 537-543.

<sup>2</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (12) BCLR 1428 (CC).

<sup>3</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] Case Number: 27740/2015.



## 2 Indirect enforcement and the project of international criminal justice

Various authors take the view that international criminal justice may be viewed as a project.<sup>4</sup> The next logical question is – whose project is it? It is possible to define international criminal justice as a collective venture on the part of the notional international community (or *civitas maxima*). Thus, one might view the movement towards indirect enforcement within the project of international criminal justice as a deliberate and collective attempt on the part of the international community to circumvent the realities of a decentralised international order wherein the perpetrators of the worst crimes have in the past often benefited from impunity sustained by the traditional notion of state sovereignty. To this end, different modes of enforcement have been developed.

*Direct enforcement* of international criminal law occurs where international crimes are prosecuted on the international level before an international court.<sup>5</sup> As such, direct enforcement refers to 'the supranational enforcement of international criminal law.'<sup>6</sup> *Indirect enforcement* is state-centred and occurs where international criminal law is enforced by way of national prosecution.<sup>7</sup> According to Van den Wyngaert, the indirect enforcement of international criminal law broadly includes 'extraterritorial applications of penal law, extradition, judicial assistance, transfer of criminal proceedings and prisoners, and compensation of victims.'<sup>8</sup> In the ICC era of international criminal justice, one may add prosecution and cooperation with the ICC in accordance with the principle of complementarity to the aforementioned list.

<sup>4</sup> See, for example, L van den Herik, 'The Dutch engagement with the project of international criminal justice' (2010) 57(2) *Netherlands International Law Review* 303–322; I Tallgren, 'The sensibility and sense of international criminal law' (2002) 13 *European Journal of International Law* 561–595; MR Damaska, 'What is the point of international criminal justice?' (2008) 83(1) *Chicago Kent Law Review* 329–368, 354; and MA Drumbl, *Atrocity, punishment and international law* (Cambridge University Press 2007) 21.

<sup>5</sup> H Satzger, 'German criminal law and the Rome Statute – A critical analysis of the new German code of crimes against international law' (2002) 2 *International Criminal Law Review* 261–282, 263.

<sup>6</sup> C van den Wyngaert, 'International criminal law as an integrated course' (1988) 1 *Touro Journal of Transnational Law* 203–207, 206.

<sup>7</sup> When it comes to the indirect enforcement of the core crimes under international law, a distinction must be made between, on the one hand, state's acting within the framework of complementarity as provided for in the Rome Statute and, on the other, national prosecution of international crimes beyond state obligations in terms of the Rome Statute. A further distinction must be made between different modalities of indirect enforcement, namely, national prosecutions, extradition and mutual cooperation with state or international courts in respect of the investigation and prosecution of international crimes.

<sup>8</sup> Van den Wyngaert (n 6) 206.

The shift towards indirect enforcement of international criminal law is broadly the result of two parallel movements of international criminal law enforcement: First, the proliferation and increased incorporation of treaties placing international legal obligations as regards the enforcement of international criminal law on states and, secondly, the establishment of the permanent ICC by way of the Rome Statute. More than anything, it was the establishment of the ‘complementarity-centred’ ICC that shifted the balance of international criminal law enforcement towards domestic courts. The vision was not for domestic courts to complement the ICC, but rather for the ICC to complement the work of domestic courts or – as it is often expressed – to act as a court of last resort.

### **3 The domestication of the Rome Statute in South Africa: An overview of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002***

As regards the legal status of international law in South Africa, it must be noted that South Africa follows the dualist tradition. According to Section 231(2) of the Constitution of the Republic of South Africa, 1996:

An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces [...].

Further, in Section 231(4):

Any international agreement becomes law in the Republic when it is enacted into law by national legislation [...].

Also, according to Section 232, customary international law is binding law in South Africa ‘unless it is inconsistent with the Constitution or an Act of Parliament.’ Finally, in accordance with Section 233, South African courts ‘must prefer any reasonable interpretation of [national] legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

At the beginning of the constitutional era, democratic South Africa showed itself to be a strong proponent of the project of international criminal justice. South Africa has incorporated the law of the Rome Statute into its domestic law by way of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (Implementation Act). The Act aims, *inter alia*, to effectively implement the Rome Statute and to give effect to South Africa’s obligations in terms of

the Rome Statute.<sup>9</sup> The Act was also a means to criminalise the core international crimes under South African law. As such, the crimes of genocide, crimes against humanity and war crimes may be viewed as national crimes reflective of internationally protected values and interests. The Act further seeks to enable, 'in accordance with the principle of complementarity,' prosecutions at national level as well as cooperation with the ICC.<sup>10</sup>

### 3.1 *Jurisdiction under the Implementation Act*

Section 4(1) of the Act confirms the substantive jurisdiction provided for in the Rome Statute by proscribing genocide, crimes against humanity and war crimes and making persons liable to punishment on conviction of such offence(s).

South Africa's (prescriptive) jurisdiction in respect of the core crimes is regulated by Section 4(3) of the Act, which provides for four grounds of jurisdiction in order to try an individual for core crimes committed outside the territory of the Republic. A court in South Africa may try 'any person who commits a crime contemplated in subsection (1) outside the territory of the Republic' if:

- (a) that person is a South African citizen;
- (b) that person is not a South African citizen but is ordinarily resident in the Republic;
- (c) that person, after the commission of the crime, is present in the territory of the Republic;
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

Section 4(3)(c) of the Act is of particular significance. It extends the (prescriptive) jurisdiction of South African courts in respect of the core crimes to non-nationals and non-residents who are present in South African territory and also to non-nationals who have committed any of the core crimes against South African citizens.

### 3.2 *Immunity under the Implementation Act*

The Act further addresses the applicability of immunities under international law for purposes of the prosecution of the crimes contemplated therein. According

<sup>9</sup> Implementation Act 2002, s 3.

<sup>10</sup> Implementation Act 2002, s 3.

to Section 4(2), irrespective of ‘any other law to the contrary, including customary or conventional international law,’ an individual’s status as a current or former head of state or government may neither be regarded as a substantive defence, nor a mitigating factor in respect of the prosecution or conviction of persons for crimes contemplated in the Act. Also, in terms of Section 10(9) of the Act, an individual’s status as a current or former head of state or government may not constitute a bar to that person’s surrender to the ICC in terms of the Act.<sup>11</sup>

The issue of immunity is of particular relevance to the enforcement of international criminal law. In this regard, one must distinguish, first of all, between functional immunity and personal immunity.<sup>12</sup> Functional immunity or official capacity (immunity *ratione materiae*) attaches to persons acting in an official capacity on behalf of a state. This form of immunity bars neither direct, nor indirect enforcement of international criminal law.<sup>13</sup>

The position is less clear as regards personal immunity from prosecution (immunity *ratione personae*). Personal immunity does not excuse criminal responsibility, but creates a temporary obstacle to the prosecution of the perpetrator. This form of immunity applies to heads of state, foreign ministers and diplomats, but only applies during the official’s tenure in office.<sup>14</sup>

In the past, high ranking state officials have not only been those most responsible for mass atrocity and grave human rights violations, but have also benefitted from impunity in respect of those crimes due to their being insulated from national prosecution and at the same time also out of reach of foreign or international courts.

<sup>11</sup> Implementation Act 2002, s 10(9): ‘The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5).’

<sup>12</sup> See G Werle, *Principles of international criminal law* (3<sup>rd</sup> edn, Oxford University Press 2014) 273-279.

<sup>13</sup> Whether before international or national courts, official capacity does not affect criminal liability under international law. Concerning the irrelevance of official capacity before international courts, see Rome Statute, art. 27(1); and Werle (n 12) 273-275. Notable cases concerning the irrelevance of official capacity before national courts are: First, case law relating to efforts of Spain to extradite Augusto Pinochet from England (see *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (1999) 4 All ER 897; *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte* (No.2) (1999) 1 All ER 577; *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) (1999) 2 All ER 97); and, secondly, Belgium’s effort to prosecute Abdulaye Yerodia Ndombasi, the incumbent foreign minister of the Democratic Republic of Congo, by way of an international arrest warrant, see *Democratic Republic of the Congo v Belgium* (The “Arrest Warrant” case), Judgment, ICJ Reports 2002, 3.

<sup>14</sup> See D Akande and S Shah, ‘Immunities of state officials, international crimes, and foreign domestic courts’ (2010) 21 (4) *European Journal of International Law* 815– 852, 818: ‘The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level.’

Thus the need for international criminal law as an alternative framework of criminal law that targets specifically a unique species of crime (especially state criminality) committed by a unique species of criminal (especially those bearing the greatest responsibility for crimes of international concern).<sup>15</sup> However, foreign and international case law illustrates the enduring controversy over personal immunity under international law as a bar to criminal prosecution before foreign national courts. In the *Arrest Warrant* case, the ICJ ruled that international law only permits the prosecution of current governmental officials before foreign national courts where the state in question has waived such official's immunity.<sup>16</sup> In the *Pinochet* case, the House of Lords held that the immunities afforded to acting heads of state under international law constitute a bar to prosecution before national courts.<sup>17</sup> These cases support the assertion that personal immunity under international law cannot be trumped by domestic legislation for the purposes of prosecuting international crime on behalf of the international community.<sup>18</sup>

However, Section 4(2) of the Implementation Act specifically disqualifies 'any law to the contrary, including customary and conventional international law' and makes specific reference to *acting* heads of state and members of government. Compared to Article 27 of the Rome Statute, Section 4(2)(a) of the Implementation Act can be regarded as a considerably bolder proclamation of the irrelevance of personal immunity in respect of the prosecution of core crimes.<sup>19</sup> Du Plessis has noted this as a proactive improvement in the Implementation Act, but warned that a South African court 'might find that [Section 4(2)(a)] does not do away with per-

<sup>15</sup> W Lee, 'International crimes and universal jurisdiction' in Larry May and Zachary Hoskins (eds.) *International criminal law and philosophy* (Cambridge University Press 2010) 21.

<sup>16</sup> See ICJ, *Arrest Warrant case* (n 13) para 58.

<sup>17</sup> See *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (1999) 4 All ER 897 (*Pinochet I*) at 938 and *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) (1999) 2 All ER 97 (*Pinochet III*) 905H.

<sup>18</sup> M du Plessis, 'Africa and the International Criminal Court' Conference Paper <<http://www.csvr.org.za/wits/confpaps/duplessis.htm>> accessed 25 August 2015.

<sup>19</sup> Rome Statute, art. 27:

'Irrelevance of official capacity -

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.'

sonal immunity.<sup>20</sup> As will be discussed below,<sup>21</sup> this became more than a theoretical question when President Omar Al Bashir of Sudan attended the African Union (AU) Summit in South Africa in June 2015.

#### 4 Overview of recent developments concerning the indirect enforcement of international criminal law in South Africa

##### 4.1 The 'torture docket' matter: *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*<sup>22</sup>

In 2008, the Southern Africa Litigation Centre (SALC) submitted a comprehensive dossier (the so-called 'torture docket') to the Priority Crimes Litigation Unit (PCLU). The docket contained evidence of the involvement of Zimbabwean security officials in the perpetration of state-sanctioned torture. Also included in the docket were numerous affidavits from persons attesting to acts of torture perpetrated against them while in police custody subsequent to a police raid that took place during March 2007 at the headquarters of the main opposition party in Zimbabwe, the Movement for Democratic Change (MDC). It was alleged that these acts of torture were committed in a widespread and systematic manner against the political opponents of the ruling Zimbabwe African National Union – Patriotic Front (ZANU-PF), therefore constituting crimes against humanity.<sup>23</sup> The crimes were allegedly committed by Zimbabweans in Zimbabwe against Zimbabweans. It should be noted that Zimbabwe is not a party to the Rome Statute.

