

International Criminal Justice in Africa, 2016



HJ van der Merwe
Gerhard Kemp
(eds)



Strathmore University
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Konrad
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ABBREVIATIONS

ACHR	American Convention on Human Rights
ACJHPR	African Court of Justice and Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights (Merged Court)
ACmHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Court on Human and Peoples' Rights
AGNU	Assemblée Générale des Nations Unies
ASP	Rome Statute Assembly of State Parties
AU	African Union
AUA	Ordinary Session of the Assembly of the [African] Union
BPFA	Beijing Platform for Action
CAJDHP	Cour africaine de justice, des droits de l'homme et des peuples
CAR	Central African Republic
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	UN Human Rights Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIA	Central Intelligence Agency (US)
CIJ	Cour internationale de justice
CPI	Cour pénale internationale
CRC	Convention on the Rights of the Child

DEVAW	Declaration on the Elimination of Violence against Women
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
ECOWAS CCJ	Court of Justice of the Economic Community of West African States
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EIDs	enhanced interrogation techniques
FGM	female genital mutilation
GWOT	Global War on Terror
HVDs	high value detainees
ICC	International Criminal Court
ICC-ASP	Assembly of States Parties to the Rome Statute
ICCPR	International Covenant on Civil and Political Rights
ICCPR OP	(First) Optional Protocol to the ICCPR
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
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)
IMT	International Military Tribunal (Nuremberg)
ITLOS	International Tribunal for the Law of the Sea
LHT	Learned Helplessness Theory
LRA	Lord's Resistance Army

NATO	North Atlantic Treaty Organisation
OAU	Organisation of African Unity
ODPP	Office of the Director of Public Prosecutions (Kenya)
OMS	on-site medical service
OTP	Office of the Prosecutor of the ICC
PADVA	Protection against Domestic Violence Act, 2015 (Kenya)
PEV	post-election violence (Kenya)
RDC (RD Congo)	République démocratique du Congo
SADC	Southern Africa Development Community
SADC T	Tribunal of the Southern Africa Development Community
SALC	Southern Africa Litigation Centre
SCSL	Special Court for Sierra Leone
SGBV	sexual and gender-based violence
SGNU	Secrétaire Général des Nations unies
SOA	Sexual Offences Act (Kenya)
TCID	torture and other forms of cruel, inhuman and degrading treatment or punishment
TMI	Tribunal militaire international de Nuremberg
TPIR	Tribunal pénal international pour le Rwanda
TSSL	Tribunal spécial pour la Sierra Leone
UA	Union africaine
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
VAW	violence against women

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PREFACE

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. The group comprises of academics, researchers and legal practitioners drawn from various parts of the Sub Saharan Africa with keen interest and expertise in the field of International Criminal Law, whose primary focus is to produce a regular edited publication to serve as *an Annual Compendium of International Criminal Justice on the African Continent*.

The inaugural meeting of the group was held in September 2011 in Brussels, Belgium which resulted into the first publication in 2012 under the title *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa – Kai Ambos, Otilia A. Maunganidze (eds)*.

Two years later the group's activities were transferred to the Rule of Law Programme for Sub Saharan Africa based in Nairobi, Kenya. In 2014 the group met in Arusha, Tanzania which resulted into the second publication entitled *International Criminal Justice in Africa: Challenges and Opportunities* under the stewardship of a new editor Beitel van der Merwe from the University of the Western Cape in South Africa.

One year later, the workshop took place in Kigali, Rwanda and resulted into the third publication under the title *International Criminal Justice in Africa: Issues, Challenges and Prospects*. Not only did the number of contributors for this edition increase, but also the quality of the publication was enhanced with the engagement of Prof Gerhard Kemp from the Stellenbosch University in South Africa, a specialist and renowned scholar on matters international criminal law as an external reviewer.

This publication is the fourth edition following the meeting that was held in September 2016 in Arusha, Tanzania. We are proud to offer all our distinguished readers this interesting piece of literature that addresses diverse issues of international criminal law as perceived and narrated by Africans as our modest contribution to the understanding and embracing of international criminal law norms and standards on the continent.

This publication like the previous ones is authored 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.

I thank all authors for their contributions which make this book worth reading. Special thanks to Beitel van der Merwe and Gerhard Kemp for supporting the authors and editing this publication. I also wish to thank Prof. Hartmut Hamann for assisting with the French editing. Last but not least I thank Peter Wendoh, the Project Advisor of KAS Rule of Law Program Sub Sahara Africa for coordinating the work of this group and for his tireless efforts to ensuring that the work of this group is showcased and sustained.

Dr Arne Wulff

*Director of the Rule of Law Program
Sub Sahara Africa*

INTRODUCTION

HJ VAN DER MERWE

I

This book contains a collection of papers by members of the Konrad Adenauer Stiftung's African Group of Experts on International Criminal Justice. This is the group's fourth annual publication on international criminal justice in Africa. The aim of the book is to offer an African perspective on issues, challenges and prospects concerning international criminal justice in Africa. The book's subject matter covers 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.

It is likely that 2016 will be remembered as one of the most tumultuous years in modern history. This is also true as far as international criminal justice is concerned. The increasingly critical scrutiny of the International Criminal Court (ICC) has continued to dominate the headlines and casts a long shadow over the prospect of justice for victims in Africa. Late in 2016, the headlines were dominated by the news that three states were to withdraw from the ICC. This represented arguably the greatest moment of crisis since the Court's establishment in 2002. However, the lack of further withdrawals and the universal failure of African states to ratify the Malabo Protocol shows that African states remain, if not actively in support of the Court, at least in its favour as a matter of principle.

But does the spectre of the state withdrawals – now no longer a hypothetical possibility – signal something more worrying for the ICC in the long term? The ICC was always going to be a divisive institution. The Rome Statute of the International Criminal Court created an idealistic legal mechanism that places legal obligations on states without affecting any significant change to the existing international legal-political landscape founded on principles that are fundamentally in favour of

maximum state sovereignty and opposed to external interference in state affairs. Perhaps it was always only going to be a matter of time before the national self-interest of states caught up with the political and diplomatic idealism on the display when the Court was established. When it comes to the ICC, a pattern seems to have emerged. As illustrated in the US, Kenya¹ and South Africa,² the initial enthusiasm for the Court and lip service to the ideal of international criminal justice tends to evaporate as soon as the ICC becomes politically inconvenient. The South African Government continues to assert its commitment to accountability in respect of international crimes. However, apart from the formal acts of ratifying the Statute and the adoption of national legislation implementing the Rome Statute into its national law,³ the South African Government has done little to demonstrate its commitment to the prosecution of core crimes through concrete steps to end impunity.⁴ Whether South Africa or any other African country ends up leaving the Court or not, it seems that we have entered a new era where ICC withdrawal or the threat thereof is no longer an unthinkable option. As noted by one commentator, '[t]he withdrawal taboo has been shattered and there is no going back to the pre-withdrawal *status quo*.'⁵

However, as argued by **Humphrey Sipalla** in his contribution (Chapter 3), a historical perspective on international legal development shows that state defiance (in this case in the form of state withdrawals from the ICC) does not necessarily represent an existential crisis for the Court. Be that as it may, the situation is such that it calls for proactive engagement and discussion between the Court and its detractors. In her contribution (Chapter 2), **Eki Yemisi Omorogbe** points out that there is some plausibility to the AU's legal reasoning concerning immunity for incumbent heads of states of non-party members. This is something that has perhaps gone underappreciated outside Africa. However, where a clash of legal positions emerges (such as the AU and ICC's divergent legal positions concerning immunity

¹ Kenya has not yet withdrawn from the Rome Statute. Now that the first shots have been fired by other African states, it seems to be question of when, not whether Kenya will withdraw. See Hansen TO, 'Will Kenya withdraw from the ICC?' *JusticeInfo.Net* (13 December 2016) <http://www.justiceinfo.net/en/component/k2/kenya.html> on 11 January 2017.

² In October 2016, South Africa became the first ever state to provide the UN Secretary General with a formal notification of intention to withdraw from the Rome Statute as required under Article 127 of the Statute.

³ *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁴ This was prominently illustrated in the 'Torture docket' and Al-Bashir cases. See *National Commissioner of the South African Police v Southern African Human Right Litigation centre and another (Dugard and others as amicus curiae)* 2104 (12) BCLR 1428 (CC) and *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

⁵ Labuda PI, 'Africa and the ICC: Shattered taboos and the status quo' *EJIL: Talk!* (23 November 2016) <http://www.ejiltalk.org/africa-and-the-icc-shattered-taboos-and-the-status-quo/> on 10 January 2017.

and the clash of international legal obligations cited by South Africa when failing to arrest President Omar Al-Bashir of Sudan) those involved would do well to respond in a constructive manner aimed at finding collective solutions to a collective problem. It cannot and should not be so easy for a state simply to withdraw its support from the ICC when it has exhibited strong support for the Court for more than a decade since its establishment.

If one is being optimistic, the political turmoil between the ICC and parts of Africa serves as a kind of victory for the Court, albeit an ironic one. The oftentimes reactionary, fervent and irrational opposition to the Court carries the hallmarks of a political counter attack, which goes to show that the ICC is now starting to be perceived as a real threat by those most firmly in the crosshairs of the Rome Statute. It is perhaps at this very point in time – when the ideals of the proponents of the Court and the values of the international community inasmuch as they are expressed in the Rome Statute are being put to the test – that the greatest resolve is required in order to achieve a breakthrough for justice, especially among African states.

Even though fears over a mass African exodus from the ICC seems to have subsided, one still must ask whether the ICC's relevance in Africa is diminishing and, if so, what options remain for accountability in Africa? A regional approach to international crime as per the Malabo Protocol represents one option.⁶ Conceivably – and in light of the general reticence of African countries to prosecute crimes beyond their own territory – a criminal chamber in the African Court of Human and Peoples' Rights (AfCHPR) could strengthen the existing international criminal justice framework. As discussed by **Evelyne Owiye Asaala** in Chapter 4, the proposed criminal chamber in the AfCHPR could make a unique and valuable contribution to justice by virtue of its expanded substantive jurisdiction, which would include not only the core international crimes, but also a host of transnational crimes such as the crimes of unconstitutional change of government, corruption, terrorism and mercenarism. A regional mechanism for accountability is certainly a worthy aspiration, but how will the proposed court interact and exist alongside the ICC? Is the proposed court a *genuine* and *realistic* endeavour on the part of the AU? **Eugene Bakama Bope** explores these and other questions in more detail in Chapter 5.