The applicants had approached the court for judicial review of the decision not to *investigate* the matter, arguing that the respondents had a legal duty to investigate allegations of international crimes in the torture docket. The respondents argued that such refusal was justified due to there being insufficient evidence to proceed with the matter as well as concerns regarding the practicality of any further investigation and the diplomatic relations between South Africa and Zimbabwe. In particular, the respondents also raised concerns regarding the jurisdiction provided for in the Implementation Act, arguing that jurisdiction on the basis of the 'anticipated

<sup>20</sup> M du Plessis, 'South Africa's implementation of the ICC Statute' (2007) 5 *Journal of International Criminal Justice* 460-479, 474.

<sup>21</sup> See Section 4.2 below.

<sup>22</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and another (Dugard and others as amici curiae)* 2014 (12) BCLR 1428 (CC).

<sup>23</sup> See *South African Litigation Centre and Another v National Director of Public Prosecutions and Others* (North Gauteng High Court) Case No. 77150/09, 8 May 2012, para 1.13 (at 9).

presence' of an offender cannot be read into Section 4 of the Act.

The High Court found that the respondents' decision not to investigate was 'unlawful, inconsistent with the Constitution and therefore invalid.' The PCLU was ordered to investigate 'so far as practicable and lawful.' The respondents then turned to the Supreme Court of Appeal (SCA) where the appeal was dismissed.

The matter proceeded to the Constitutional Court, where, once more, the Court considered whether South African law enforcement authorities had a duty to investigate the international crimes in question in light of South Africa's international and domestic legal obligations.<sup>24</sup> In particular, the Court was required to delineate the circumstances under which any such duty would be activated.<sup>25</sup> The dispute related to the *investigation* (as opposed to the *prosecution*) of international crimes by South African courts.<sup>26</sup> Section 4(3)(c) of the Implementation Act is silent on the matter of the duty to investigate the crimes provided for in the Act as well as the scope of any such duty. Thus, there was a need for clarity as to what is required for the initiation of an investigation under the Act. Is the physical presence of the alleged offender an indispensable pre-requisite for investigation? If not, must there be an anticipation that the alleged perpetrator will be physically present at some future time?

From a broader perspective, the Court was also required to consider the extent of 'South Africa's domestic and international powers and obligations to prevent impunity and to ensure that perpetrators of international crimes committed by foreign nationals beyond our borders are held accountable.'<sup>27</sup>

In the judgment, the Court highlighted the fact that the requirement of the anticipated presence of the offender as a trigger for investigation would fundamentally inhibit the underlying purposes of the Implementation Act, which, in turn, reflects the objects of the Rome Statute:

Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence

<sup>24</sup> *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another* (n 22) paras 4 and 21.

<sup>25</sup> *Ibid* para 21.

<sup>26</sup> As opposed to trying an accused *in absentia*, which would be unconstitutional in accordance with Section 35(3)(e) of the Constitution of the Republic of South Africa, 1996.

<sup>27</sup> *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* (n 22) para 4.

requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation.<sup>28</sup>

The Court further held that:

There is not just a power [to investigate the allegations of torture], but also a duty. While the finding that the SAPS does have the power to investigate is unassailable, the point of departure is that the SAPS has a duty to investigate the alleged crimes against humanity of torture. That duty arises from the Constitution read with the [Implementation] Act, which we must interpret in relation to international law.<sup>29</sup>

However, the Court was also at pains to draw attention to international law principles limiting the duty to investigate international crime.<sup>30</sup> First, in accordance with the principle of subsidiarity, a foreign national court may only invoke universal jurisdiction if the state on whose territory the crime was committed or the state in which the offender has nationality is unable or unwilling to prosecute. There seems to be no reason to think that this principle would not apply over situations not involving the commission of core crime under international law.<sup>31</sup>

Secondly, in accordance with the principle of practicability, it must be asked whether it is reasonable and practical to investigate the matter considering the circumstances of the particular case. In the ‘torture docket’ matter, for example, the fact that Zimbabwe is a neighbouring country of South Africa as well as the information that the suspects in question were shown to have visited South Africa from time to time may be regarded as crucial considerations that were specific and relevant only to the matter at hand. One could postulate that, if these particular considerations were missing, the outcome of the case may well have been different. As noted in the judgment, ‘anticipated presence of a suspect in South Africa is not a prerequisite to trigger an investigation. *It is only one of various factors that need to be balanced in determining the practicability and reasonableness of an investigation.*’<sup>32</sup>

<sup>28</sup> Ibid para 48.

<sup>29</sup> Ibid para 55.

<sup>30</sup> Ibid paras 61-64.

<sup>31</sup> Although it is beyond the scope of this paper, an interesting question in this regard relates to the determination of ability and willingness by domestic courts. Should it, for example, be modelled on the admissibility criteria in the Rome Statute, namely, complementarity and gravity? Or, should states develop their own criteria with reference to international legal principles?

<sup>32</sup> *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* (n 22) para 81. Emphasis added.



#### 4.2 *The Al Bashir matter: Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*<sup>33</sup>

On 31 March 2005, the United Nations Security Council (UNSC) referred the situation in Darfur, Sudan, to the Prosecutor of the ICC.<sup>34</sup> In 2010, Pre-Trial Chamber (PTC) I of the ICC issued warrants of arrest against Omar Al Bashir for war crimes, crimes against humanity and genocide allegedly committed in the Darfur region of Sudan. This was the first time that a sitting head of state of a non-ICC state party faced such charges. In accordance with Article 59 of the Rome Statute, the ICC requested state parties to arrest President Al Bashir should he enter into their jurisdiction.

In January 2015, the South African Government agreed to act as the host state for the AU Summit. Before the meeting, the South African Government received word that President Al Bashir would be in attendance as well as a request for the granting of the necessary privileges and immunities.

On 14 June 2015, whilst President Al Bashir was attending the Summit and pursuant to an application for his arrest by SALC, the South Gauteng High Court issued an interim order preventing President Al Bashir from leaving South Africa pending the making of a final order. The next day, the Court ruled that the failure of the respondent to arrest President Al Bashir was inconsistent with the Constitution and invalid and ordered the respondents to take reasonable steps to arrest and detain President Al Bashir, pending a formal request for his surrender from the ICC. However, it has been established that President Al Bashir had at that stage already left the country in a clandestine fashion.

In providing reasons for the order above, the Court was called upon to delimit South Africa's international and domestic legal obligations in respect of the arrest of sitting heads of state accused of international crimes falling within the substantive jurisdiction of the Rome Statute.

The respondents argued that the promulgation of a Government notice in terms of Section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 (Immunities Act) by the Minister of International Relations was an embodiment of the terms of the host agreement between South Africa and the AU and that the latter agreement's provision for immunity of African heads of state attending the meeting

<sup>33</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and others* 2015 (9) BCLR 1108 (GP).

<sup>34</sup> UNSC Res. 1593 (2005).

served a legal basis for South Africa's non-compliance with its obligations towards the ICC in respect of the arrest of President Al Bashir.<sup>35</sup>

The Court was unequivocal in its assertion that none of the grounds relied upon by the respondents could lawfully trump the provisions in the Implementation Act. It highlighted South Africa's domestic legal obligation in respect of cooperation with the ICC.<sup>36</sup> The Court held that, despite the various arguments raised by the respondents, President Al Bashir could only be entitled to personal immunity under the rules of customary international law.<sup>37</sup> However, the Court found that:

[...] the Rome Statute expressly provides that heads of state do not enjoy immunity under its terms. Similar provisions are expressly included in the Implementation Act. It means that the immunity that might otherwise have attached to President Bashir as head of state is excluded or waived in respect of crimes and obligations under the Rome Statute.<sup>38</sup>

Furthermore, it was held that the Minister of International Relations cannot exercise the power to grant immunity in terms of the Immunities Act so as to prevent the arrest and surrender of a person pursuant to a lawfully authorised request to this effect from the ICC.

A compelling issue raised by the Al Bashir matter is the effect of Sudan's status as non-state party to the Rome Statute and, more specifically, whether Sudan can be bound to the terms of an international agreement that it has not signed.<sup>39</sup> In this regard, the Court referred to the following dictum of the ICC PTC:

[...] the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court [...].<sup>40</sup>

<sup>35</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* (n 33) para 22.

<sup>36</sup> *Ibid* para 11. As regards the obligations of state parties towards the ICC in respect of cooperation and judicial assistance, the most relevant provisions in the Rome Statute are:

Art. 86: 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the court [ICC] in its investigation and prosecution of crimes within the jurisdiction of the Court;' and

Art. 89(1): 'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.'

<sup>37</sup> *Ibid* para 28.7.

<sup>38</sup> *Ibid* para 28.8.

<sup>39</sup> Vienna Convention on the Law of Treaties (1969), art. 34: 'A treaty does not create either obligations or rights for a third State without its consent.'

<sup>40</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*, para 28.9 and *Prosecutor v Al Bashir (Decision following the Prosecutor's request for an order further*

The Court also relied on the decision of the ICC PTC II in an earlier decision *On the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court*<sup>41</sup> to assert that the Respondents' arguments in respect of immunity were 'misguided.'<sup>42</sup>

It is interesting (and perhaps also surprising) that the judgment contains no direct reference to Article 98 of the Rome Statute. According to Article 98(1):

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

In the context of the Al Bashir matter, the following questions arise: Did the ICC request require South Africa to act contrary to its international legal obligations in respect of personal immunity? Was President Al Bashir entitled to such immunity before a South African court *under international law*?

It is widely accepted that personal immunity under international law may under certain conditions constitute a bar to legal proceedings, including *extradition proceedings*, directed towards the determination and allocation of criminal and civil liability before foreign national courts.<sup>43</sup> However, it may be asked whether such immunity presents a bar to domestic proceedings directed towards the *surrender* of a suspect not to a state, but to the ICC (or any other international court)?<sup>44</sup>

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*clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber, 13 June 2015, para 9.

<sup>41</sup> *On the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court* ICC 02/05-01/09 (9 April 2014).

<sup>42</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* (n 33) para 32.

<sup>43</sup> See ICJ, Arrest Warrant case (n13); see also *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) (1999) 2 All ER 97, 111-112: '[...] immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*.' See generally Akande and Shah (n 14).

<sup>44</sup> The Rome Statute distinguishes between "surrender" and "extradition" in Art. 102: 'For the purposes of this Statute:

(a) 'surrender' means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) 'extradition' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.'

This distinction is important for ensuring that the rules and principles of extradition law (which applies between states) are not applicable to the surrender of suspects to the ICC for proceedings in terms of the Rome Statute. See G Sluiter, 'The surrender of war criminals to the International Criminal Court' (2003) 25(3) *International and Comparative Law Review* 607-608.

The nature of extradition proceedings was considered in *Minister of Justice and Another v Additional Magistrate, Cape Town*.<sup>45</sup> It was held that enquiries held before a magistrate for the purposes of extradition do not constitute ‘criminal proceedings.’ Such proceedings are not administrative in nature, but *sui generis* judicial proceedings not involving any dispute between the state in question and the individual suspect that is the subject of the extradition request.<sup>46</sup> This being so, the court in the requested state is merely called upon to determine whether there is sufficient evidence to warrant the suspect’s prosecution in a foreign state.<sup>47</sup> Thus, it is not about prosecution and conviction in any immediate sense, but rather concerns ‘the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting State.’<sup>48</sup> Furthermore, any detention that may be imposed by the court would only be for the purposes of extradition and not as a form of punishment. In this regard, in *Geuking v President of the Republic of South Africa and Others*, it was held that:

[...] extradition proceedings do not determine the guilt or innocence of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign state in order to be put on trial there.<sup>49</sup>

If President Al Bashir had been arrested in South Africa, the question of his surrender to the ICC would have been subject to an inquiry before a magistrate in terms of Section 10 of the Implementation Act. It is submitted that the nature of judicial proceedings to determine whether President Al Bashir should be surrendered must be viewed as legally akin to extradition proceedings as described above. This submission finds further support in the similarity between the wording of Section 9(2) of the Extradition Act and Section 10(3) of the Implementation Act.<sup>50</sup>

<sup>45</sup> *Minister of Justice and Another v Additional Magistrate, Cape Town* 2001 (2) SACR 49 (C).

<sup>46</sup> *Ibid* 61C.

<sup>47</sup> See *Extradition Act* 67 of 1962, s 10(2), according to which it is not necessary for requesting state to establish *prima facie* guilt prior to the granting of a request for extradition: ‘For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.’

<sup>48</sup> *President of the Republic of South Africa v Quagliani* 2009 (2) SA 466 (CC), para 1.

<sup>49</sup> *Geuking v President of the Republic of South Africa and Others* 2004 (9) BCLR 895 (CC), para 44.

<sup>50</sup> See *Extradition Act*, s 9(2): ‘Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.’ See also *ICC Act* 2002, s 10(3): ‘The magistrate holding the enquiry must proceed in the manner in

Thus, when engaged with extradition proceedings, the *extraditing state* is acting on the basis of a pre-existing legal agreement with the requesting state in terms of which it has agreed to act not on its own behalf, but *on behalf of (or as a temporary extension of) the requesting state's criminal justice system* in respect of the suspect in question. Under these "normal" circumstances a sitting head of state may claim personal immunity before the courts of the extraditing state. This is because his/her prosecution in the requesting state – irrespective of the nature of the crimes involved – would be contrary to the rules of personal immunity under international law. *Ipsa facto*, an extraditing state would be facilitating the violation of the international law rules pertaining to personal immunity by acceding to such a request.

However, when a *surrendering state* is acting *on the behalf of the ICC* (one could say also *acting on behalf of criminal justice system of the international community*), the situation may be viewed as *sui generis*. Under these circumstances, Article 27 of the Rome Statute explicitly renders personal immunity (including immunity for sitting heads of state) to be irrelevant in respect of the prosecution of individuals for genocide, war crimes and crimes against humanity. If, in addition, the surrendering state is acting at the behest of a binding UNSC Resolution implicitly rendering such immunity irrelevant, there is certainly room to argue that such proceedings should be recognized as a narrow exception to the general rule that sitting heads of state are immune from any domestic legal proceedings that could facilitate or enable their prosecution.

## 5 Lessons learnt

In light of the above, it appears that both the legal and political characteristics of a state have a crucial impact on its ability to dynamically reflect modern international criminal justice via its legal system. The following aspects appear to be crucial to effective indirect enforcement of international criminal law by states:

### 5.1 The limitations of domestic jurisdiction in respect of international crimes

In principle, a national court asserting universal jurisdiction has authority to punish certain offences as an agent of the international community 'without re-

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which a preparatory examination is held under Chapter 20 of the Criminal Procedure Act, 1977 (Act 51 of 1977), and has, for the purposes of holding the inquiry, the same powers as he or she would have had in respect of a preparatory examination so held, including the power to commit any person for further detention or to release such person on bail.'

gard to where the crime was committed, the nationality of the [...] perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.’<sup>51</sup> Crimes that are offensive to the international community as a whole represent the legitimising link between the proscribed conduct and the prosecuting state (or *forum deprehensionis*). ‘Pure’ or ‘absolute’ universal jurisdiction (or ‘universal jurisdiction *in absentia*’<sup>52</sup>) is by now accepted to be an untenable concept when it comes to the enforcement of international criminal norms before foreign domestic courts. Beyond the practical difficulties that arise in this context (for example, the limits on criminal procedural activities such as investigation and arrest), there are compelling arguments against such a liberal invocation of universal jurisdiction. First, it violates the fundamental international law principles of territorial sovereignty and sovereign equality. Secondly, if used unscrupulously, the principle poses a real risk of potentially destabilising political abuse by states. Finally – and not unrelated to the aforementioned concern – its acceptability is called into question by considerations of fairness (it may, for example, come into conflict with human rights principles, such as, the principle *ne bid in idem*).

As a result, universal jurisdiction is now accepted as a qualified concept (some refer to it as ‘conditional’ universal jurisdiction). This is taken to mean that, while states may proscribe certain conduct as universally criminalised under its national criminal laws, a state is severely limited in the enforcement of such rules as *enforcement* jurisdiction is strictly limited under international law to the territory of the prosecuting state. Thus, when we speak of universal jurisdiction in a broad sense, we are actually broadly referring to universal *prescriptive* jurisdiction accompanied by the actual presence of the accused within a state’s territory.<sup>53</sup> This may seem like a pedantic point, but as recent South African case law illustrates, this understanding of universal jurisdiction may be of great significance when it comes to the indirect enforcement of international criminal law. Domestic investigative authorities and courts must be aware of the distinction between wide prescriptive jurisdiction (as, for example, provided for in Section 4(1) of the Implementation Act) and narrow enforcement jurisdiction (as, for example, provided for in Section 4(3) of the Act) as well as the international legal principles limiting the duty to investigate international crimes.

<sup>51</sup> *Princeton principles on universal jurisdiction* (2001), Principle 1(1).

<sup>52</sup> See ICJ, Arrest Warrant case (n 13).

<sup>53</sup> See R O’Keefe, ‘Universal jurisdiction – clarifying the basic concept’ (2004) 2 *Journal of International Criminal Justice* 735-760.

Beyond the limitations as regards enforcement jurisdiction, it must further be accepted that domestic courts are likely to continue to be constrained in respect of the indirect enforcement of international crimes by the rules of immunity *ratione personae*. The judgment in the Al Bashir case may be considered as highly positive from the perspective of the aim of the project of international criminal justice, namely, ending the culture of impunity. However, it may be asked whether the judgment sets a dangerous precedent from the perspective of international political and diplomatic peace and security. In this latter respect, it must be remembered that the judgment above does not purport to render personal immunity irrelevant to domestic prosecution of international crimes under all circumstances. In this regard, an earlier – and lesser-known – legal matter involving the Implementation Act may provide a good example. In 2013, the Muslim Lawyers Association (MLA) submitted a complaint to South African authorities in terms of, *inter alia*, the Implementation Act, requesting the institution of a criminal investigation as well as the arrest and prosecution of US President Barack Obama (who was scheduled to visit South Africa) for war crimes, genocide as well as crimes against humanity. Alternatively, it was asked that President Obama should be surrendered to the ICC to stand trial. The allegations (contained in the so-called ‘Obama docket’) arose from US drone strikes in the Middle East and some African countries. The North Gauteng High Court dismissed the application on the basis that it lacked urgency.<sup>54</sup> Needless to say, President Obama was not arrested when he later visited South Africa.

It is well known that the US is at present not a party to the Rome Statute. With reference to the facts above, one may create a useful hypothetical example in order to illustrate that personal immunity under international law may under certain circumstances constitute a bar to prosecution for international crimes before a foreign domestic court. Hypothetically speaking, a South African court considering an application for the arrest and surrender (or a request to that effect from the ICC) of an incumbent head of state must consider, first, whether that person is entitled to personal immunity under international law and, secondly, the fact that the state in question is not a party to the Rome Statute and therefore cannot be bound by its terms. If, furthermore, the case had not been referred to the ICC by way of a UNSC Resolution, it must be concluded that personal immunity under international law would constitute a temporary bar to prosecution before the foreign national court in question. That would be the case irrespective of whether the national legislation of that state contains a provision explicitly rendering immunities under international

<sup>54</sup> See Muslim Lawyers Association, Press Release <<http://www.mlajhb.com/obama-docket-high-court-press-release>> accessed 4 September 2015.

law to be irrelevant in respect of the *prosecution* of individuals for international crimes. A state that *surrenders* a sitting head of state to the ICC (a treaty-based institution) under these circumstances would be acting contrary to international law. To interpret the Implementation Act to the contrary would – under these particular circumstances – be inconsistent with Section 233 of the Constitution, which requires South African courts to opt for a reasonable interpretation of national legislation that is consistent with international law over one that is not.

## 5.2 *The role of national implementation legislation*

A curious feature of the cases discussed above is that all of them involve allegations against nationals of non-state parties to the Rome Statute. This illustrates the true significance and potential of domestic prosecution and cooperation in respect of international crime. Some form of ‘ICC involvement’ is not an indispensable requirement in order for states to enforce the norms of international criminal justice. In other words, the reach of states’ collective prescriptive and enforcement jurisdiction is much broader than that of the ICC, which jurisdiction is – but for those cases referred to the Court by the UNSC – limited to the bases of nationality and territoriality via states party to the Statute.<sup>55</sup> Du Plessis and Maunganidze have highlighted the importance of domestic implementation legislation within the broader project of ending the culture of impunity for international crimes:

[...] to the extent that [domestic implementation legislation] provide[s] for universal jurisdiction – [domestic or state] authorities can investigate and prosecute crimes that fall outside the Rome Statute system’s net: namely, those occurring in states that are not ICC members, or by national of such states [...].<sup>56</sup>

The ability and potential for national implementation legislation to spread the net of accountability in respect of international crimes was also underscored by the Constitutional Court:

The need for states parties to comply with their international obligation to investigate international crimes is most pressing in instances where those crimes are committed by citizens of and within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity. If an investigation is not instituted by non-signatory countries in which the crimes have been committed, the perpetrators can only be brought to justice through the application of universal jurisdiction, namely the

<sup>55</sup> See Rome Statute, arts. 12 and 13.

<sup>56</sup> A du Plessis and O Maunganidze, ‘The ICC and the AU’ in C Stahn (ed) *The law and practice of the International Criminal Court* (Oxford University Press 2015) 65-83, 75.



investigation and prosecution of these alleged crimes by states parties under the Rome Statute.<sup>57</sup>

South Africa already has a rather impressive list of implementation legislation.<sup>58</sup> As regards the goal of ending the culture of impunity in respect of international crimes, this is laudable development. However, the domestication of international crimes is only the first step towards effective application of international criminal law on the domestic level. Ideally, such legislation should provide for extraterritorial jurisdiction in respect of the core international crimes as well as provisions relating to the duties and powers of domestic authorities regarding the investigation of such crimes. Such legislation should also clearly provide for duties and powers of local authorities in respect of cooperation with the ICC.

Furthermore, domestic courts must be legislatively empowered to apply international law norms and adjudicate upon matters relating to the enforcement of international criminal law. In this regard, it is important to raise awareness among the government, domestic lawyers, civil society and the general public of the central role of domestic prosecution and cooperation in the larger project of international criminal justice. The cases above suggest that effective domestic enforcement requires, first, an enforceable domestic legal framework and, secondly, buy-in or proactive engagement with this legal framework from government and, perhaps more importantly, from other domestic role players such as civil society organisations.<sup>59</sup> This type of engagement with an enforceable legal framework is especially important in countries following the accusatorial system of criminal justice as judges in those countries do not choose the cases that come before them.

Finally, a minimum requirement for the effective domestic enforcement of international criminal law is that of impartiality and independence in the judiciary and the national prosecuting authority. Naturally, these domestic legal attributes are largely dependent on the political and legal characteristics of the state in question. However, judicial and prosecutorial independence should, as far as possible, also be provided for in domestic legislation concerning the indirect enforcement of international criminal law.

<sup>57</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (n2), para 32.

<sup>58</sup> See *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*; *Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004*; *Implementation of the Geneva Conventions Act 8 of 2012*; and *Prevention and Combatting of Torture of Persons Act 13 of 2013*.

<sup>59</sup> Du Plessis and Maunganidze (n 56) 68.