By now, the questions surrounding the future of the ICC in Africa are familiar. Yet they remain mostly unanswered. Some view criticism against the ICC from

⁶ The Protocol will come into effect at such time that it receives 15 ratifications. As of yet, no African state has ratified the Protocol.

within Africa as a kind of protest action against double standards concerning the enforcement of international law. Is the ICC inextricably caught up in, and part of a biased legal system or is it being scapegoated for larger, more enduring problems inherent to international law such as state exceptionalism, hegemonic behaviour and long-standing inequalities of power in the UNSC? My hope is that this book will aid readers seeking to make a distinction between legitimate and well-founded criticism of the ICC and political noise in the ‘spaghetti bowl’ of facts, opinions and ideals in today’s international legal and political order.

But where can we start in an effort to dissolve the impasse between the project of international criminal justice and some African states? First, we must be mindful of the adage that *everyone is allowed their own opinion, but not their own facts*.⁷ As such we must address the ‘disconnect between rhetoric and reality’ that exists in respect of African relations with the ICC.⁸ We need to separate fact from opinion, especially in cases where opinions are politically inspired or deliberately obfuscating. Second, we need to see the bigger picture concerning international criminal justice, which is more complex than often portrayed. The conviction of Hissène Habré by the AU-backed Extraordinary African Chambers in Senegal is a prime example of the more nuanced bearing towards international criminal justice in Africa. So too is the Malabo Protocol and efforts towards national prosecution of international and transnational crimes by some African states. Looking at the bigger picture means looking beyond the ICC-Africa conflict. The ICC only has jurisdiction over a limited number of crimes and then only as a court of last resort. The interface between Africa and international criminality is not so one-dimensional that it can be confined to a discussion of the relationship between African states, the AU and the ICC, as illustrated, for example, by **Jeanne-Mari Retief** in Chapter 8, which provides an African perspective on the problems of extraordinary rendition and enhanced interrogation techniques and the crime of torture.

To see the bigger picture, one must also look beyond the African continent. Take, for example, the AU’s slogan of ‘African solutions for African problems.’ The slogan leaves little room for recognition of the fact that international crime is not an exclusively ‘African problem’ even when such crimes are committed by

⁷ This dictum is based on a statement attributed to the American politician and sociologist, Daniel Patrick Moynihan.

⁸ See Venture MJ and Bleeker AJ, ‘Universal Jurisdiction, African perceptions of the International Criminal Court and the new AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’ in Ankumah EA (ed.), *The International Criminal Court and Africa: One decade on*, Intersentia, Cambridge/Antwerp/Portland, 2016, 441-460.

Africans, against Africans or in Africa. International crimes are a universal concern affecting the collective interest of the international community. This is the basis for the existence of international criminal law. That being said, as Africa would do well to think beyond itself on the issue of international criminal justice, the international community must as a matter of urgency begin to think (and act) beyond Africa. Though some have tried to paint Africa as the victim of international criminal justice, Africa has in fact benefitted more than any other region from efforts to end impunity in respect of international crimes. These efforts must be redoubled but it is high time to spread the benefits of accountability beyond Africa. This should also go a long way towards addressing *legitimate* African concerns regarding the application of international criminal law.

II

This year's publication contains a number of new features for the benefit of the reader:

- The publication now includes an annual report concerning significant developments affecting international criminal justice in Africa. This report is not intended to be an exhaustive analysis of events, but rather to provide the reader with a factual and loosely chronological overview of ongoing situations and significant events relating to international criminal justice in Africa. In many cases, the developments mentioned in the report are addressed and analysed in more detail in subsequent chapters.
- In an effort towards greater engagement with Francophone readers, this edition features two contributions in French. All abstracts are also provided in both English and French. The group hopes to progress towards a greater parity between English and French contributions in future editions of the book.
- This year's edition contains a guest contribution by **Anne-Charlotte Recker** (Chapter 9). Her chapter serves as a report on the 2nd Annual Strathmore Institute for Advanced Studies in International Criminal Justice (SIASIC) Conference held at Strathmore University, Nairobi, Kenya, from 4-5 August 2016, titled *Prosecuting Sexual and Gender*

Based Violence both during peacetime and during conflict. Her chapter engages with the challenges in the fight against impunity in respect of violence against women (VAW) in Kenya, especially those related to the investigation, prosecution and adjudication of such cases. Through the inclusion of this chapter, we hope to draw attention to the problem of VAW in Kenya and beyond as well as the nexus between VAW and international crimes.

III

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

My thanks go out to all members of our group and especially to those who have contributed to this book for their hard work, dedication and patience.

I also wish to thank Prof Gerhard Kemp, who acted as external advisor for the publication and also very kindly agreed to review the final manuscript. His guidance and advice was, as always, very sound and helpful. I would also like to thank our French editor, Prof Hartmut Hamann, for his assistance with editing and translations.

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

Finally, I extend a word of thanks to our publishers, Strathmore University Press, for the work that they have put into the book. I would especially like to thank Dr J Osogo Ambani, Humphrey Sipalla, and Jerusha Asin for their help and guidance in the publication process.

ANNUAL REPORT 2016¹

BURUNDI

- In April, the Office of the Prosecutor opens a preliminary examination into the situation in Burundi since April 2015 when President Pierre Nkurunziza's decision to run for a third term as president sparked acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances.
- In October, the Parliament of the Republic of Burundi voted in support for a plan to withdraw its country from the Rome Statute.

CENTRAL AFRICAN REPUBLIC

CAR I: The ICC's investigation in CAR I focussed on alleged war crimes and crimes against humanity committed in the context of the conflict in CAR since 1 July 2002.

CAR II: The ICC's investigation in CAR II focussed on alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 August 2012. The 2012 conflict reportedly involved alleged crimes by both Muslim Séléka and Christian anti-balaka groups, which allegedly led to thousands of deaths and left hundreds of thousands displaced. The UN has also issued warnings of the high risk of genocide in the CAR.

- In March, the ICC convicted former Congolese rebel militia leader Jean-Pierre Bemba Gombo of crimes against humanity and war crimes.² The decision has been heralded as a landmark trial for the principle of command responsibility. It also represented the first conviction for sexual and gender-based crimes at the ICC.

¹ Note that section of this report are based on extracts taken directly from the 'Situations and Cases' section of the ICC website as at 12 January 2017, <https://www.icc-cpi.int/Pages/Home.aspx#>.

² *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

- In June, the ICC sentenced Bemba to 18 years imprisonment.³
- In October, Trial Chamber VII of the ICC convicted five accused (including Jean-Pierre Bemba Gombo) of offences against the administration of justice.⁴

DEMOCRATIC REPUBLIC OF CONGO

The ICC investigations in the DRC have focused on alleged war crimes and crimes against humanity committed mainly in eastern DRC, in the Ituri region and the North and South Kivu Provinces, since 1 July 2002. The situation was referred to the ICC by the DRC government in 2004.

- In January, Democratic Republic of Congo (DRC) President Joseph Kabila officially passed the new Implementation of the Rome Statute Act into law.⁵
- In April, the ICC Presidency approved, pursuant to Article 108(1) of the Rome Statute, the prosecution of Germain Katanga (who was previously convicted of war crimes and crimes against humanity by the ICC in 2014) before the High Military Court in the DRC.⁶

EXTRAORDINARY AFRICAN CHAMBERS IN SENEGAL

- In May, former Chadian dictator Hissène Habré was convicted of crimes against humanity, war crimes and torture, including sexual violence and rape, by the AU-backed Extraordinary African Chambers in the Senegalese court system and sentenced to life in prison.⁷

³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016.

⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13.

⁵ For a detailed discussion of this legislation, see Chapter 6 by **Pacifique Muhindo Magadju** on ‘Législation congolaise de mise en œuvre du Statut de Rome: Un pas en avant, un pas en arrière’ and Chapter 7 by **Balingene Kahombo** on ‘The principle of complementarity in practice: A survey of Congolese legislation implementing the Rome Statute of the International Criminal Court’.

⁶ *The Prosecutor v. Germain Katanga* (Decision pursuant to article 108(1) of the Rome Statute) ICC-01/04-01/07, 7 April 2016.

⁷ For a more detailed discussion of the Habré case, see Chapter 1 for the contribution by **Bernard Ntahiraja**, ‘The present and future of universal jurisdiction in Africa: Lessons from the Habré case’.

IVORY COAST

The ICC's investigation in Ivory Coast has focused on alleged crimes against humanity committed during the 2010/11 post-electoral violence (PEV), which arose from a dispute over the results of the presidential election between Laurent Gbagbo and Alassane Ouattara. The ICC Prosecutor received authorisation to open a proprio motu investigation from the Pre-Trial Chamber in October 2011.

- The trial of Charles Blé Goudé and Laurent Gbagbo (which cases were joined on 11 March 2015) began on 28 January 2016. Both accused face charges of crimes against humanity stemming from the violence surrounding the 2010/11 presidential election and which resulted in over 3000 deaths. Gbagbo is the first former head of state to be prosecuted at the ICC. The trial continues.

KENYA

The past year marks the low point for efforts to end impunity in Kenya in respect of the PEV of 2007/8. The collapse of all cases related to PEV in Kenya, has drawn the adequacy of ICC investigation and witness protection into focus. According to Fatou Bensouda, the 'case was ultimately eroded by a "perfect storm" of witness interference and intense politicisation of the Court's legal mandate and work.'⁸ Since 2013, the ICC has charged three Kenyan nationals with offences against the administration of justice by corruptly influencing prosecution witnesses.⁹

- In April, Trial Chamber V(A) of the ICC decided, by majority with Judge Olga Herrera Carbuccion dissenting, that the case against William Samoei Ruto and Joshua Arap Sang should be terminated.¹⁰ The Court ruled that there was insufficient evidence to proceed to trial. The ruling was preceded by the withdrawal of several key witnesses for the prosecution.

⁸ ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future', 6 April 2016 <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406> on 11 January 2017.

⁹ See *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13 and *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15.

¹⁰ See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 16 June 2016. It should be noted that this decision does not preclude new prosecution in the future, either at the ICC or at the domestic level.

MALI

Investigations in Mali are ongoing and have focussed on alleged war crimes committed since January 2012, mainly in the northern regions of the country.

- In March, the first trial concerning destruction of cultural monuments as a war crime opened at the ICC. The accused, Ahmad Al Faqi Al Mahdi, a jihadi leader is charged in relation to the demolition of religious and historic buildings in UNESCO World Heritage city of Timbuktu.
- In August, Al Mahdi became the first person to plead guilty before the Court. His conviction also marks the first time that intentionally directed attacks leading to the destruction of cultural sites has been prosecuted as a war crime at the ICC. It was also the first prosecution of an Islamic radical at the ICC.