### 5.3 *Some hope for the mitigation of politically inspired impunity*

The impact of international and regional political affiliations – whether positive or negative – on the exercise of government power may affect the willingness of states to fulfil their international and domestic legal obligations regarding the enforcement of international criminal law norms on the domestic level. Politics remains as much of an inhibiting factor to the administration of international criminal justice at the national level as it has always proven to be at the international level.

Decision making in respect of the investigation and prosecution of crime is inherently politicised. National decision making as regards the investigation and prosecution of international crime is no different. The ‘de-politicisation’ of national decision making in respect of international crimes is beyond the reach of international legal rules. Nonetheless, there is potential to regulate or minimise the impunity-generating effects of such decision making by way of national legislation. Section 5 of the Implementation Act, for example, regulates the institution of national prosecutions in South Africa. In accordance with Section 5(1) of the Act, the National Director of Public Prosecutions (NDPP) must consent to the prosecution of any of the crimes contemplated in the Act at the national level. The Act also, however, requires that the NDPP must take into account, in reaching any such decision, that South Africa has responsibility to prosecute such persons in line with the principle of complementarity.<sup>60</sup> Another useful example can be found in Section 5(6) of the Act, according to which the NDPP’s decision not to prosecute a person for genocide, crimes against humanity or war crimes ‘does not preclude the prosecution of that person in the Court.’ This provision may be viewed as a legislative endorsement on the part of the state of the subsidiary jurisdiction of the ICC by acknowledging, albeit indirectly, the relationship between prosecutorial decision making under the Act and the admissibility regime in Article 17 of the Rome Statute.

From a broader perspective, the question over the arrest and surrender of President Al Bashir to the ICC can be approached from two perspectives, namely, legal idealism (as represented by the letter of international law) or political realism (the demands of diplomatic or political stability). In this latter respect, the overarching narrative seems to be that it would have been legally correct, but politically impossible to surrender President Al Bashir to the ICC.<sup>61</sup> The larger political backdrop

<sup>60</sup> ICC Act 2002, s 5(3).

<sup>61</sup> See, for example, B Olugbuo, ‘Law and Politics at the International Criminal Court’ *Open Democracy* (24 August 2015); T Mazwai, ‘Letting Bashir go helped keep SA conflict free’ *Rand Daily Mail* (2015/07/01).

– the well documented tension between the ICC and the AU – must also be kept in mind. The Al Bashir matter as well as the ICC-AU conflict is symptomatic of the general tension between the idealism of the project of international criminal justice and the realities of the anarchic and politically dominated international order. However, it is wrong to view the Al Bashir matter as a total defeat for international criminal law. In fact, both justice and politics – if there truly is such a ‘battle’ to speak of – have grounds for claiming a symbolic victory. As opposed to a defeat, President Al Bashir’s departure from South Africa represents the latest loss in a long series of losses for international criminal law idealism against the demands of realpolitik. It is highly likely that we will be seeing similar ‘political victories’ again in the near future.

## 6 Conclusion

International criminal justice may be viewed as a collaborative legal initiative of the international community designed to achieve a particular aim. That aim of this project is, first and foremost, to end the culture of impunity in respect of international crimes. This does not mean *accountability at all costs*, but *maximised accountability*. Furthermore, within this project, domestic prosecution and cooperation in international criminal law enforcement is envisioned as the primary means through which the goal to maximise accountability can be achieved.

The success of the project of international criminal justice – as with any other project – will depend primarily on the present and future disposition (the willingness, goodwill and commitment) of its current (and future) proponents, namely, states (especially those acting within the framework of enforcement established by way of the Rome Statute). States with a genuine interest in the success of the project of international criminal justice must prioritize indirect modes of international criminal law enforcement. Recent developments in South Africa illustrate that this requires more from states than ratification and domestic incorporation of the Rome Statute.

Despite the role and potential for indirect enforcement in the project of international criminal justice, states must remain mindful of what is potentially the dark underbelly of the prioritisation of indirect enforcement of international criminal law. The risks associated with unscrupulous, abusive and politically compromised domestic prosecutions conducted under the guise of being in the interests of the international community are perilous and can therefore only be ignored to the detriment of the project as a whole.



# WHITHER INTERNATIONAL CRIMINAL JUSTICE IN AFRICA?

EMILIA SIWINGWA\*

## Abstract

*In Africa, the drive towards the eradication of colonialism ushered in the promotion of non-interference, as well as the sovereignty, territorial integrity and independence of states as enshrined in the Organization for African Unity (OAU) Charter. In the lead up to and with the adoption of the Constitutive Act of the African Union, however, these areas of focus were replaced with the ideals of economic integration, the quest for socio-economic development and the promotion of democracy and human rights.*

*The departure from the OAU objectives encouraged progress towards ensuring an environment conducive for an emerging human rights culture on the continent, which would forge an entry point for international criminal justice. However, political will towards the promotion and implementation of international criminal justice on the continent has time and again proved to be inconsistent with this critical paradigm shift.*

*This chapter adopts Slaughter's view that law is politics and that it has always been dominated by power-based actors, namely states, and attempts to identify the key factors that have mitigated the negative political influences on international criminal justice on the continent for practical application by civil society actors and legal practitioners.*

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## 1 Introduction

How many pictures of dead children do you need to see before you understand that killing children is wrong?<sup>1</sup>

Abuses and mass loss of human life always strike a moral chord with the global community. Alongside regular exposure to such atrocities through civil society briefs and media reports circulated in real time through readily accessible mediums, an increase in access to information has given rise to great societal expectations about the attainment of justice and the diminution of impunity through international criminal justice mechanisms.

However, such expectations are lowered by the perception of selective investigations, prosecutions and punishment of global international crimes. The International Criminal Court (ICC), for example, has been criticized for seemingly targeting African leaders to the exclusion of Western and Middle Eastern leaders who have been embroiled in conflicts that have caused the mass violations of rights and the deaths of countless civilians in countries such as Iraq, Afghanistan, Israel and Palestine to name a few.

As a result, African leaders have repeatedly cried foul over what they have viewed as injustices, and have made (sometimes popular)<sup>2</sup> decisions to counter what has been labelled by some as neo-colonialism.<sup>3</sup> For instance, the African Union (AU) in its 13<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government held in July 2009 in Sirte, Libya, famously reiterated its decision ‘not [to] cooperate with the ICC in the arrest and surrender of President Al Bashir of The Sudan.’<sup>4</sup> This resolution has since been followed by the adoption of motions to withdraw from the ICC by Kenya’s Parliament,<sup>5</sup> and more recently by South Africa’s ruling political party the African National Congress (ANC).<sup>6</sup> These are poignant

<sup>1</sup> S Moore, ‘Sharing pictures of corpses on social media isn’t the way to bring ceasefire’ *The Guardian* 21 July 2014.

<sup>2</sup> The comments section of online media reports sometimes show popular support for retaliatory actions taken by African leaders against international criminal justice mechanisms supported by the West, such as the ICC.

<sup>3</sup> F Kuvirimirwa, ‘ICC agent of neocolonialism’ *The Herald* 29 May 2014.

<sup>4</sup> See M du Plessis and C Gevers, ‘The obligation of African Union states to implement ICC arrest warrants’ *EJIL: Talk!* 4 February 2011.

<sup>5</sup> G Gatehouse, ‘Kenya MPs vote to withdraw from the ICC’ *BBC News* 5 September 2013. According to the article, Kenyan parliamentarians voted to approve a motion to withdraw from the Rome Statute in September 2013.

<sup>6</sup> M Raborife, ‘ANC wants SA to withdraw from ICC’ (11 October 2015) <<http://www.timeslive.co.za/politics/2015/10/11/ANC-wants-SA-to-withdraw-from-ICC>> accessed 30 October 2015. The article

ant examples of a manifest escalation of the mistrust of, and discontentment with the ICC. Not to be forgotten is the unprecedented move in which the AU Summit approved an amendment to the Protocol on the African Court of Justice and Human Rights,<sup>7</sup> which exempts sitting senior government officials from prosecution.<sup>8</sup>

Many see these events and developments as attempts to create an alternative forum to the ICC for the prosecution of international crimes. This is, for some, an apt response to the ICC's targeting Africa; and to others, a step backward in international criminal justice and the manifestation of a lack of political will on the continent to advance the same.

In a passionate article voicing condemnation<sup>9</sup> of the perceived unequal application of international criminal justice, Aayesha Soni writes:

*Why is George W Bush not being tried, the man who led a modern day crusade against Iraq and Afghanistan with fabricated motives and is responsible for the complete destruction of those countries? [...] That warrants a war crime worthy of trial.*

*Why is Benjamin Netanyahu not being tried, a man who launches an offensive on the besieged people of Gaza [...] wreaking havoc and death that doesn't spare children, hospitals and even UN shelters... [E]xtensive fact-finding missions [have concluded] that Israel is guilty of war crimes already. That warrants a trial, surely.<sup>10</sup> (emphasis added)*

The International Court of Justice (ICJ) has held that neither financial nor regional 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.<sup>11</sup> However, practitioners and scholars alike have advanced various positions in response to the notion of disparate international criminal justice.

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explains that on 15 June 2015, the Gauteng High Court had ordered the South African Government to arrest Sudanese President Omar Al Bashir when he was in Johannesburg in June 2015 for an African Union summit - but despite the court order, he left the country. The ICC had issued a warrant of arrest for Al Bashir, wanting him to stand trial on charges of war crimes and genocide. The High Court ruled that Government had acted unconstitutionally when it did not arrest him on the basis that the Implementation Act did not give heads of state immunity from prosecution on criminal charges.

<sup>7</sup> The Protocol mandates the prosecution of international and other crimes.

<sup>8</sup> A Mudukuti, 'The African Union endorses impunity' (2 July 2014) <<http://www.southernafricalitigationcentre.org/2014/07/02/the-african-union-endorses-impunity/>> accessed 20 October 2015.

<sup>9</sup> Such sentiments have even been echoed by the likes of Nobel Peace Prize winner, Desmond Tutu. See 'Tony Blair should face trial over Iraq War, says Desmond Tutu' *The Guardian* 2 September 2012.

<sup>10</sup> S Aayesha, 'The ICC: When law becomes injustice' <<http://www.politicsweb.co.za/opinion/why-is-the-icc-not-trying-bush-blair-and-netanyahu>> accessed 8 August 2015.

<sup>11</sup> G Kemp, 'Taking stock of international criminal justice in Africa: Three inventories considered' in B van der Merwe (ed) *International criminal justice in Africa: Challenges and opportunities* (2014) 7-32, quoting *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, ICJ, 20 July 2012.

According to Krisch, international law is always in a precarious position where it mediates between the demands of the powerful and the ideals of justice held by international society at any given moment.<sup>12</sup> In the same vein, Wegner posits that the promotion of the rule of law internationally always remains subservient to political expediency.<sup>13</sup> Through an exposition of international relations theory, Van der Merwe provides some guidance as regards state support for international criminal justice (or the lack thereof)<sup>14</sup> and highlights *inter alia* the prominent view that law is a mere by-product of the political processes that bring about social change.<sup>15</sup>

Following the reasoning of these authors, this author finds logic in concluding that political calculations always factor into the decisions and efforts to pursue international criminal justice universally. In this regard, African states have either been slow to act in certain respects, or have favoured the evasion of justice as a means of circumventing the accountability of senior officials through trials for grave crimes contrary to the traditional notions of state sovereignty and immunity for heads of state.<sup>16</sup> Therefore, despite the traction gained in bringing the African international criminal justice system into proximity with the human rights and justice systems, competing interests have led to retrogression<sup>17</sup> from what had ostensibly appeared to be positive and forward-looking developments in international criminal justice.

This author recognizes that a study on the relationship between law and politics within the context of international criminal justice is not novel; indeed, several authors have widely interrogated this issue either through the lens of international relations, or, have assessed the practicability of this relationship against events of the time in international criminal justice. This chapter, however, seeks to isolate the factors, which have either facilitated, or have created an enabling environment for the achievement of justice for international crimes in Africa, even in the face of competing political interests.

<sup>12</sup> N Krisch, 'International law in times of hegemony: Unequal power and the shaping of the international legal order' (2005) 16(3) *European Journal of International Law* 369, 370.

<sup>13</sup> P Wegner, 'Law versus politics in international criminal justice' <<http://justiceinconflict.org/2011/07/28/law-versus-politics-in-international-criminal-justice/>> accessed 1 October 2015.

<sup>14</sup> HJ van der Merwe, 'The influence of politics in international criminal law: A primer (for lawyers)' (2014) *African Yearbook of International Humanitarian Law* 111-132, citing AM Slaughter 'International law in a world of liberal states' (1995) 6 *European Journal of International Law* 503, 506.

<sup>15</sup> See also R Teitel, *Transitional Justice* (Oxford University Press 2000) 3.

<sup>16</sup> E Keppler, 'Bashir's South Africa visit, actually a step forward' *The SADC Lawyer Magazine* (August 2015).

<sup>17</sup> The AU's decision in Sirte not to cooperate with the International Criminal Court is one example. Another example is the AU decision to adopt provisions espousing immunity for sitting senior officials from prosecution against international crimes under the Protocol on Amendments to the 2008 Protocol on the Statute of the African Court of Justice and Human Rights ("Malabo Protocol").



The chapter comprises a primer on international criminal justice to overview basic notions in international criminal law; a description of some of the notable successes and challenges in international criminal justice in Africa; and a conclusion that seeks to answer the question: which factors minimise the negative influence of politics on international criminal justice in Africa?

## 2 Key developments in international criminal justice theory and practice

Crimes against international law are committed by [persons], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>18</sup>

Despite being a subset of public international law, international criminal law places responsibility squarely on individuals for proscribed acts that are defined as crimes under international law,<sup>19</sup> and an obligation on states to prosecute and punish international crimes.<sup>20</sup> And whilst a universal definition for ‘international crimes’ remains elusive,<sup>21</sup> international criminal law derives legal force from treaty law, customary international law, general principles of law, judicial decisions and learned writings. It is regarded as a relatively new area of international law especially with regard to the application of human rights<sup>22</sup> law to international criminal justice. In fact, the transformative developments in classical international legal theory have been key to establishing mechanisms to ensure that perpetrators of international crimes (wherever committed) can be brought to account before impartial *fora*.

<sup>18</sup> Excerpt from the Judgment in *Göring et al* before the International Military Tribunal (IMT) at Nuremberg, Germany in 1946.

<sup>19</sup> See International criminal law and practice training materials, ‘Module 2: What is international criminal law?’ <[http://wcjp.unicri.it/deliverables/docs/Module\\_2\\_What\\_is\\_international\\_criminal\\_law.pdf](http://wcjp.unicri.it/deliverables/docs/Module_2_What_is_international_criminal_law.pdf)> accessed 25 July 2015.

<sup>20</sup> K Obura, ‘Duty to prosecute international crimes under international law’ in C Murungu and J Biegon (eds) *Prosecuting international crimes in Africa* (Pretoria University Law Press 2011) 11-31.

<sup>21</sup> *Ibid.* It should, however, be noted that common international crimes include genocide, war crimes, crimes against humanity and the crime of aggression.

<sup>22</sup> In this regard, human rights are defined as ‘fundamental freedoms to which all human beings are entitled.’ See JS Albanese, *Human rights: Oxford bibliographies online research guide* (Oxford University Press 2009).

To be sure, international criminal law has been in an expansionary phase, seeing an international leap forward in the 1990s caused by growing incidents of violence that were managed within the ambit of international humanitarian law, and has since expanded to include international cooperation in criminal matters between states.<sup>23</sup> These developments have resulted in various modalities, which serve as international criminal justice mechanisms to respond to international crimes.

In this regard, Kemp lists the following as the well-known international criminal justice modalities:<sup>24</sup>

1. Exercise by national courts of jurisdiction over offences on grounds of territoriality or nationality;
2. The exercise by national courts of extraterritorial jurisdiction;
3. The establishment of truth commissions; and
4. International tribunals.

This section provides an overview of the significant developments in international criminal law and justice, which have given rise to these modalities.

## 2.1 *The individual as a subject of international criminal law*

The establishment of criminal norms in international law required the recognition of the individual as a subject of international law and the removal of the notion of sovereignty.<sup>25</sup> These developments first took root after the First World War with the signing of the Treaty of Versailles of 1919,<sup>26</sup> which saw the first attempt at establishing individual criminal responsibility under international law and international criminal courts.

Advocacy efforts followed, led by what is now known as the International Committee of the Red Cross, resulting in the promulgation of the Geneva Conventions and Additional Protocols from 1949 onwards. Following the Second World War, there was a proliferation of courts, laws and notions further transforming international criminal jurisprudence, the most significant of these being the International Military Tribunal at Nuremberg, Germany (Nuremberg IMT).

<sup>23</sup> I Tallgren, 'The sensibility and sense of international criminal law' (2002) 13 *European Journal of International Law* 561-595.

<sup>24</sup> Kemp (n 11).

<sup>25</sup> Ibid.

<sup>26</sup> Signed between Germany and the Allied and Associated powers following WWI, forcing Germany to accept blame and liability for the war. See <<http://www.firstworldwar.com/source/versailles.htm>> accessed 25 July 2015.

Credited with ushering in the new international criminal justice dispensation, the Nuremberg IMT was established through a Charter executed by the allied forces in the Second World War<sup>27</sup> with a view to realize the just and prompt trial and punishment of the major war criminals of the so-called European Axis. Located at Nuremberg, Germany, the Tribunal conducted 22 trials better known as the ‘Nuremberg Trials.’<sup>28</sup>

Several authors have written extensively about the contribution of the Nuremberg IMT towards the developments of international criminal law, but of note to this chapter is Article 6 of the Charter, which provided for an accountability mechanism for crimes against peace, war crimes and crimes against humanity. This provided for individual and collective responsibility for the said crimes, which is of import because up until then, jurisdiction for such crimes had been the purview of national military tribunals. Also of significance was Article 7 of the Charter, under which high-ranking government officials did not enjoy immunity from prosecution or liability.

## 2.2 States' duty to prosecute

Respected authors in the field of international criminal law have contended that the notion of a duty to prosecute and punish international law crimes is well established in international law. Such authors have argued that states have a general obligation to ensure the enjoyment of fundamental rights, which obligation is incompatible with impunity or blanket amnesties for international crimes.<sup>29</sup>

To advance this notion, experts argue that once a crime has been identified as having *jus cogens* status, it inevitably imposes obligations *erga omnes* and that such obligations include the duty to prosecute and punish perpetrators of interna-

<sup>27</sup> WWII Allied Forces comprised the US, France, Great Britain, and Soviet Union. See Article I of the Charter, <<http://avalon.law.yale.edu/imt/imtconst.asp>> accessed 25 July 2015.

<sup>28</sup> The Nuremberg Trials were heavily criticized for the Allies' lack of impartiality, since the allied-victors were directly responsible for the administration of the trials to the exclusion of applicable crimes that may have been committed by the allied forces; and due to the appearance that the trials were a foregone conclusion on account that the list of the accused had been developed prior to the drafting of both the IMT Charter and the indictments. See <<http://www.trial-ch.org/en/resources/tribunals/international-military-tribunals/tribunal-militaire-international-de-nuremberg/the-significance-and-legacy-of-the-tribunal.html>> accessed 25 July 2015.

<sup>29</sup> Obura (n 20), quoting D Orentlicher, ‘Setting accounts: The duty to prosecute human rights violations of a prior regime’ (1991) 100 *Yale Law Journal* 2537-2618; MC Bassiouni, ‘Searching for peace and achieving justice: The need for accountability’ (1969) 59 *Law and Contemporary Problems* 9; and A Cassese, *International Criminal Law* (Oxford University Press 2013) 313.

tional crime.<sup>30</sup> Deductions made from the interpretation and application of international conventions<sup>31</sup> and customary international law<sup>32</sup> have garnered widespread acceptance that states have an international obligation to prosecute and punish international crimes, and that the use of amnesties and the failure to prosecute where international crimes have been committed, would be a breach of the international obligation to prosecute.<sup>33</sup>

### 2.3 *Universal jurisdiction*

In international criminal law, states have jurisdiction over certain offences recognized by the community of nations as being of universal concern, which gives rise to the exercise by domestic courts of universal jurisdiction - the legal principle that permits states having custody of the offender to punish crimes irrespective of the place where the offence was committed.<sup>34</sup> The duty of states under this doctrine has been explained thus:<sup>35</sup>

[S]tates have a general duty under customary international law and certain international treaties<sup>36</sup> to apply universal jurisdiction in order to prosecute international crimes. If states cannot prosecute suspects of these crimes there is an international customary law obligation to extradite suspects to other states willing and prepared to prosecute perpetrators of

<sup>30</sup> Obura (n 20), citing MC Bassiouni, 'International crimes: *Jus cogens* and *obligation erga omnes* (1996) 59 *Law and Contemporary Problems* 67.

<sup>31</sup> Obura (n 20), citing the 1949 Geneva Convention and 1977 Additional Protocols, which place particular obligations on state parties to search for, prosecute, and punish perpetrators of these grave breaches unless they opt to hand over such persons for prosecution by another state party; Convention on the crime of genocide, which was intended to prevent genocide by ensuring its punishment; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes unequivocal duty on state parties to prosecute acts it defines as criminal; Rome Statute on the International Criminal Court, which obligates state parties to investigate and prosecute 'core international crimes'; and human rights conventions (e.g. the International Covenant on Civil and Political Rights, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights), which advance the duty to respect, protect, promote human rights through the investigation, prosecution and punishment of serious violations of physical integrity rights.

<sup>32</sup> Through *opinio juris* and state practice as evinced through international documents, activities and resolutions of the United Nations, decisions of international and national courts and respected authors in the field of international criminal law.

<sup>33</sup> Obura (n 20).

<sup>34</sup> J van der Vyver, 'Universal jurisdiction in international criminal law' (1999) 24 *South African Yearbook of International Law* 105-132, 114-116.

<sup>35</sup> K Kamanga, 'The Rome Statute and Tanzanian legislation' in R Shilamba (ed) *Towards domesticating the Rome Statute in Tanzania: A position paper* (CHESO 2012).

<sup>36</sup> See, for example, the Geneva Conventions (1949) and the Convention against Torture (1984), arts 5(2) and 7(2).

international crimes, that is, according to the *aut dedere, aut judicare*<sup>37</sup> rule.

The crimes for which a state may exercise universal jurisdiction may be found in multilateral treaties, customary international law and domestic statutes. In the absence of a treaty, states may exercise universal jurisdiction for certain crimes under customary international law.<sup>38</sup> In this regard, it is not the defendants themselves who are stigmatised but the acts that they have committed.<sup>39</sup>

## 2.4 *Ad hoc courts*

To overcome the challenges presented by practical, diplomatic and legal obstacles to states implementing universal jurisdiction, courts have been created by the United Nations to try persons guilty of international crimes.<sup>40</sup>

Following the Nuremberg IMT, a recent example of such a court is the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY has provided victims with the opportunity to voice the horrors they witnessed and cemented the notion that an individual's senior position can no longer protect them from prosecution.<sup>41</sup> Established by a United Nations Security Council (UNSC) Resolution,<sup>42</sup> in 1993, the mandate of the ICTY was to prosecute persons responsible for serious violations of international humanitarian law committed since 1991 in the territory of the former Yugoslavia.

## 2.5 *The permanent International Criminal Court*

The principle of complementarity<sup>43</sup> provides for primacy of the state in question to prosecute international crimes over which it has jurisdiction.<sup>44</sup> The ICC is a permanent international court, intended as a court of last resort – thus investigating

<sup>37</sup> Meaning extradite or prosecute.