SOUTH AFRICA

- In March, the South African Supreme Court of Appeal (SCA) pronounced on the Al-Bashir matter, dismissing the government's appeal and ruling that the South African government acted in breach of its own law and international law by failing to detain Al-Bashir during the 2015 AU Summit in Johannesburg.¹¹ The South African government intended to take the matter to the Constitutional Court on appeal, where it was to be heard in November 2016. However, the appeal was abandoned following South Africa's decision in October 2016 to withdraw from the Rome Statute. The South African government cited a clash of international legal obligations concerning immunity for incumbent heads of states as necessitating 'the removal of all legal impediments inhibiting South Africa's ability to honour its obligations relating to the granting of diplomatic immunity under the international law as provided for under our domestic legislation.'¹² It also cited the demands of regional peace as motivation for its decision to withdraw. The government's decision to withdraw from the ICC was challenged in the high court by the op-

¹¹ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

¹² South African Minister of Justice and Correctional Services Michael Masutha. See 'Government backs down on Omar Al-Bashir ConCourt fight' *eNCA* (21 October 2016) <https://www.enca.com/south-africa/government-backs-down-on-omar-al-bashir-concourt-fight> on 11 January 2017.

position Democratic Alliance. Oral argument in the matter was heard in December and the court's decision is expected early in 2017.

THE GAMBIA

- In October, The Gambia notified the UN Secretary General of its intention to withdraw from the Rome Statute with the Gambian Information Minister Sheriff Bojang referring to the Court as the 'International Caucasian Court for the prosecution and humiliation of the people of colour.'¹³
- In December, President-elect Adama Barrow indicated his intention to keep The Gambia in the ICC. At the time of writing, President Yahya Jammeh was refusing to step down as leader whilst pursuing a legal challenge to the election results.

UGANDA

The ICC investigations in Uganda have focussed on alleged war crimes and crimes against humanity committed in the context of an armed conflict predominantly between the Lord's Resistance Army (LRA) and the national authorities, mainly in Northern Uganda, since 1 July 2002. Two suspects are still at large, among them the LRA's leader Joseph Kony.

- In March, the ICC confirmed charges against Ugandan Dominic Ongwen. Ongwen is the first member of the LRA to appear at the ICC and faces 70 counts of war crimes and crimes against humanity committed in Northern Uganda in 2003 and 2004. His trial opened on 6 December 2016, where he entered a plea of not guilty.

¹³ Simwaka F, 'Africa's retreat from International Criminal Court is about impunity, not dignity' *Washington Post* (8 November 2016) https://www.washingtonpost.com/news/global-opinions/wp/2016/11/08/africas-retreat-from-international-criminal-court-is-about-impunity-not-dignity/?utm_term=.a66889c89009 on 11 January 2016.

THE ICC-AFRICA CONFLICT

- In May, Sudanese President Omar Al-Bashir attended the inaugurations of President Yoweri Museveni in Uganda (an ICC state party and the first to refer a situation to the court in 2004) and President Ismail Omer Gaili in Djibouti. In July, Pre-Trial Chamber II of the ICC referred the non-compliance of Uganda and Djibouti in respect of the request for arrest and surrender of Omar Al Bashir to the ICC to the Assembly of States Parties (ASP) and the United Nations Security Council (UNSC).¹⁴
- In July, the 27th AU Summit in Kigali closed without an AU call for immediate mass withdrawal from the ICC. Calls for mass withdrawals faced a strong pushback from Nigeria, Senegal, Ivory Coast, Tunisia, and even ICC non-member Algeria.¹⁵ Governments opposing mass withdrawal argued that the AU, as an intergovernmental organisation, is not a member of the ICC and cannot direct member states to withdraw from the Court as it is comprised of both member and non-member states of the ICC.¹⁶ Article 127 of the Rome Statute stipulates that states must withdraw individually. Withdrawal from the ICC should commence with a state party depositing a notification of the intention to withdraw with the UN Secretary-General. The state party then has to wait for a year before the withdrawal comes into force.
- In October, three states (Burundi, South Africa and The Gambia) indicated their intention to withdraw from the Rome Statute.¹⁷ South Africa thereby became the first state party to provide the UN Secretary General with a formal notification to withdraw in terms of Article 127 of the Rome Statute. This notification was, at the time of writing, the subject of a court challenge in South Africa.

¹⁴ *Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*, ICC-02/05-01/09, 11 July 2016.

¹⁵ Pauron M and Duhem V, 'Sommet de l'UA: Pas d'entente sur un retrait collectif de la CPI' *Jeune Afrique* (16 July 2016) <http://www.jeuneafrique.com/341589/politique/sommet-de-lua-pas-dentente-sur-un-retrait-collectif-de-la-cpi/> on 11 January 2017.

¹⁶ Keppler E, 'Dispatches: Governments defend ICC at African Union Summit - Pushback against AU call for withdrawal' *Human Rights Watch* (20 July 2016) <https://www.hrw.org/news/2016/07/20/dispatches-governments-defend-icc-african-union-summit> on 8 August 2016.

¹⁷ **Namibia** has also announced its intention to withdraw from the Rome Statute.

OTHER DEVELOPMENTS

- **ICTR:** As of 31 December 2015, the ICTR has been officially closed. Although the ICTR has been winding down for a considerable time, 2016 has been the first year since the Tribunal's establishment in 1994 that the ICTR has not been in operation. An International Residual Mechanism for Criminal Tribunals has been established and eight fugitives remain at large.
- **Georgia:** In February, Pre-Trial Chamber I of the ICC approved the Prosecutor's request to open a *proprio motu* investigation in the situation in Georgia, in relation to crimes against humanity and war crimes within the jurisdiction of the Court in the context of an international armed conflict between 1 July and 10 October 2008. The ICC's intervention into the conflict between Georgia, Russia and Moscow-backed belligerents in South Ossetia represents the Court's first *investigation* into a situation outside Africa. It also marks the first time that the alleged crimes of a major power and permanent member of the UNSC (Russia) will be under official investigation by the Court.
- **Gabon:** In September, the Gabonese Republic requests the OTP to open an investigation regarding the situation in the country. Later in the same month, the ICC Prosecutor opens a preliminary examination focusing on alleged crimes potentially falling within the ICC's jurisdiction committed in Gabon since May 2016, including those allegedly committed in the context of the presidential elections of 27 August 2016.
- **South Sudan:** In November, the United Nations Special Advisor on the Prevention of Genocide, Adama Dieng, warned that South Sudan is at risk of plunging into ethnic war and genocide.
- **Libya:** In November, Prosecutor Fatou Bensouda announced that the OTP will prioritise the investigation into the situation in Libya in 2017 and also urged the Libyan government to surrender Saif Al-Islam Gaddafi to the Court.¹⁸

¹⁸ ICC-OTP, Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 9 November 2016.

INTRODUCTION

HJ VAN DER MERWE

I

Cet ouvrage rassemble une collection d'articles écrits par le groupe d'experts africains de Konrad Adenauer Stiftung en matière de la justice pénale internationale. C'est la quatrième publication annuelle du groupe sur la justice pénale internationale en Afrique et dont le but est de donner un point de vue africain sur les questions, les défis et les perspectives concernant la justice pénale internationale. Le sujet de l'ouvrage traite des situations et des cas qui se produisent dans divers pays du continent ainsi que des débats élargis et des questions actuelles touchant et façonnant l'application du droit pénal international en Afrique.

Il est probable que l'année 2016 restera comme l'une des années plus tumultueuses dans l'histoire moderne. C'est aussi le cas pour la justice pénale internationale. La surveillance de plus en plus critique de la CPI a continué à faire de gros titres et projette son ombre sur la perspective de la justice pour les victimes en Afrique. Vers la fin de l'année 2016, les informations que trois pays africains allaient se retirer de la CPI ont dominé les médias. Cela a sans doute représenté un grand moment de crise depuis la création de la Cour en 2002. Cependant, l'absence d'autres retraits et le refus quasi universel des Etats africains de ratifier le Protocole de Malabo montre que les Etats africains restent, par principe, favorables à la Cour, même s'ils ne se prononcent pas activement pour cette dernière.

Mais le spectre des retraits étatiques (qui n'est plus une possibilité hypothétique) donne-t-il un signal de quelque chose plus inquiétante pour la CPI à long terme? La CPI allait toujours être un établissement susceptible de soulever des opinions partagées car le Statut de Rome a créé un mécanisme juridique idéaliste qui impose des obligations juridiques aux Etats sans porter atteinte au paysage politico-juridique international basé sur les principes qui sont fondamentalement

en faveur de la souveraineté optimale des Etats et opposé à l'ingérence extérieure dans les affaires internes d'un Etat. Peut-être, ce n'était toujours qu'une question de temps avant que l'intérêt national des Etats contourne l'idéalisme politique et diplomatique évident au moment de l'établissement de la Cour. En ce qui concerne la CPI, une tendance semble apparaître ces derniers temps. Comme illustré par les Etats-Unis, le Kenya¹ et l'Afrique du Sud,² l'enthousiasme initial pour la Cour et les simples paroles au sujet de l'idéal de la justice pénale internationale disparaissent dès que la CPI devient politiquement gênante. Le gouvernement de l'Afrique du Sud continue à affirmer son engagement de traduire en justice les auteurs de crimes internationaux. Toutefois, à part les actes formels de la ratification du Statut et l'adoption de la législation nationale pour la mise en œuvre du Statut de Rome dans son droit national,³ le gouvernement de l'Afrique du Sud n'a pas beaucoup fait pour montrer son engagement aux poursuites de crimes principaux par des mesures concrètes dans l'optique de mettre fin à l'impunité.⁴ Soit l'Afrique du Sud ou tout autre pays africain se retire de la Cour ou pas, il paraît que nous sommes entrés dans une nouvelle ère où se retirer de la CPI ou menacer de s'en retirer n'est plus une option inconcevable. Comme il a été affirmé par un commentateur, 'le tabou de retrait a été brisé et il n'y a pas de retour à l'état avant le retrait.'⁵

Cependant, comme l'a souligné **Humphrey Sipalla** dans sa contribution (Chapitre 3), une perspective historique sur l'évolution du droit international montre que la désobéissance étatique (dans ce cas, sous la forme de retrait des Etats de la CPI) ne représente pas nécessairement la crise existentielle pour la Cour. Quoiqu'il en soit, la situation actuelle nécessite un engagement ferme et des discussions entre la Cour et ses détracteurs. Dans sa contribution (Chapitre 2), **Eki Yemisi Omorogbe** soutient de manière relativement plausible le raisonnement juridique

¹ Le Kenya ne s'est pas encore retiré du Statut de Rome. Maintenant que les premiers tirs ont été lancés par d'autres pays africains, il paraît que la question n'est pas savoir si le Kenya s'en retirera mais quand il le fera. Voir Hansen TO, 'Le Kenya se retirera-t-il de la CPI?' *JusticeInfo.Net* (le 13 décembre 2016) <http://www.justiceinfo.net/en/component/k2/kenya.html> le 11 janvier 2017.