<sup>38</sup> N Roht-Arriaza and M Fernando, 'Universal jurisdiction' in B Brown (ed) *Research handbook on international criminal law* (Edward Elgar Publishing 2011) 359-369.

<sup>39</sup> HJ van der Merwe (n 14).

<sup>40</sup> H Jallow and F Bensouda, 'International criminal law in an African context' in M du Plessis (ed) *African guide to international criminal justice* (Institute for Security Studies 2008).

<sup>41</sup> See ICTY website <<http://www.icty.org/sections/AbouttheICTY>> accessed 25 July 2015.

<sup>42</sup> Pursuant to Article VII of the Charter of the United Nations.

<sup>43</sup> See Rome Statute, art. 1.

<sup>44</sup> Kenyans for Peace with Truth and Justice, 'Domestic Prosecution of International Crimes: Lessons for Kenya' <[http://dspace.africaportal.org/jspui/bitstream/123456789/34947/1/domestic-prosecution-of-international-crimes-final210215%20\(2\).pdf?1](http://dspace.africaportal.org/jspui/bitstream/123456789/34947/1/domestic-prosecution-of-international-crimes-final210215%20(2).pdf?1)> accessed 25 July 2015.

and, if necessary, prosecuting only where national courts are unwilling or unable to investigate or prosecute a case.<sup>45</sup>

The Rome Statute of the ICC (Rome Statute) has been hailed as the most important international legal document since the UN Charter. The Rome Statute obliges States Parties to cooperate with the ICC in the investigation and prosecution of the Article 5 crimes<sup>46</sup> and in the arrest and surrender of suspects. At present, 123 countries are States Parties to the Rome Statute.<sup>47</sup>

The ICC may exercise (non-retroactive) jurisdiction<sup>48</sup> over natural persons<sup>49</sup> (irrespective of official capacity)<sup>50</sup> with respect to Article 5 crimes if a State Party refers a situation; or if the Security Council refers a situation in accordance with Article VII of the Charter of the United Nations;<sup>51</sup> or if the Prosecutor investigates crimes on their own initiative (*proprio motu*).<sup>52</sup> However, with the exception of UN Security Council referrals, the ICC may only exercise jurisdiction over crimes committed in the territory – or by a national – of a State Party, unless a non-State Party consents.<sup>53</sup> The Prosecutor may also seek information from reliable sources, including governments and non-governmental organizations, to establish whether there is a reasonable basis to proceed with an investigation.

The Rome Statute provides a rigorous admissibility test, which considers measures already taken by a state as regards prosecution of the crime, in addition to a state's capacity and willingness to prosecute, with respect to a situation.<sup>54</sup> Upon satisfying itself that a person has committed a crime within the jurisdiction of the ICC and that arrest is necessary, the Court may issue a warrant of arrest or summons to appear,<sup>55</sup> which shall be issued by a custodial state in accordance with its laws.<sup>56</sup>

<sup>45</sup> Jallow and Bensouda (n 40).

<sup>46</sup> Article 5 of the Rome Statute lists the following as crimes over which the ICC has jurisdiction: genocide, war crimes, crimes against humanity and the crime of aggression.

<sup>47</sup> See ICC website <[http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)> accessed 25 July 2015.

<sup>48</sup> See Rome Statute, art. 24.

<sup>49</sup> See Rome Statute, art. 25.

<sup>50</sup> See Rome Statute, art. 27.

<sup>51</sup> Chapter VII of the Charter of the United Nations addresses actions with respect to threats to the peace, breaches of the peace, and acts of aggression.

<sup>52</sup> See Rome Statute, arts. 13-15.

<sup>53</sup> See Rome Statute, art. 12.

<sup>54</sup> See Rome Statute, art. 17.

<sup>55</sup> See Rome Statute, art. 58.

<sup>56</sup> See Rome Statute, art. 59.

## 2.6 Truth commissions

Truth commissions are usually fact-finding bodies set up to investigate serious violations of human rights and international criminal law, often committed during an internal armed conflict or during the time that a repressive regime has been in power.<sup>57</sup> They are usually mandated to propose methods for the compensation of the victims of the crimes investigated and to recommend measures for fostering national reconciliation. Occasionally, they are empowered to recommend the prosecution of persons suspected of serious crimes.<sup>58</sup>

For purposes of this chapter, however, examples in the next section and the conclusion will exclude truth commissions in favour of judicial international criminal justice modalities.

## 3 International criminal justice in Africa: Judicial mechanisms

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity.<sup>59</sup>

In spite of being largely absent<sup>60</sup> from the earlier transformative developments in international criminal law, African states have evinced a willingness to embrace and apply judicial mechanisms relating to international criminal justice, particularly in the 1990s.<sup>61</sup> This section aims to highlight examples of judicial applications of international criminal law in Africa.

### 3.1 Exercise of universal jurisdiction

The proscription and punishment of international crimes finds expression in several pieces of legislation on the continent. According to Murungu, there are at least twelve countries and one sub-region whose legislation proscribes and pun-

<sup>57</sup> Jallow and Bensouda (n 40), citing T Burgenthal, 'Truth commissions: Between impunity and prosecution' Transcript of the FK Cox International Law Centre lecture in global legal reform (2006–07) *Case Western Reserve Journal of International Law*.

<sup>58</sup> Jallow and Bensouda (n 40).

<sup>59</sup> P Mochochoko, 'Africa and the International Criminal Court' in E Ankumah and E Kwakwa (eds) *African perspectives on international criminal justice* (Africa Legal Aid 2005).

<sup>60</sup> By virtue of being colonies and/or due to the continent's then principled focus on the independence and sovereignty of states.

<sup>61</sup> E Siwingswa, 'Domestication versus non-cooperation: The African Union dilemma on the domestication of the Rome Statute of the International Criminal Court' in R Shilamba (ed) *Towards domesticating the Rome Statute in Tanzania: A position paper* (CHESO 2012) Chapter 5.

ishes international crimes.<sup>62</sup> Of those, the ones with laws that provide for universal jurisdiction over international crimes include: South Africa, Kenya, Uganda, Senegal, Niger and Burkina Faso.<sup>63</sup>

Three key cases are summarized below, which show the influence of leadership transitions, external pressure from the international community, civil society activism and the rule of law on international criminal justice.

### 3.1.1 Ethiopia: The case of Mengistu Haile Mariam

Ethiopia became a party to the Genocide Convention in 1949, but to date is not a party to the Rome Statute.<sup>64</sup> The Penal Code of Ethiopia of 1957<sup>65</sup> prohibited and provided punishment for genocide, crimes against humanity and aggravated homicide.

Mengistu Haile Mariam, former President of the People's Democratic Republic of Ethiopia, was responsible for toppling the Ethiopian monarchy in a popular uprising in the 1970s. At the time, Mengistu was the most prominent officer of the Dergue (Coordinating Committee of the Armed Forces, Police and Territorial Army).<sup>66</sup> After assuming power, Mengistu's regime targeted individuals and groups likely to pose a threat to military rule until he himself was toppled by a coalition of rebels in 1991.<sup>67</sup>

Starting from 1992, in what was the first trial on the African continent where representatives of an entire regime were investigated and tried before a national court, the transitional regime decided to bring Mengistu and his associates to trial for crimes committed during his reign:<sup>68</sup>

<sup>62</sup> CB Murungu, 'Immunity of state officials and prosecution of international crimes in Africa' (Doctoral Thesis, University of Pretoria 2011) Chapter 5. Murungu lists Rwanda, Burundi, the Republic of Congo, the Democratic Republic of the Congo, Malawi, Kenya, Burkina Faso, Niger, Uganda, Senegal, Ethiopia and South Africa as the 12 countries with legislation proscribing and punishing international crimes; and the Great Lakes as the sub-region, which has a Protocol for the Prevention and the Punishment of the Crimes of Genocide, War Crimes and Crimes against Humanity and all Forms of Discrimination (2006).

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid. Murungu notes that this has since been repealed by way of the Criminal Code of 2005. This, together with the Constitution of Ethiopia, 1995, provides for the prohibition and punishment of genocide and crimes against humanity; the former includes war crimes.

<sup>66</sup> Jallow and Bensouda (n 40).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.



1. A special prosecutor's office was established and held trials in different locations in the country against: i) policy and decision makers; ii) officials who passed on orders or reached decisions on their own; and iii) those directly responsible for committing the alleged crimes. Of the 5,198 people who were indicted, over 1,000 were convicted; and
2. Mengistu and his co-accused were put on trial before the Ethiopian Federal High Court on 211 counts of genocide and crimes against humanity. Twenty-five of the 55 accused were tried *in absentia*. Mengistu and his co-accused were convicted on all counts in December 2006.

### 3.1.2 Senegal: The case of Hissène Habré

Hissène Habré, former President of Chad, ruled between 1982 and 1990 in a reign marked by severe political oppression, the torture and deaths of 40,000 individuals, and more than 12,000 victims of human rights violations.<sup>69</sup> President Idriss Déby Itno deposed Habré in 1990 and subsequently appointed a truth commission to investigate the crimes allegedly committed during Habré's regime. After being deposed, Habré fled to Senegal.

A torture victims' group filed a civil party complaint<sup>70</sup> suit against Habré in Senegal<sup>71</sup> and a Belgian national of Chadian origin also filed a suit invoking the Convention against Torture (CAT) in Belgium.<sup>72</sup> Habré was indicted in Senegal in 2000, but continuously sought dismissal of the suit in Senegal on the basis of immunity as a former head of state.<sup>73</sup> Meanwhile, Belgium sought to exercise jurisdiction over the complaint that had been instituted in Belgium on the basis of universal jurisdiction (passive personality), as well as to compel Senegal to honour its obligations under the CAT by either bringing criminal proceedings against Habré,

<sup>69</sup> Ibid.

<sup>70</sup> According to Jallow and Bensouda, the Senegalese legal system allows civil suits to be joined with a criminal investigation.

<sup>71</sup> Jallow and Bensouda (n 40).

<sup>72</sup> Kemp (n 11).

<sup>73</sup> See Jallow and Bensouda (n 40). The regime of the former President of Senegal, Abdoulaye Wade, was complicit in the delays of trying Habré. Then UN Secretary General, Kofi Annan, had to request Wade not to permit Habré to leave. The 25 year delay of bringing Habré to trial has even been labelled as 'one of the world's most patient and tenacious campaigns for justice' by the *New York Times*; and an 'interminable political and legal soap opera' by Nobel Peace Prize Winner, Desmond Tutu. See HRW website <<https://www.hrw.org/news/2015/08/31/qa-case-hissene-habre-extraordinary-african-chambers-senegal#4>> accessed 20 November 2015.

or extraditing him to Belgium. Senegal refused, on three occasions, to extradite Habré to Belgium.<sup>74</sup>

According to Murungu,<sup>75</sup> Senegal then proceeded to enact a law implementing the Rome Statute, amended its Constitution to confer jurisdiction to its national courts to prosecute all persons (without exception) who commit international crimes, and amended its criminal procedure code to allow universal jurisdiction for international crimes.<sup>76</sup> After twenty-five years, these events culminated in the establishment of the Extraordinary African Chambers,<sup>77</sup> which instituted proceedings against Habré in July 2015 – the first in the world in which the courts of one country prosecute the former ruler of another for alleged human rights crimes.<sup>78</sup>

### 3.1.3 South Africa: The Zimbabwe Torture Case

In 2008, South African authorities were approached by a group of individuals from the political opposition in Zimbabwe who alleged that acts of torture had been perpetrated against them by agents of the ruling Zimbabwean African National Union Patriotic Front (ZANU PF) in 2007.<sup>79</sup>

South Africa has domesticated the Rome Statute through the Implementation of the International Criminal Court Act (2007), which includes a duty to investigate and to prosecute international crimes. So with the assistance of the Southern Africa Litigation Centre (SALC),<sup>80</sup> these individuals assembled a dossier, detailing the al-

<sup>74</sup> Kemp (n 11). According to Kemp, Belgium instituted proceedings before the International Court of Justice (ICJ) against Senegal on the basis that Senegal was in breach of the CAT. The ICJ found that Senegal was in breach of its international obligations and had to either prosecute or extradite Habré.