² En octobre 2016, l'Afrique du Sud est devenu le premier pays de déposer une notification formelle auprès du Secrétaire général des Nations Unies pour son intention de se retirer du Statut de Rome conformément à l'article 127 du Statut.

³ *La mise en œuvre du Statut de Rome de la Cour pénale internationale Loi 27* du 2002.

⁴ Ceci était notablement illustré dans le 'Dossier de la torture' et dans l'affaire Al-Bashir. Voir *National Commissioner of the South African Police v Southern African Human Right Litigation centre and another (Dugard and others as amicuscuriae)* 2104 (12) BCLR 1428 (CC) et le *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

⁵ Labuda PI, 'l'Afrique et la CPI: Taboux brisés et le status quo' *EJIL: Talk!* (23 novembre 2016) <http://www.ejiltalk.org/africa-and-the-icc-shattered-taboos-and-the-status-quo/> le 10 janvier 2017.

de l'UA concernant l'immunité des chefs d'Etats en exercice des pays non-parties. C'est une chose qui est peut-être moins appréciée en dehors de l'Afrique. Cependant, en cas de divergence des opinions juridiques (telles que les opinions juridiques divergentes entre l'UA et la CPI en ce qui concerne l'immunité et le conflit des obligations juridiques internationales cité par l'Afrique du Sud pour justifier son refus d'exécuter le mandat d'arrêt contre le Président Omar Al-Béchir du Soudan), il serait idéal pour ceux impliqués d'y répondre de manière constructive afin de fournir des solutions collectives à un problème commun. Cela ne peut, et cela ne devrait pas être si facile pour un Etat de simplement retirer son soutien à la CPI alors qu'il accorde un soutien solide à la Cour pendant plus d'une décennie depuis sa création.

En étant optimiste, le conflit politique entre la CPI et certains pays africains reflète en quelque sorte une victoire pour la Cour, bien que cela soit une victoire ironique. L'opposition souvent réactionnaire, ardente et irrationnelle à la Cour porte les marques d'une contre-attaque politique, ce qui montre que la CPI commence maintenant à être vue comme une véritable menace par ceux qui se trouvent principalement en ligne de mire du Statut de Rome. C'est peut-être maintenant – le moment où les idéaux des défenseurs de la Cour et les valeurs de la communauté internationale pour autant qu'ils sont exprimés dans le Statut de Rome sont mis à l'épreuve – qu'on a besoin de la plus grande détermination afin de réaliser une percée pour la justice, surtout parmi les Etats africains.

Bien que des craintes liées à l'exode en masse des pays africains de la CPI semble s'être apaisé ces derniers temps, on peut se poser la question si la pertinence de la CPI en Afrique est en train de se diminuer, et si c'est le cas, quelles options restent-elles pour tenir responsables les auteurs des crimes internationaux en Afrique ? Une approche régionale aux crimes internationaux selon le Protocole de Malabo représente une option.⁶ Probablement – et à la lumière de la réticence générale des pays africains de mener des poursuites des crimes au-delà de leurs territoires – une chambre pénale dans la Cour africaine des droits de l'homme et des peuples (CADHP) pourrait renforcer le cadre existant en matière de la justice pénale internationale. Comme le fait remarquer **Evelyne Owiye Asaala** au Chapitre 4, la chambre pénale proposée dans la CADHP pourrait apporter une contribution précieuse et exceptionnelle en matière de la justice en vertu de sa compétence matérielle élargie, qui comprendrait non seulement des crimes internationaux

⁶ Le protocole entrera en vigueur après avoir reçu 15 ratifications. A l'heure actuelle, aucun Etat africain n'a ratifié le protocole.

principaux, mais aussi nombreux crimes transnationaux tels que les crimes liés aux changements anticonstitutionnels des gouvernements, à la corruption, au terrorisme et au mercenariat. Un mécanisme régional pour tenir responsables les auteurs de ces crimes est certainement une inspiration louable, mais comment la cour proposée interagira-t-elle et coexistera-t-elle avec la CPI? La cour proposée est-ce une initiative *réelle* et réaliste de la part de l'UA? **Eugene Bakama Bope** explorera en détail ces questions et d'autres au Chapitre 5.

Maintenant les questions sur l'avenir de la CPI en Afrique nous sont familières. Toutefois, les questions demeurent sans réponse. Certains pensent que la critique contre la CPI venant de l'Afrique est une action de protestation contre des critères différents liés à l'application du droit international. La CPI est-elle inextricablement prise, ou et est – elle une partie d'un système juridique partiel ou est-elle en train d'être utilisée comme le bouc émissaire pour des problèmes plus larges et plus persistants inhérents au droit international tels que l'exceptionnalisme étatique, le comportement hégémonique et les inégalités du pouvoir ancrées au sein du CSNU? J'espère que cet ouvrage sera utile aux lecteurs qui cherchent à distinguer entre la critique légitime et bien fondée de la CPI et la voix politique dans le « bol de spaghetti » de faits, opinions et idéaux relatifs à l'ordre juridique et politique international d'aujourd'hui.

Mais d'où peut-on commencer dans le but de dissoudre l'impasse entre le programme de la justice pénale internationale et quelques états africains? Premièrement, nous devons être conscients de l'adage que *chacun a droit à son opinion, mais personne n'a le monopole des faits*.⁷ Ainsi, il est nécessaire de s'adresser au décalage entre la rhétorique et la réalité en place concernant les relations entre l'Afrique et la CPI.⁸ Il faut distinguer les faits de l'opinion, surtout en cas où les opinions seraient motivées par des préoccupations politiques ou sont délibérément obscurcissantes. Deuxièmement, nous devons voir le contexte plus large de la justice pénale internationale, qui est d'ailleurs plus complexe que ce qui est souvent présenté. La condamnation d'Hissène Habré par les Chambres extraordinaires africaines appuyées par l'UA au Sénégal constitue un exemple remarquable vers la réalisation de la justice pénale internationale en Afrique. C'est aussi le cas pour le

⁷ Ce dicton est basé sur une déclaration attribuée au politicien et sociologue américain, Daniel Patrick Moynihan.

⁸ Voir Ventura MJ et Bleeker AJ, 'Jurisdiction universelle, les perceptions africaines sur la Cour pénale internationale et le nouveau protocole de l'UA sur les modifications au protocole sur le Statut de la Cour africaine de justice et des droits de l'homme' in Ankumah EA (ed.), *La Cour pénale internationale et l'Afrique: une décennie après*, Intersentia, Cambridge/Antwerp/Portland, 2016, 441-460.

protocole de Malabo et des efforts vers les poursuites nationales des crimes internationaux et transnationaux par certains pays africains. Voir le contexte plus large signifie voir au-delà du conflit entre la CPI et l’Afrique. La CPI a seulement la compétence sur un nombre limité de crimes et n’est qu’un tribunal de dernier ressort. L’interface entre l’Afrique et la criminalité internationale n’est pas si unidimensionnelle qu’elle se limite à la discussion sur les relations entre les Etats africains, l’UA et la CPI, comme l’illustre par exemple **Jeanne-Mari Retief** au Chapitre 8, qui donne la perspective africaine sur les problèmes de l’extradition extraordinaire et les techniques d’interrogation renforcée et le crime de la torture.

Pour voir le contexte le plus large, il serait idéal de regarder au-delà du continent africain. Prenons l’exemple du slogan de l’UA « solutions africaines aux problèmes de l’Afrique ». Le slogan laisse peu de place pour reconnaître le fait que le crime international n’est pas exclusivement « un problème de l’Afrique » même si les auteurs de tels crimes sont les Africains contre les Africains ou ils se trouvent en Afrique. Les crimes internationaux constituent une préoccupation universelle qui touche l’intérêt commun de la communauté internationale. Ils fournissent la base de l’existence du droit pénal international et cela étant dit, ce serait bien pour l’Afrique de penser au-delà d’elle-même en matière de la justice pénale internationale. La communauté internationale doit de toute urgence commencer à penser (et agir) au-delà de l’Afrique. Même si certains présentent l’Afrique comme la victime de la justice pénale internationale, elle a en fait bénéficié davantage que toute autre région, des efforts déployés pour mettre fin à l’impunité à l’égard des crimes internationaux. Il faut redoubler ces efforts mais il est grand temps que les avantages de la responsabilité soient élargis au-delà de l’Afrique. Cela devrait aussi s’adresser aux préoccupations légitimes de l’Afrique concernant l’application du droit pénal international.

II

La publication de cette année regroupe un certain nombre de nouvelles caractéristiques au profit du lecteur:

- La publication comprend maintenant un rapport annuel concernant les évolutions de la justice pénale internationale en Afrique. Ce rapport n'est pas destiné à faire une analyse exhaustive des événements, mais plutôt permettre au lecteur d'avoir un aperçu factuel et simplement chronologique des situations en cours et des événements marquants relatifs à la justice pénale internationale en Afrique. Dans de nombreux cas, les évolutions indiquées dans le rapport sont abordées et analysées en détail dans les chapitres ultérieurs.
- Dans une perspective visant à avoir un engagement accru avec les lecteurs francophones, cette édition présente deux contributions en français. Tous les résumés sont en anglais et en français. Le groupe souhaite réaliser une meilleure parité entre les contributions en anglais et en français dans les futures éditions du recueil.
- L'édition de cette année contient une contribution par **Anne-Charlotte Recker** (Chapitre 9). Son chapitre constitue un rapport de la 2ème *Annual Strathmore Institute for Advanced Studies in International Criminal Justice (SIASIC)* tenue du 4 au 5 août 2016 à l'Université de Strathmore, à Nairobi au Kenya et dont le thème était, *Répression de la violence sexuelle et sexiste en temps de paix et en temps de conflits*. Son chapitre aborde les difficultés en matière de la lutte contre l'impunité relative à la violence sexuelle et sexiste au Kenya, surtout celles liées aux enquêtes, aux poursuites judiciaires et au jugement de telles affaires. Par le biais de ce chapitre, nous espérons attirer l'attention sur le problème de la violence contre les femmes au Kenya et ailleurs ainsi que le lien entre la violence contre les femmes et les crimes internationaux.

III

J'aimerais tout d'abord remercier, la Fondation Konrad-Adenauer-Stiftung de son soutien généreux au Groupe d'experts africains en matière de la justice pénale internationale et, de manière plus générale, de la cause de la paix et de la justice en Afrique.