<sup>75</sup> Murungu (n 62).

<sup>76</sup> Kemp (n 11). According to Kemp, Habré approached the Economic community of West African States (ECOWAS) Court of Justice with a request that court find that his human rights would be violated by Senegal if criminal proceedings were instituted against him, particularly because of the retroactive application of the laws as a result of the legislative reform in Senegal. The court ruling directed that any prosecution must take place within the strict framework of special *ad hoc* international criminal proceedings. The African Union between 2011 and 2012 repeatedly expressed its desire for Habré's trial to be held in Africa.

<sup>77</sup> The chambers were inaugurated by Senegal and the African Union in February 2013 to prosecute the "person or persons" most responsible for international crimes committed in Chad between 1982 and 1990, the period when Habré ruled Chad. See HRW website <<https://www.hrw.org/news/2015/08/31/qa-case-hissene-habre-extraordinary-african-chambers-senegal>> accessed 20 November 2015.

<sup>78</sup> See HRW website <<https://www.hrw.org/news/2015/08/31/qa-case-hissene-habre-extraordinary-african-chambers-senegal>> accessed 20 November 2015.

<sup>79</sup> M du Plessis, 'The Zimbabwe Torture Docket decision and proactive complementarity' (November 2015) *ISS Policy Brief*.

<sup>80</sup> SALC is a South African NGO that promotes and advances human rights and the rule of law in southern

legations of torture, and delivered it to the Priority Crimes Litigation Unit of South Africa's National Prosecuting Authority (NPA) in March 2008. The dossier was not acted on, although earlier indications were provided by the NPA to the effect that prosecution might be possible if the police first investigated the allegations.<sup>81</sup>

In June 2009, SALC and the Zimbabwe Exiles Forum took this decision not to prosecute on review to the North Gauteng High Court ('SALC Case') to order the police to investigate the allegations. The High Court found that the State's failure to open an investigation was unconstitutional and unlawful, and ordered the South African police to do the necessary expeditious and comprehensive investigation. The Supreme Court of Appeal rejected an appeal by the police and the NPA in November 2013. An appeal by the police to the Constitutional Court found the following:<sup>82</sup>

1. South Africa can exercise universal jurisdiction over such crimes under both international and domestic law;
2. The presence of the suspect in South Africa was not required in international or domestic law in order to begin an investigation; and
3. South Africa was under an obligation to investigate such crimes under international law and that under domestic law such obligations were to be discharged by law enforcement agencies.

### 3.2 *International crimes divisions in national courts*

In addition to the enactment of laws, which prohibit and punish international crimes, there are examples in Africa of special mechanisms that have been established to investigate and prosecute international crimes.

#### 3.2.1 Uganda

In 2008, an International Crimes Division (ICD) was established as a special division of the High Court of Uganda with a mandate to prosecute perpetrators of war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes.<sup>83</sup>

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Africa, primarily through strategic litigation support and capacity building. See website <<http://www.southernafricalitigationcentre.org/about/>> accessed 4 November 2015.

<sup>81</sup> M du Plessis (n 79).

<sup>82</sup> Ibid.

<sup>83</sup> Jurisdiction is derived from Section 6 of The High Court (International Crimes Division) Practice Directions, NO.10 of 2011. See the Ugandan Judiciary website <[http://www.judicature.go.ug/data/smnu/18/International\\_Crimes\\_Division.html](http://www.judicature.go.ug/data/smnu/18/International_Crimes_Division.html)> accessed 25 July 2015.

Whilst Uganda has domesticated the Rome Statute as The International Criminal Court Act, 2011, the ICD was established as a way of fulfilling the Government of Uganda's commitment to the actualization of the Juba Agreement on Accountability and Reconciliation, which was the result of the peace talks to end the conflict in northern Uganda between the Uganda Government and the Lord's Resistance Army (LRA).<sup>84</sup>

Reports indicate that there has been reluctance by ICD prosecutors to prosecute crimes committed before the enactment of the International Criminal Court Act on account that it would give the act retrospective force, as well as a reluctance to prosecute conduct that had not been criminalized prior to the establishment of the ICD. Reports further indicate that the lack of adequate training and the lack of resources to adequately protect witnesses<sup>85</sup> hinder the ICD's ability to be effective.<sup>86</sup> As of 2014, Uganda's Judiciary reported that 7 cases had been brought before the Court and 2 cases were being prepared for committal.<sup>87</sup>

### 3.2.2 Kenya

Kenya has domesticated the Rome Statute through the International Crimes Act, 2008, allowing for the prosecution of war crimes, crimes against humanity and genocide committed in Kenya after 1 January 2009. After calls from various civil society actors for the establishment of a special division to deal with international crimes and the appointment of an independent prosecutor, Kenya proposed the establishment of an International and Organized Crime Division (IOCD) of the High Court in 2012.<sup>88</sup>

Critics have voiced concerns over the proposed merger of the prosecution of international crimes and organized crimes within a single division, arguing that a merged mandate would be too broad, whilst others question whether prosecuting

<sup>84</sup> REDRESS Briefing on Uganda's International Crimes Division, 'Key limitations to an effective accountability mechanism' <<http://www.redress.org/downloads/factsheet-on-icd-in-uganda-final.pdf>> accessed 25 July 2015.

<sup>85</sup> There has been a call from the Judiciary for the enactment of a Witness Protection Bill. See International Crimes Division, 'Annual Report 2014: Enhancing Public Confidence in the Judiciary' <<http://www.judicature.go.ug/files/downloads/International%20Crimes%20Division%20Report%2020130001.pdf>> accessed 25 July 2015.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Kenyans for Peace with Truth and Justice, 'A real option for justice? The International Crimes Division of the High Court of Kenya' <<http://kptj.africog.org/a-real-option-for-justice-the-international-crimes-division-of-the-high-court-of-kenya/>> accessed 25 July 2015.

international crimes domestically could actually achieve the objective of combating impunity.<sup>89</sup> At present, the IOCD has not been established and it is unclear when it will be established. Meanwhile, reports indicate that the Office of the Director of Public Prosecutions is in advanced stages of setting up the IOCD in Kenya.<sup>90</sup>

### 3.2.3 Democratic Republic of the Congo (DRC)

A two-decade long conflict continues to ravage the Democratic Republic of Congo (DRC). According to one report:

Over the past two decades, the Democratic Republic of Congo has been ravaged by conflicts that have resulted in an estimated six million deaths. During the violence, warring groups have repeatedly committed mass atrocities amounting to violations of international law. The majority of these crimes remain unpunished, while the victims have had no redress.<sup>91</sup>

Whilst the DRC domesticated the Rome Statute in 2002, through publishing the same in the Government Gazette,<sup>92</sup> there is no implementing legislation, although the DRC Government has referred cases to the ICC.<sup>93</sup>

Despite the few number of cases that are before the ICC as well as the gravity of the situation in the country, attempts to create a Special Chamber within the Appeal Courts at Goma, Lubumbashi and Mbandaka and a Special Chamber of Appeal at Kinshasa have failed. Calls by civil society groups to constitute an *ad hoc* tribunal have also gone unheeded.<sup>94</sup>

There is, however, domestic legislation criminalizing genocide, war crimes and crimes against humanity. Article 28 of the 2006 Constitution is also important as it excludes a defence of ‘following orders.’ Be that as it may, civil courts in the

<sup>89</sup> ICTJ Briefing, ‘Prosecuting international and other serious crimes in Kenya’ (April 2013) <<https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>> accessed 25 July 2015.

<sup>90</sup> See ‘National paper of the Republic of Kenya presented by the Office of the Attorney General and Department of Justice at the 13<sup>th</sup> UN Congress on Crime Prevention and Criminal Justice’ <<https://www.unodc.org/documents/congress/Documentation/HLSstatements/transfer/KENYA.pdf>> accessed 25 July 2015.

<sup>91</sup> See N Elebe, ‘Why DRC lawmakers again rejected special chambers to prosecute international crimes’ *OSISA* 23 May 2014 <<http://www.osisa.org/law/blog/why-drc-lawmakers-again-rejected-special-chambers-prosecute-international-crimes>> accessed 25 July 2015.

<sup>92</sup> DRC ascribes to the monist theory of international law. See *Club des amis du droit de Congo*, ‘The repression of international crimes by Congolese jurisdictions’ <[http://www.iccnw.org/documents/CAD\\_TheRepressionofInternationalCrimes\\_Dec2010\\_EN.pdf](http://www.iccnw.org/documents/CAD_TheRepressionofInternationalCrimes_Dec2010_EN.pdf)> accessed 25 July 2015.

<sup>93</sup> See ICC Website <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx)> accessed 25 July 2015.

<sup>94</sup> See Elebe (n 91).

DRC are not empowered to prosecute international crimes (as those prosecutions are reserved for military courts). However, the mobile courts structure has gone some way to remedy this for the communities they serve.<sup>95</sup> Mobile courts have been established in a number of regions (including Bandundu, Katanga, Maniema, North Kivu, South Kivu, Ituri, Kasai Occidental and Equateur) with the support of the Government and inter-governmental organizations. In October 2009, the American Bar Association/Rule of Law Initiative (ABA/ROLI) helped to establish an itinerant court to hear primarily, but not exclusively, cases of gender-based violence and sexual crimes in South Kivu, with jurisdiction to hear civil and criminal matters as well as apply international law.<sup>96</sup>

The courts are domestic mechanisms, operating within the DRC's existing judicial structure. They reach communities that have little access to traditional judicial processes. They have the ability to apply international law, and so hold those responsible for atrocity crimes to account, and are an illustration of a novel approach to positive complementarity.<sup>97</sup> According to a 2013 report, 20 traveling courts heard 382 cases, with 204 rape convictions, 82 convictions for other crimes and 67 acquittals (29 decisions are pending).<sup>98</sup>

### 3.3 *Ad hoc and hybrid tribunals*

#### 3.3.1 International Criminal Tribunal for Rwanda

Established by the UNSC<sup>99</sup> in 1994 as an *ad hoc* court,<sup>100</sup> the mandate of the International Criminal Tribunal for Rwanda (ICTR) is to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.<sup>101</sup> Situated in Arusha, Tanzania, with

<sup>95</sup> Southern Africa Litigation Centre Case Study, 'Complementarity in action: The mobile gender courts' (2013) <<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Case-Study-DRC-Mobile-Gender-Courts.pdf>> accessed 25 July 2015.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Pursuant to Chapter VII of the Charter of the United Nations.

<sup>100</sup> The ICTY held its closing ceremony on 1 December 2015. See ICTR website <<http://www.unict.org/en/news/ictr-host-closing-events-december-2015>> accessed 2 December 2015.

<sup>101</sup> C Garraway, 'Courts and tribunals' <<http://www.crimesofwar.org/a-z-guide/courts-and-tribunals/#sthash.DObDiGm.dpuf>> accessed 25 July 2015: '[This] Statute broke new ground in granting international

an Appeals Chamber in The Hague, the ICTR is credited with working towards the establishment of a credible international criminal justice system, and the production of a substantial body of jurisprudence<sup>102</sup> on genocide, crimes against humanity, war crimes as well as forms of individual and superior responsibility.