Je tiens à remercier tous les membres de notre groupe et surtout ceux qui ont contribué à cet ouvrage, de leur excellent travail, de leur dévouement et de leur patience.

Je remercie également Prof Gerhard Kemp, qui en tant que conseiller externe pour la publication de cet ouvrage a très aimablement accepté de revoir la version finale du manuscrit. Ses conseils et suggestions étaient, comme toujours, très sains et utiles. J'aimerais également remercier notre rédacteur français pour de son assistance avec la rédaction et des traductions.

Encore une fois, je profite de cette occasion pour adresser des remerciements particuliers à l'équipe de KAS Rule of Law for Sub Saharan Africa Dr Arne Wulff (Directeur) et Monsieur Peter Wendoh (Conseiller de projet) pour leurs conseils et leur aide précieuse dans la coordination du projet.

Je remercie enfin nos éditeurs, Strathmore University Press, de leur contribution dans la publication de cet ouvrage. Je tiens tout particulièrement à remercier Dr J Osogo Ambani, Jerusha Asin et Humphrey Sipalla de leur aide et ses conseils dans le processus de publication.

RAPPORT ANNUEL 2016¹

Burundi

- En avril, le Bureau du procureur a ouvert un examen préliminaire sur la situation en Burundi depuis avril 2015 suite à la décision du Président Pierre Nkurunziza de briguer un troisième mandat qui a déclenché des actes de tuerie, emprisonnement, torture viol et d'autres formes de violence sexuelle, ainsi que des cas de disparitions forcées.
- En octobre, le Parlement de la République du Burundi s'est prononcé en faveur de l'intention du pays de se retirer du Statut de Rome.

République centrafricaine

RCA I: Les enquêtes menées par la CPI en RCA I étaient axées sur les crimes de guerre et les crimes contre l'humanité perpétrés dans le cadre des conflits en RCA depuis le 1er juillet 2002.

RCA II: les enquêtes menées par la CPI en RCA II étaient axées sur les crimes contre de guerre et les crimes contre l'humanité perpétrés dans le cadre des conflits en RCA depuis le 1^{er} aout 2012. Les conflits de 2012 auraient impliqué des crimes perpétrés par le groupe musulman "le Seleka et le groupe chrétien l'anti-balaka", qui auraient entraîné des milliers de morts et des centaines de personnes déplacées. L'ONU a également annoncé un risque élevé de génocide en RCA.

¹ Il convient de noter que la partie de ce rapport est basée sur les extraits tirés directement la section "Situations et affaires" du site web de la CPI au 12 janvier 2017, <https://www.icc-cpi.int/Pages/Home.aspx#>.

- En mars, la CPI a condamné l'ancien chef de la milice rebelle congolaise Jean-Pierre Bemba Gombo de crimes contre l'humanité et des crimes de guerre.² La décision a été considérée comme un procès de repère pour le principe de la responsabilité du supérieur hiérarchique. Il a aussi représenté la première condamnation pour crimes de la violence sexuelle et sexiste par la CPI.
- En juin, la CPI a condamné Jean-Pierre Bemba à 18 ans de prison ferme.³
- En octobre, la Chambre de première instance de la CPI a condamné cinq accusés (dont Jean-Pierre Bemba Gombo) pour des infractions contre l'administration de la justice.⁴

République démocratique du Congo

Les enquêtes menées par la CPI en RDC sont axées sur les crimes de guerre et les crimes contre l'humanité perpétrés, depuis le 1^{er} juillet 2002, principalement dans l'est de la RDC, dans la région de l'Ituri et dans les provinces du nord et du sud Kivu. La situation avait été renvoyée devant la CPI en 2004 par le Gouvernement de la RDC.

- En janvier, le Président de la République démocratique du Congo (RDC) a signé le texte de la loi pour la mise en œuvre du Statut de Rome.⁵
- En avril, la présidence de la CPI a approuvé, conformément à l'article 108(1) du Statut de Rome, la poursuite de Germain Katanga (qui avait été condamné par la CPI en 2014, de crimes de guerre et de crimes contre l'humanité) devant la Haute Cour militaire de la RDC.⁶

² *Procureur c. Jean-Pierre Bemba Gombo*, CPI-01/05-01/08.

³ *Procureur c. Jean-Pierre Bemba Gombo*, Décision sur la condamnation conformément à l'article 76 du Statut, CPI-01/05-01/08-3399, le 21 juin 2016.

⁴ *Procureur c. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, ICC-01/05-01/13.

⁵ Pour une discussion plus détaillée de cette législation, voir Chapitre 6 par **Pacifique Muhindo Magadju** sur 'Législation Congolaise de mise en œuvre du Statut de Rome: Un pas en avant, un pas en arrière' et Chapitre 7 par **Balingene Kahombo** sur 'Le principe de complémentarité: Une enquête sur la Législation Congolaise de mise en œuvre du Statut de Rome de la Cour pénale internationale'.

⁶ *Procureur c. Germain Katanga* (Décision conformément à l'article 108(1) du Statut de Rome) CPI-01/04-01/07, 7 avril 2016.

Chambres extraordinaires africaines au Sénégal

- En mai, l'ancien dictateur tchadien Hissène Habré était condamné à l'emprisonnement à perpétuité après avoir été reconnu coupable de crimes contre l'humanité, de crimes de guerre et de torture, y compris la violence sexuelle et le viol, par les chambres extraordinaires africaines au Sénégal. Ces chambres étaient appuyées par l'UA.⁷

Côte d'Ivoire

Les enquêtes menées par la CPI en Côte d'Ivoire étaient axées sur les crimes contre l'humanité perpétrés pendant la violence postélectorale de 2010/2011, suite au litige relatif aux résultats des élections présidentielles entre Laurent Gbagbo et Alassane Ouattara. Le procureur de la CPI a reçu en octobre 2011, l'autorisation de la Chambre préliminaire d'ouvrir une enquête proprio motu.

- Le procès de Charles Blé Goudé et Laurent Gbagbo (les deux procès ont été joints le 11 mars 2015) a commencé le 28 janvier 2016. Les deux accusés font face à des crimes contre l'humanité découlant de la violence suite à la contestation des résultats des élections présidentielles de 2010/2011 qui a entraîné plus 3000 morts. Laurent Gbagbo est le premier ancien chef d'Etat de faire l'objet de poursuites à la CPI. Le procès est en cours.

Kenya

L'année écoulée, a marqué un point bas des efforts pour mettre fin à l'impunité au Kenya suite à la violence postélectorale de 2007/8. L'échec de tous les procès liés à la violence post-électorale au Kenya a mis en cause l'efficacité des enquêtes menées par la CPI et la protection des témoins. Selon Fatou Bensouda, le 'procès était finalement affaibli par une "combinaison parfaite" de l'exercice de pression sur les témoins et la politisation intense du mandat et du travail juridique de la Cour'⁸

⁷ Pour une discussion plus détaillée pour l'affaire Habré, voir chapitre 1 pour la contribution par **Bernard Ntahiraja**, 'le présent et l'avenir de la juridiction universelle en Afrique: Leçons tirées de l'affaire Habré'.

⁸ CPI, 'Déclaration du Procureur de la Cour pénale internationale, Fatou Bensouda, concernant la décision de la Chambre de première instance de mettre fin aux accusations contre Messrs. William Samoei Ruto and Joshua Arap Sang sans préjudice de reprendre les mêmes poursuites dans l'avenir', le 6 avril

*Depuis 2013, la CPI a inculpé trois ressortissants kenyans des infractions contre l'administration de la justice par la subordination des témoins de l'accusation.*⁹

- En avril, la Chambre de la première instance V(A) de la CPI a décidé, à la majorité avec un jugement dissident par Juge Olga Herrera Carbuca, que le procès de William Samoei Ruto et Joshua Arap Sang devrait être terminé.¹⁰ La Cour a déclaré qu'il n'y avait pas assez d'éléments de preuve pour continuer avec le procès. Le jugement était précédé de retrait de plusieurs témoins de l'accusation.

Mali

Les enquêtes en cours au Mali sont axées sur les crimes de guerre perpétrés depuis janvier 2012, surtout dans les régions du nord du pays.

- En mars, la CPI a vu l'ouverture du premier procès concernant la destruction des monuments culturels comme un crime de guerre. L'accusé, Ahmad Al Faqi Al Mahdi, un leader djihadiste est inculpé de la démolition des bâtiments historiques et religieux de la ville de Tombouctou inscrits au patrimoine mondial de l'UNESCO.
- An août, Al Mahdi est devenu la première personne de plaider coupable devant la Cour. Sa condamnation marque aussi la première fois que des attaques délibérées menant à la destruction des sites culturels ont été poursuivies comme crime de guerre à la CPI. C'était aussi la première poursuite judiciaire contre un radical islamiste à la CPI.

Afrique du Sud

- En mars, la Cour suprême d'appel en Afrique du Sud s'est prononcée sur l'affaire du Président Omar El-Béchir en rejetant l'appel du gouvernement et en statuant que le gouvernement de l'Afrique du Sud a contre-

2016 <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406> le 11 janvier 2017.

⁹ Voir *Procureur c. Walter Osapiri Barasa* CPI-01/09-01/13 et *Procureur c. Paul Gicheru et Philip Kipkoech Bett* CPI-01/09-01/15.

¹⁰ Voir *Procureur c. William Samoei Ruto et Joshua Arap Sang*, La version publique de la décision sur les demandes de la défense pour le jugement d'acquiescement, CPI-01/09-01/11-2027-Red-Corr, le 16 juin 2016. Il convient de noter que la décision n'exclue pas une nouvelle poursuite judiciaire dans l'avenir, soit à la CPI ou soit au niveau national.

venu à son propre droit national et au droit international par son refus de placer Omar El-Béchir en détention lors du Sommet de l'UA tenu à Johannesburg.¹¹ Le gouvernement de l'Afrique du Sud avait l'intention de faire appel auprès de la Cour constitutionnelle, et l'audience était prévue pour novembre 2016. Cependant, l'appel a été abandonné suite à la décision en octobre 2016 pour l'Afrique du Sud de se retirer du Statut de Rome. Le gouvernement de l'Afrique a cité un conflit entre les obligations juridiques internationales concernant l'immunité pour les chefs d'Etat en exercice qui a nécessité la suppression de toutes les entraves d'ordre juridique empêchant la capacité de l'Afrique du Sud de s'acquitter de ses obligations relatives à l'octroi de l'immunité diplomatique en vertu du droit international prévues dans notre législation nationale.¹² Il a également cité les exigences de la paix régionale comme étant une des motivations pour la prise de décision de se retirer. La décision du gouvernement de se retirer de la CPI a été attaquée devant la Haute Cour par le parti de l'opposition « l'Alliance démocratique ». L'audition de la plaidoirie orale dans l'affaire s'est déroulée en décembre et la décision de la cour est attendue au début de 2017.

Gambie

- En octobre, la Gambie a notifié au Secrétaire général des Nations unies de son intention de se retirer du Statut de Rome. Le ministre gambien de l'information a traité la CPI de “la Cour internationale des Blancs” pour la poursuite et l'humiliation des personnes de couleur.¹³
- En décembre, le Président élu Adama Barrow a fait part de son intention de maintenir la Gambie dans la CPI. Au moment de la rédaction de cet ouvrage, le Président sortant Yahya Jammeh avait refusé de quitter ses

¹¹ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

¹² Le Ministre Sud-africain de la justice et du service correctionnel Michael Masutha. See 'le gouvernement prend un recul dans le combat de l'affaire Omar Al-Bashir devant la Cour constitutionnelle' *eNCA* (le 21 octobre 2016) <https://www.enca.com/south-africa/government-backs-down-on-omar-al-bashir-concourt-fight> le 11 janvier 2017.

¹³ Simwaka F, 'Africa's retreat from International Criminal Court is about impunity, not dignity' *Washington Post* (8 November 2016) https://www.washingtonpost.com/news/global-opinions/wp/2016/11/08/africas-retreat-from-international-criminal-court-is-about-impunity-not-dignity/?utm_term=.a66889c89009 le 11 janvier 2016.

fonctions tout en poursuivant une contestation judiciaire des résultats des élections.

Ouganda

Les enquêtes menées par la CPI en Ouganda sont axées sur les crimes de guerre et les crimes contre l'humanité perpétrés dans le cadre d'un conflit armé principalement entre l'Armée de résistance du Seigneur (LRA) et les autorités nationales, surtout dans le nord de l'Ouganda, depuis le 1 juillet 2002. Deux suspects sont toujours en fuite, dont Joseph Kony le leader de la LRA.

- En mars, la CPI a confirmé les accusations à l'encontre de l'Ougandais Dominic Ongwen. Ongwen est le premier membre de la LRA de comparaître devant la CPI et fait face à 70 accusations de crimes de guerre et de crimes contre l'humanité perpétrés dans le nord de l'Ouganda en 2003 et en 2004. Son procès a commencé le 6 décembre 2016 et il a plaidé non coupable.

Conflit entre la CPI et l'Afrique

- En mai, le président soudanais Omar El-Béchéir a assisté aux inaugurations du Président Yoweri Museveni en Ouganda (un Etat partie à la CPI et le premier pays de saisir la cour en 2004) et du Président Ismail Omer Gailiau Djibouti. En juillet, la Chambre préliminaire II de la CPI a porté à l'attention de l'Assemblée des Etats parties et du Conseil de sécurité des Nations unies le non-respect de l'Ouganda et du Djibouti en ce qui concerne l'exécution du mandat d'arrêt contre Omar El-Béchéir.¹⁴
- En juillet, le 27ème Sommet de l'UA s'est clôturé sans un appel pour le retrait en masse de la CPI. Les appels pour le retrait en masse ont été fortement résistés par le Nigeria, Le Sénégal, la Cote d'Ivoire, la Tunisie et même par un Etat non-partie, l'Algérie.¹⁵ Les gouvernements opposés

¹⁴ *Décision constatant la non-conformité de la République du Djibouti avec la demande d'arrêter et de remettre Omar El-Béchéir à la Cour et renvoyer l'affaire au Conseil de Sécurité des Nations Unies et à l'Assemblée des Etats parties au Statut de Rome*, CPI-02/05-01/09, le 11 juillet 2016.

¹⁵ Pauron M and Duhem V, 'Sommet de l'UA: Pas d'entente sur un retrait collectif de la CPI' *Jeune Afrique* (16 July 2016) <http://www.jeuneafrique.com/341589/politique/sommet-de-lua-pas-dentente-sur-un-retrait-collectif-de-la-cpi/> on 11 January 2017.

au retrait en masse ont affirmé que l'UA, en tant qu'une organisation intergouvernementale, n'est pas membre de la CPI et elle n'est pas en mesure d'ordonner des Etats membres de se retirer de la Cour car elle est composée des Etats parties et des Etats non-parties à la CPI.¹⁶ L'Article 127 du Statut de Rome prévoit que les Etats doivent de se retirer à titre individuel. Le retrait de la CPI doit commencer par un Etat partie déposant une notification de son intention de se retirer auprès du Secrétaire général de l'ONU. L'Etat partie est donc obligé d'attendre un an pour que le retrait entre en vigueur.

- En octobre, trois Etats (le Burundi, l'Afrique du Sud et la Gambie) ont fait part de leur intention de se retirer du Statut de Rome.¹⁷ L'Afrique du Sud est donc devenu le premier état de déposer une notification formelle auprès du Secrétaire général de l'UNO conformément à l'article 127 du Statut de Rome. Au moment de la rédaction de cet ouvrage, cette notification faisait l'objet d'une attaque judiciaire en Afrique du Sud.

D'autres nouveaux éléments

- **TPIR:** Au 31 décembre 2015, le TPIR a été officiellement clôturé. Bien que le TPIR ait commencé à ralentir progressivement ses activités depuis une période importante, l'année 2016 a été la première année depuis la création du tribunal en 1994, que le TPIR n'a pas été en activité. Un mécanisme international résiduel pour des tribunaux pénaux a été mis en place pour juger éventuellement les huit fugitifs en fuite.
- **Georgie:** En février, la Chambre préliminaire I de la CPI a donné son approbation à la demande du Procureur de la CPI pour ouvrir des enquêtes *proprio motu* sur la situation en Géorgie, en relations avec des crimes contre l'humanité et des crimes de guerre au sein de la compétence de la Cour dans le cadre d'un conflit armé international entre le 1^{er} juillet et le 10 octobre 2008. L'intervention de la CPI dans le conflit entre la Géorgie, la Russie et les belligérants appuyés par Moscou en Ossétie du Sud représente la première enquête menée par la Cour sur une situation en

¹⁶ Keppler E, 'Dispatches: Governments defend ICC at African Union Summit - Pushback against AU call for withdrawal' *Human Rights Watch* (20 July 2016) <https://www.hrw.org/news/2016/07/20/dispatches-governments-defend-icc-african-union-summit> on 8 August 2016.

¹⁷ La **Namibie** a également fait part de son intention de se retirer du Statut de Rome.

dehors de l’Afrique. C’est aussi la première fois qu’un pays puissant et un membre permanent du Conseil de Sécurité des Nations (la Russie) fait l’objet d’une enquête officielle pour les crimes relevant de la compétence de la Cour.

- **Gabon:** En septembre, la République gabonaise a fait une demande auprès du bureau du procureur pour ouvrir une enquête sur la situation dans le pays. Le même mois, le procureur de la CPI a ouvert un examen préliminaire axé sur les crimes susceptibles de relever de la compétence de la Cour et perpétrés au Gabon depuis mai 2016, y compris ceux perpétrés dans le contexte des élections présidentielles du 27 août 2016.
- **Soudan du Sud:** en novembre, le Conseiller spécial des Nations Unies pour la prévention de génocide, Adama Dieng, a averti que le Soudan du Sud est en danger de replonger dans la guerre ethnique et le génocide.
- **Libya:** En novembre, le procureur de la CPI Fatou Bensouda a annoncé qu’en 2017, le Bureau du Procureur accordera la priorité à l’enquête sur la situation en Libye et a par ailleurs demandé le gouvernement libyen de remettre Saïf Al-Islam Gaddafi à la Cour.¹⁸

¹⁸ CPI-BDP, Douzième rapport du procureur de la Cour pénale internationale au Conseil de Sécurité des Nations Unies conformément à la résolution 1970 (2011) du Conseil de Sécurité des Nations Unies du 9 novembre 2016.

CHAPTER 1

THE PRESENT AND FUTURE OF UNIVERSAL JURISDICTION IN AFRICA: LESSONS FROM THE HISSÈNE HABRÉ CASE

BERNARD NTAHIRAJA

Abstract

The judgment rendered by the Extraordinary African Chambers in the Habré case, has been saluted as a great accomplishment around the world. Being the first judicial decision of an African national court condemning a former head of state of another African country, the judgment is painted as a success story for universal jurisdiction. This chapter assesses the state of affairs in Africa as far as universal jurisdiction is concerned after that judgment. It analyses relevant legal instruments and practices of the African Union and some individual African states. It concludes that although the judgment in the Habré case sends a positive sign, a lot still needs to be done for universal jurisdiction to be a significant tool in the fight against impunity in Africa.

L'ETAT ET L'AVENIR DE LA COMPETENCE UNIVERSELLE EN AFRIQUE: LECONS TIREES DE L'AFFAIRE HABRÉ

Résumé

Le jugement rendu par la chambre africaine extraordinaire d'assises dans l'affaire Habré a été saluée à travers le monde comme une importante avancée. Première décision d'une juridiction nationale africaine condamnant un ancien chef d'état d'un autre pays africain, le jugement est considéré comme un exemple de réussite en matière de la compétence universelle. Ce chapitre évalue l'état des lieux de la compétence universelle en Afrique après ce jugement. Il analyse les instruments juridiques et les pratiques de l'Union africaine et de certains Etats africains, à titre individuel. Il conclut que bien que le jugement dans l'affaire Habré soit un élément positif, beaucoup reste à faire pour que le principe de la compétence universelle puisse contribuer de manière significative à la lutte contre l'impunité en Afrique.

1 Introduction

On 30 May 2016, the Extraordinary African Chambers (the Chambers) in the Senegalese court system delivered the verdict in the case *Ministère Public contre Hissène Habré*.¹ The former Chadian dictator was found guilty of torture, war crimes and crimes against humanity and sentenced to life imprisonment.² Human rights organisations worldwide saw the event as historical.³ It was the first time a former African head of state was judged by a foreign African domestic court for serious human rights violations committed while in power.

¹ *Ministère Public contre Hissène Habré*, Extraordinary African Chamber of Assises, Judgment of 30 May 2016. A French version of the judgment can be accessed at www.chambresafricaines.org.

² *Ministère Public contre Hissène Habré*, 536.

³ Human Rights Watch, 'Procès Hissène Habré: La France doit tirer les leçons du passé' 29 June 2016.