The ICTR had jurisdiction to prosecute natural persons<sup>103</sup> for genocide and crimes against humanity;<sup>104</sup> and persons committing or ordering to commit violations common to those of the Geneva Conventions of 1949.<sup>105</sup> The ICTR Statute provided for individual criminal responsibility irrespective of official capacity.<sup>106</sup>

Similar to the ICTY, the ICTR Statute provided for concurrent jurisdiction and primacy over the national courts to the ICTR to prosecute violations of international humanitarian law, and also permitted the ICTR to formally request national courts to defer to its competence.<sup>107</sup>

The ICTR prosecutor could initiate investigations *ex-officio* or on the basis of information received from other sources, including governments and non-governmental organizations.<sup>108</sup> The ICTR was the first international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. It was also the first international tribunal to define rape in international criminal law and to recognize rape as a means of perpetrating genocide.<sup>109</sup> The ICTR indicted 93 persons, 61 of whom were sentenced.<sup>110</sup> The ICTR delivered its last trial judgment on 20 December 2012 and the remaining judicial work now rests solely with the Appeals Chamber.<sup>111</sup>

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jurisdiction for the first time over war crimes committed in a non-international armed conflict.’

<sup>102</sup> See UNICTR website <<http://www.unicttr.org/en/tribunal>> accessed 25 July 2015.

<sup>103</sup> See ICTR Statute, art. 5.

<sup>104</sup> See ICTR Statute, arts. 2 and 3.

<sup>105</sup> See ICTR Statute, art. 4.

<sup>106</sup> See ICTR Statute, art. 6.

<sup>107</sup> See ICTR Statute, art. 8.

<sup>108</sup> See ICTR Statute, art. 17.

<sup>109</sup> See UNICTR website <<http://www.unicttr.org/en/tribunal>> accessed 25 July 2015.

<sup>110</sup> *Ibid.* In this regard, Jallow and Bensouda (n 40) indicate that the ICTR has provided for some of the best examples of state cooperation in international criminal justice in that arrests of accused perpetrators of the Rwandan genocide took place in Cameroon, Kenya, Togo, Mali, Tanzania, Benin, Angola, Congo, Burkina Faso South Africa, Zambia, Cote D’Ivoire, Senegal, Uganda, Gabon, Senegal, and Namibia.

<sup>111</sup> *Ibid.*

### 3.3.2 Special Court for Sierra Leone and Residual Special Court for Sierra Leone

The Special Court for Sierra Leone ('Special Court') was established on the request of the Government of Sierra Leone to the United Nations for 'a special court' to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war.<sup>112</sup>

The Special Court was the world's first 'hybrid' international criminal tribunal, mandated to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, had threatened the implementation of the peace process in Sierra Leone.

The Special Court had jurisdiction to prosecute natural persons irrespective of official capacity<sup>113</sup> for crimes against humanity;<sup>114</sup> violations common to the Geneva Conventions of 1949;<sup>115</sup> serious violations of international humanitarian law;<sup>116</sup> and criminal violations of provisions of the Sierra Leone Prevention of Cruelty to Children Act (1926) and Malicious Damage Act (1861).<sup>117</sup>

Similar to the ICTY and ICTR, the Special Court had concurrent jurisdiction with national courts, and primacy over the national courts to prosecute the statutory violations. The Special Court could also formally request national courts to defer to the competence of the Special Court. The Special Court prosecutor could investigate crimes with the assistance of the authorities as appropriate.<sup>118</sup>

The Special Court was the first modern international tribunal to sit in the country where the crimes took place, and the first to have an effective outreach programme on the ground.<sup>119</sup> Ten persons were brought to trial before the Special Court, including former President Charles Taylor. In 2013, the Special Court became the first internationalised court to complete its mandate and transition to a residual mechanism.<sup>120</sup>

<sup>112</sup> See Special Court website <<http://www.rscsl.org/>> accessed 25 July 2015.

<sup>113</sup> Statute for the Special Court for Sierra Leone, art. 6.

<sup>114</sup> Statute for the Special Court for Sierra Leone, art. 2.

<sup>115</sup> Statute for the Special Court for Sierra Leone, art. 3.

<sup>116</sup> Statute for the Special Court for Sierra Leone, art. 4.

<sup>117</sup> Statute for the Special Court for Sierra Leone, art. 5.

<sup>118</sup> Statute for the Special Court for Sierra Leone, art. 15.

<sup>119</sup> Special Court website (n 112).

<sup>120</sup> *Ibid.*



The Residual Special Court for Sierra Leone ('Residual Court') was established pursuant to an agreement signed between the United Nations and the Government of Sierra Leone on 11 August 2010. The court is seated in Freetown with operations at an interim seat in The Netherlands and a sub-office in Freetown for witness and victim protection and support. It was ratified by Parliament on 15 December 2011 and signed into law on 1 February 2012.<sup>121</sup>

The mandate of the Residual Court is to carry out the functions of the Special Court, which must continue after the closure of the Special Court. To that end, the Residual Special Court has ongoing and *ad hoc* functions with a mandate to: maintain, preserve and manage its archives, including the archives of the Special Court; provide for witness and victim protection and support; respond to requests for access to evidence by national prosecution authorities; supervise enforcement of sentences; review convictions and acquittals; conduct contempt of court proceedings; provide defence counsel and legal aid for the conduct of proceedings before the Residual Special Court; and respond to requests from national authorities with respect to claims for compensation and prevent double jeopardy.<sup>122</sup>

### 3.4 Permanent court – International Criminal Court

Thus far, 22 cases in nine situations<sup>123</sup> have been brought before the Court: two by way UN Security Council referrals; five by way of referral by governments; and two non-State Parties accepted the jurisdiction of the Court.<sup>124</sup> Although the OTP is reportedly conducting preliminary examinations in other situations including Afghanistan, Colombia, Georgia, Guinea, Iraq, Nigeria, Palestine and Ukraine,<sup>125</sup> all of the active cases hail from Africa.

African states have viewed this as a betrayal following their role in the promulgation of the Rome Statute after the genocide in Rwanda. Forty-seven African countries were present during the drafting, and pushed for adoption of the same. To date, African states continue to lead the number of member-representatives with 34 (out of 55 African) nations as States Parties.<sup>126</sup>

<sup>121</sup> Ibid.

<sup>122</sup> Statute for the Residual Special Court for Sierra Leone, art. 1(1).

<sup>123</sup> Uganda, Democratic Republic of the Congo, Darfur (Sudan), Central African Republic, Kenya, Libya, Cote D'Ivoire and Mali.

<sup>124</sup> See ICC Website <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)> accessed 25 July 2015.

<sup>125</sup> See ICC website <[https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)> accessed 4 November 2015.

<sup>126</sup> Of the 123 States Parties, 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe,

In addition to earlier-cited threats to withdraw from the ICC, there have been other clear examples of non-cooperation. A case in point is the failure by South Africa's Government to execute the ICC arrest warrant for the surrender and arrest of Sudanese President, Al Bashir, despite a court order issued by the High Court of South Africa barring Al Bashir from departing the country whilst attending the 2015 AU Summit in Johannesburg.<sup>127</sup>

On 5 December 2014, the ICC Prosecutor filed a notice to withdraw charges against Kenya's President, Uhuru Kenyatta, stating that 'the evidence has not improved to such an extent that Mr Kenyatta's alleged criminal responsibility can be proven beyond a reasonable doubt.'<sup>128</sup> Whilst the notice did not state the reasons behind the failure to collect evidence, an open letter<sup>129</sup> by the ICC Chief Prosecutor, Fatou Bensouda, stated that two key witnesses had withdrawn their testimonies in 2013, and in court filings, prosecutors indicated that their witnesses were blackmailed, bribed and intimidated into withdrawing, and blamed the Government of Kenya for creating a 'climate of fear.'<sup>130</sup>

## 4 Conclusion

The arc of the moral universe is long, but it bends towards justice.<sup>131</sup>

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27 are from Latin America and Caribbean States, and 25 are from Western European and other States. See ICC website <[http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)> accessed 8 August 2015.

<sup>127</sup> See SALC website <<http://www.southernafricalitigationcentre.org/2015/09/16/news-release-state-denied-leave-to-appeal-bashir-case/>> accessed 20 October 2015.

In a bid to ensure that South Africa adheres to its domestic and international law commitments, SALC brought an urgent application on 13 June 2015, before the High Court, seeking the immediate arrest and detention of President Al Bashir. On 14 June 2015, the Court issued an interim order preventing President Al Bashir from leaving the country pending the finalization of the matter, which was set down for hearing the following day. The Court reconvened on 15 June 2015 and after hearing submissions from all the parties, it ordered that President Omar al Bashir be arrested and detained for subsequent transfer to The Hague. After handing down this order, the Court was informed by the state respondents that President Al Bashir had already left the Republic in direct contravention of the interim court order issued on 14 June 2015. The Court, in its judgment, indicated that the failure to arrest President Al Bashir was unconstitutional and therefore invalid.

<sup>128</sup> See 'Notice of withdrawal of the charges against Uhuru Muigai Kenyatta' <<https://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf>> accessed 20 October 2015.

<sup>129</sup> See F Bensouda, 'Why I applied to adjourn Kenyatta case' *KenyaMOJA* 2013.

<sup>130</sup> S Allison, 'Kenyatta escapes the ICC, and shows others how' (6 February 2014), <<http://www.dailymaverick.co.za/article/2014-02-06-analysis-kenyatta-escapes-the-icc-and-shows-others-how-its-done/#.VmB9ZdJ97Mx>> accessed 20 October 2015.

<sup>131</sup> Martin Luther King Jr.

In many respects, Africa has been proactive in institutionalizing pro-justice mechanisms, which have culminated in significant manifestations of the promotion and implementation of the rule of law and human rights as well as the condemnation and rejection of impunity.

This chapter has provided key examples of how international criminal justice on the continent has yielded: individual criminal responsibility within and beyond national borders; reparations for victims; international oversight in national situations; prosecution at international *fora*; and interventions by the international community where a government or local judiciary were unable or unwilling to act. This chapter has, however, also provided examples where the politics of the day have thwarted or significantly delayed efforts to implement international criminal justice.

To be sure, the circumstances of the day and context within which international criminal justice interventions have been implemented should be noted. Timeous efforts to advance justice in the following circumstances have resulted in positive results: post-conflict situations, drastic transitions in leadership; and significant interventions or application of pressure from African states through the AU or pressure from the international community.

The issues that are more proximate to practitioners, however, are as follows:

1. *Application of universal jurisdiction*: The potential created by the notion of universal jurisdiction over the prosecution of international crimes is self-evident, particularly where the political will to do so is strong. As Kamanga has stated, to strengthen complementarity, there is a need to review<sup>132</sup> relevant penal codes to empower the prosecution of international crimes.<sup>133</sup>
2. *Establishment and strengthening of national mechanisms for investigating and prosecuting international crimes*: In the absence of implementing legislation, the prosecution of international crimes at the national level remains elusive. This then speaks to the need to domesticate key international criminal law instruments to provide for domestic legislation, which addresses international crimes and establishes/strengthens investigation mechanisms (such as the police), as well as special prosecutors (in special courts).

<sup>132</sup> As well as implement.

<sup>133</sup> C Murungu, 'The Rome Statute of the International Criminal Court and the Constitution of Tanzania' in R Shilamba (ed) *Towards domesticating the Rome Statute in Tanzania: A position paper* (CHESO 2012).

3. *Independence of the judiciary*: Where there is impunity, bad governance is not far behind. The independence of the judiciary is a critical issue of concern in many African jurisdictions, which when compromised undermines the accountability mechanisms and undercuts complementarity. However, when respected, protected and promoted, it may act to safeguard international criminal justice.
4. *Civil society activism*: In apt situations, civil society ought to intervene by instituting legal action(s) to compel governments to comply with their statutory and treaty obligations,<sup>134</sup> and to carry out training and sensitization activities for the benefit of other practitioners and lay communities.

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<sup>134</sup> Du Plessis (n 79).

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