The verdict raised hope and expectations far beyond Chad and Habré's direct victims. On a continent where accountability for heinous international crimes is the exception rather than the rule, many want to see the judgment as the beginning of a new era. However, the question that needs asking is the extent to which the judgment sets a precedent in the broad sense. In other words, one needs to ask whether, based on the same principle, it is realistic to expect that other African state officials will face trials in the future. At a time when relations between Africa and the International Criminal Court (ICC) are, to say the least, problematic⁴ and the Protocol to establish an 'African criminal court' does not seem to attract enthusiasm, even from African states themselves,⁵ it is worth asking if the 'project'⁶ of international criminal justice will succeed in Africa.

This chapter will first clarify the concept of universal jurisdiction and underline its relevance for international criminal justice in Africa (part 2). It will then discuss African policies as far as universal jurisdiction is concerned. A clear distinction will be made between continental perspectives and national ones (part 3). Lastly, looking at the Habré case as a process, the chapter will assess whether similar trials are likely to be held in Africa in the near future (part 4).

2 The concept of universal jurisdiction and its relevance for Africa

To measure how relevant universal jurisdiction is for international criminal justice in Africa (part 2.2 below), one first needs a clear understanding of what the concept really means (part 2.1 hereafter).

⁴ At the time of writing (15 November 2016), three African states (the Republic of Burundi, the Republic of Gambia, and the Republic of South Africa) have given official notice of their withdrawal from the Rome Statute to the United Nations Secretary General. For Burundi, see United Nations: Reference: C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification), 27 October 2016. For Gambia, see United Nations: Reference: C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification), 10 November 2016. In accordance with Article 127(1) of the Rome Statute, the withdrawals shall take effect on 27 October 2017 and 10 November 2017 for Burundi and Gambia, respectively. South Africa's Instrument of Withdrawal was signed on 19 October 2016. At the time of writing, the South African government's decision to withdraw from the Rome Statute was challenged in the High Court in Pretoria. Oral arguments were presented by Government and by a number of *amici curiae*. A decision is expected early in 2017. Separate from the legal challenge, it should also be noted that a notice to repeal the Implementation of the Rome Statute of the International Criminal Court Act, 2002, was published in the *Government Gazette* No 40403, 3 November 2016.

⁵ At the time of writing (15 November, 2016), no single state had yet ratified the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) adopted in Malabo on 27 June 2014 [hereinafter 'Malabo Protocol']

⁶ Van der Merwe HJ, 'Assessing the role of indirect enforcement in the 'project' of international criminal justice: Some Lessons from South Africa' in Van der Merwe HJ and Kemp G (eds), *International criminal justice in Africa*, Konrad Adenauer Stiftung and Strathmore University Press, Nairobi, 2016, 115.

2.1 Clarifying the notion of universal jurisdiction

As most commonly understood, universal jurisdiction is an international law principle that allows any nation to prosecute offenders for certain crimes even when it lacks a traditional nexus with the crime, the alleged offender or the victim.⁷ As such, it is an exception to the norm under which jurisdiction is founded on the existence of a linkage between the prosecuting state and the crime in question.

Traditional heads of jurisdiction are the territory where the crime took place (territorial jurisdiction), the nationality of the suspect (active personality or active personal jurisdiction), the nationality of the victim (passive personality or passive personal jurisdiction) and the existence of a fundamental interest of the prosecuting state that is presumably offended by the crime (protective jurisdiction).⁸ Jurisdiction based on the ‘effects’ doctrine—where the offence is deemed to have some deleterious effects on the territory of the prescribing state remains controversial if not objectionable in all cases, except in some areas like inchoate conspiracies to commit murder or to import illicit drugs.⁹ There are less common heads of jurisdiction such as the offender’s residence in the prescribing state or his or her service in its armed forces.¹⁰

Universal jurisdiction covers a limited category of offences generally recognised as of universal concern, regardless of the *situs* of the offence and the nationalities of the offender and the offended.¹¹ It is based solely on the nature of the crime.¹² In other words, it is reserved for the most serious crimes. To use Mohammed Bedjaoui’s words, referring to nuclear weapons, universal jurisdiction is recognised for crimes considered as being representative of ‘ultimate evil.’¹³ The concept is based on the idea that certain acts affect the common interests of the entire international community. As a result, any state may investigate and prosecute such acts as a trustee of the international community.¹⁴ In the exercise of universal jurisdiction,

⁷ Randall KC, ‘Universal jurisdiction under international law’, 66 *Texas Law Review* 785, 1988, 785.

⁸ It is now recognised, though it used to be questioned. See O’Keefe R, ‘Universal jurisdiction: Clarifying the basic concepts’ *Journal of International Criminal Justice* 2, 2004, 739.

⁹ O’Keefe, ‘Universal jurisdiction’, 739.

¹⁰ O’Keefe, ‘Universal jurisdiction’, 739.

¹¹ Schachter O, *International law in theory and practice*, 262.

¹² *Princeton principles on universal jurisdiction*, Princeton project on universal jurisdiction, 2001, Principle 1, 1.

¹³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, Declaration of President Bedjaoui, 273.

¹⁴ Jessberger F, ‘Universal jurisdiction’ in Cassese A (ed), *The Oxford companion to international criminal justice*, Oxford University Press, Oxford, 2009, 555-557.

a state acts on behalf of the international community in a manner equivalent to the Roman concept of *actio popularis*. In the words of Cherif Bassiouni, the exercising state acts on behalf of the international community because it has an interest in the preservation of the world order as a member of that community.¹⁵ It is, therefore, fitting that the International Court of Justice (ICJ) stated in *Senegal v Belgium*, with regard to the prosecution of torture, that:

... all the other states parties have a *common interest* in compliance with the obligations [under the Convention against Torture] by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.¹⁶

The universality principle is relied upon particularly where, for some reason, the suspected criminal would otherwise go unpunished.¹⁷ In some cases universal jurisdiction is mandatory. An increasing number of instruments, in humanitarian law in particular, oblige state parties to criminalise certain forms of conduct and to establish jurisdiction over them.¹⁸

There is some uncertainty as to whether the concept of universal jurisdiction refers to jurisdiction to prescribe, to enforce or both. In international criminal law, jurisdiction must, indeed, be considered from two perspectives. On the one hand, *jurisdiction to prescribe* (prescriptive jurisdiction or legislative jurisdiction) refers to the state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in some circumstances, judicial ruling.¹⁹ Put simply, jurisdiction to prescribe refers to the jurisdiction to criminalise a certain conduct. On the other, *jurisdiction to enforce* (enforcement jurisdiction or executive jurisdiction) is used to mean the state's authority under international law to actually apply its criminal law, through police or other executive action and through the courts.²⁰ This is jurisdiction to arrest, detain, prosecute, try and sentence and to punish persons for the acts so criminalised. It goes beyond the scope of this chapter to discuss at length

¹⁵ Bassiouni C, 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practices' 42 *Virginia Journal of International Law*, 2002, 88.

¹⁶ *Questions relating to the obligation to prosecute or extradite, (Belgium v Senegal)*, Judgment, ICJ Reports 2012, para 68 (author's emphasis).

¹⁷ Hadamar Trial, 1. L. Rep. Trials of War Criminals (1946-1949), 53.

¹⁸ See, for example, the Geneva Conventions: Article 49, *Geneva Convention I*; Article 50, *Geneva Convention II*; Article 129, *Geneva Convention III*; Article 146, *Geneva Convention IV*. See also Article 5, *United Nations Convention against Torture*.

¹⁹ O'Keefe, 'Universal jurisdiction: clarifying the basic concept' 736.

²⁰ O'Keefe, 'Universal jurisdiction' 736.

the legal consequences of each of the two understandings of universal jurisdiction. Suffice it to mention that the two aspects of jurisdiction do not always go hand in hand.²¹

From a historical perspective, universal jurisdiction is far from being a new concept, despite the juridical and political controversy still surrounding it. It is widely admitted that, centuries ago, well before treaty law, courts developed this doctrine to address piracy as a threat to international trade.²² Given the danger they posed, pirates were deemed '*hostis humani generis*' or the enemies of all people.²³ The principle was soon extended to slave trading. Because those offences endanger values to which the global community is committed, states that had traditional jurisdictional nexus with them became less and less inclined to claim an exclusive right to prosecute offenders.²⁴

Donnedieu de Vabres traces universal jurisdiction back to the Roman Justinian Code, C. III, 15, *Ubi de criminibus agi oportet*, 1, which defined the jurisdiction of governors of the empire in criminal matters. Jurisdiction was recognised, both of the authorities where the crime was committed and of where the offender was arrested (*judex deprehensionis*). The rule applied especially for dangerous offenders of that time like vagabonds and murderers.²⁵ The same author recalls that erroneous interpretation changed *judex deprehensionis* into *judex domicilli* (or jurisdiction based on residence).

In the twentieth century, universal jurisdiction gained more relevance. It is generally admitted that International Military Tribunals (IMTs) operated under the universality principle. Although there is doctrinal controversy over that question based on the seemingly international character of the tribunals and on the fact that the states that created the IMT were the factual sovereigns over Germany and Japan at the time of the prosecutions and trials, the Nuremberg IMT judgment itself referred to the universality principle:

The Signatory Powers created this Tribunal, defined the Law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, *they have done together*

²¹ See, for instance, *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre and Another* (2014) ZACC 30, 30 October 2014 ('Zimbabwe Torture Docket Case') 25-29.

²² Randall, 785.

²³ Randall, 785.

²⁴ Randall, 785.

²⁵ de Vabres D, *Les principes modernes du droit pénal international*, 1928, 135-136, cited in Bassiouni C, 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practices' 100-101.

*what any one of them might have singly; for it is not to be doubted that any nation has the right to set up special courts to administer the law.*²⁶

It is less controversial that the so-called ‘zonal trials’ were based on the same principle.²⁷ According to James Fawcett, because the universality principle applies to piracy, it must *a fortiori* apply to the more serious crimes committed by the Axis powers.²⁸

Today, in addition to piracy and slave trade, universal jurisdiction also applies to genocide, war crimes, crimes against peace, crimes against humanity and torture.²⁹

2.2 *The legal relevance of universal jurisdiction for Africa*

For a very long time, it was suggested that universal jurisdiction of national courts would lose its relevance with the creation of an international criminal court – like the ICC.³⁰ Nothing could be further from the truth. From a legal perspective, there are a number of reasons that make universal jurisdiction an important and interesting complement to other avenues of international criminal justice in Africa. First, universal jurisdiction enables the prosecution of criminal conduct that is beyond the reach of existing international judicial institutions like the ICC (part 2.2.1 below). Secondly, by adopting a prosecution-friendly approach to time limitations, universal jurisdiction also makes accountability more likely (part 2.2.2 below).

²⁶ ‘International Military Tribunal (Nuremberg): Judgment and sentence’ 41 *American Journal of International Law* 172, 1947, 216 (author’s emphasis).

²⁷ In addition to the well-known Nuremberg and Tokyo trials, the allied powers occupying Germany and Austria in the aftermath of the Second World War (United States of America, United Kingdom, France and the Soviet Union) held trials in their zones of occupation and tried a variety of perpetrators for wartime offences.

²⁸ Fawcett, JES, ‘The Eichmann case’, 38 *British Yearbook of International Law*, 181, 1962, 204.

²⁹ For a list combining treaty law and customary law, see the Princeton Principles on Universal Jurisdiction, principle nr. 2 on universal jurisdiction. Examples of treaty provisions providing for universal jurisdiction include: the Geneva conventions: Article 49, *Geneva Convention I*; Article 50, *Geneva Convention II*; Article 129, *Geneva Convention III*; Article 146, *Geneva Convention IV*; Article 5, *the United Nations Convention against Torture*; and Article IV and V, *International Convention on the suppression and punishment of the crime of apartheid*, 30 November, 1973.

³⁰ Graefrath B, ‘Universal Criminal Jurisdiction and an International Criminal Court, 1 *European Journal of International Law*, 1990, 67, 81-2. The author quotes Sinclair writing, in 1986, that “...it is implied that there are two alternatives: universal jurisdiction or an international criminal jurisdiction. “Discussing the issue of a code of international crimes, even the International Law Commission (ILC) believed universal jurisdiction and an international criminal court to be alternatives: “The problem of competent jurisdiction was most serious, since it involved a choice between creating an international jurisdiction and extending the competence of national courts to cover such crimes.” [Emphasis mine.]

With regard to the ICC, for instance, universality creates an opportunity for what some authors call ‘complementarity in the broad sense.’³¹ The idea is that it does not truly matter whether crimes are prosecuted by the ICC, the territorial state, the national state of the alleged victim or any other jurisdiction. As is often recalled, not every atrocity calls for an international tribunal. Ending impunity for the most egregious crimes is the real and only goal.

2.2.1 Universal jurisdiction: Wider *ratione materiae* coverage

Contrary to the legal frameworks of the ICC and other international tribunals, there is no definitive list of crimes prosecutable through universal jurisdiction, neither by convention nor by custom. Deciding on whether universal jurisdiction is permissible or even mandatory in respect of a particular form of criminal conduct requires an examination of the conventional or customary rule(s) criminalising it.

According to the Princeton Principles on Universal Jurisdiction (Princeton Principles), serious crimes under international law warranting universal jurisdiction include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.³² It is, therefore, obvious that universal jurisdiction covers a more extensive range of crimes than the Rome Statute or the statutes of any of the *ad hoc* or hybrid international criminal tribunals that have existed so far.³³ Interestingly, the authors of the Princeton Principles were also open to the possibility of adding other crimes to the list.³⁴ That approach was appropriate, given the evolving nature of customary international law. The African Union (AU) Model Law on Universal Jurisdiction (Model Law) follows the same approach. It considers genocide, war crimes, crimes against humanity, piracy, trafficking in narcotics and terrorism as ‘serious international crimes’ warranting universal jurisdiction.³⁵ Interestingly enough, the Model Law uses the wording ‘international crimes’ in-

³¹ Du Plessis, Louw and Maunganidze O, ‘African efforts to close the impunity gap: Lessons for complementarity from national and regional actions’ 241 *ISS Paper*, 2012, 1.

³² Princeton Principle 2.1.

³³ The ICC statute, for instance, even after the entry into force of the Kampala Amendment, will only cover four crimes: genocide, war crimes, crimes against humanity and aggression (Article 5 of the Statute). As far as the *ad hoc* tribunals are concerned, the ICTY Statute covers violations of the laws or customs of war (or war crimes), genocide and crimes against humanity (Articles 3, 4 and 5) while the ICTR statute covered genocide, crimes against humanity and violations of Article 3 Common to the *Geneva Conventions* and of Additional Protocol II (Articles 2, 3 and 4).

³⁴ The Princeton Principle 2 states: ‘The application of universal jurisdiction to the crimes listed in paragraph 1 is *without prejudice to the application of universal jurisdiction to other crimes under international law*’ (author’s emphasis).

³⁵ Article 8, *AU Model Law on Universal Jurisdiction*.

stead of ‘international law crimes’ or ‘crimes under international law’ as is often the case in doctrine. Some commentators have suggested that, by this choice of words, the AU did not intend the Model Law to be restricted by customary international criminal law.³⁶

The broadness of the material scope of universal jurisdiction is of special interest to Africa. It is now admitted that there are crimes peculiar to Africa but over which global international criminal tribunals, such as the ICC, have no jurisdiction. Beyond universal jurisdiction, the approach affects the thinking of substantive international criminal law on the African continent regardless of the institutional structures deemed to implement it. It is in this regard, for example, that the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) criminalises unconstitutional change of government (UCG).³⁷ Sound and commendable policy objectives support the approach. One of them is the yearning for prevention. As far as UCG is concerned, for example, commentators have suggested that while the ICC prosecutes crimes mostly committed *after* violence or disorder has already ensued in a state, criminalising UCG, as the Malabo Protocol does, aims to prevent the occurrence of such crimes *ab initio* through the proscription of acts that may precipitate violence and disorder in a state.³⁸

Universal jurisdiction complements other avenues of international criminal justice, not only because of its more extensive material scope but also because it is less vulnerable to time-frame limitations.

2.2.2 Universal jurisdiction: A more pro-accountability approach to time limitations

Permanent international criminal courts³⁹ operate within a very precise time framework. To put it simply, their jurisdiction is limited to crimes committed after their creation. The ICC, for instance, holds no jurisdiction for crimes committed before 2002 or before the Rome Statute entered into force for the specific country.

³⁶ Dube A, ‘The AU Model Law on universal jurisdiction: An African response to western prosecutions based on the universality principle’ 18 *Potchefstroom Electronic Law Journal* 3, 2015, 457.

³⁷ Article 28 a, 1. 4 of the *Malabo Protocol*.

³⁸ Ademola, 939.

³⁹ The author is aware that only one such a court has ever been created in history, namely, the ICC. The wording in plural is chosen to make a general point concerning the ICC and the proposed criminal section of the African Court envisaged by the Malabo Protocol.

The Malabo Protocol does not deviate from that, on the contrary.⁴⁰ On paper, it could even be seen as more restrictive. Unlike the Rome Statute, it does not provide for the possibility of an extension of jurisdiction to crimes committed before its entry into force for a specific state, when, not being a state party (yet), makes a declaration accepting the jurisdiction of the African Court of Justice and Human Rights.⁴¹ However, the possibility to make declarations of such effect derives from general public international law.⁴² In that sense, the Malabo Protocol did not need to provide for it.

As far as *ad hoc* tribunals are concerned, given that they are set up for precise situations and can only, by definition, be created after crimes have been committed, their temporal jurisdiction is always limited, sometimes very rigorously. The International Criminal Tribunal for the former Yugoslavia (ICTY) is, for instance, only competent for crimes committed since 1 January 1991.⁴³ The jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) was even more tightly restricted as the Tribunal could only judge crimes committed in 1994.⁴⁴

⁴⁰ Its Article 46E reads as follows:

- ‘1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this protocol and statute.
2. If a state becomes a party to this protocol and statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this protocol and statute for that state.’

⁴¹ For the Rome Statute, the extension of temporal jurisdiction is made possible by Article 11(2) stipulating:

‘If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.’

And Article 12(3), which states:

‘If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.’

⁴² The *raison d’être* of the rule of non-retro-activity of treaties is to protect state’s consent. States are therefore free to renounce to it. Article 28 of the *Vienna Convention on the Law of Treaties* (23 May 1969) reads as follow: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. The different intention of a state can be expressed through a declaration like the one envisioned by Article 12(3) of the Rome Statute.

⁴³ Article 8, *ICTY Statute* states ‘... The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.’

⁴⁴ Article 7, *ICTR Statute* states: ‘... The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a *period beginning on 1 January 1994 and ending on 31 December 1994*’ (author’s emphasis).

If justice were to be sought only through international courts and tribunals, the abovementioned limitations would leave a number of crimes legally out of reach. For those crimes, national prosecution is the only remaining option. And obviously, for a number of reasons, countries with traditional jurisdictional nexus can be unable or unwilling to prosecute. Universal prosecution becomes, in practice, the only viable venue to justice. This venue can be legally interesting as states can adopt legislation on international crimes that have already been committed and use them without violating the principle of non-retroactivity. As this will be discussed later on in this chapter in the context of the Habré case, international human rights law explicitly allows for this. What matters is that the relevant crimes were prohibited under international law at the time they were committed.⁴⁵

3 Universal jurisdiction and the politics of international criminal justice in Africa: A non-linear story

While it is quite obvious that universal jurisdiction is legally relevant for Africa, it matters to look at how the concept is perceived and discuss the legal framework already in place as far as it is concerned.

In 2009, an AU-European Union (AU-EU) expert group concluded that no African state had ever effectively exercised universal jurisdiction over international crimes.⁴⁶ Were the assessment to be done today (November 2016), Senegal would somewhat redeem the continent on this front. However, the fact remains that universal jurisdiction is not very popular in Africa (although the same can also be said about other continents).⁴⁷ To conclude that Africa's attitude towards the concept is

⁴⁵ See, for instance, Article 15(2) of the *ICCPR*: 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.'

⁴⁶ See Council of the EU, AU-EU Expert report on the principle of Universal Jurisdiction, Doc No. 8672/1/09 Rev. 1, 16 April 2009, para 19. At the time of the report, Senegalese authorities had issued an indictment against former Chadian leader Hissène Habré on the basis of universal jurisdiction. However, proceedings had not then been pursued.

⁴⁷ States rarely exercise universal jurisdiction. A quick survey of such incidents from after the *Eichmann case* would include the following procedures: An extradition request by a Spanish Court seeking to try the former Chilean President Augusto Pinochet for crimes such as torture, murder, illegal detention, and forced disappearances (1998); the indictment of Muammar Gaddafi in France for torture and conspiracy to commit torture and terrorist acts; the prosecution and conviction of two Rwandan nuns, Sister Maria Kisito and Sister Gertrude, by a court in Belgium for war crimes committed during the 1994 Rwandan genocide (2001); the prosecution and conviction of Nikola Jorgic, a former leader of a paramilitary Serb group, and Novislav Djajic, a Serbian soldier, by German courts for acts of genocide committed in Bosnia and Herzegovina (1997); the investigation and indictment of Hissène Habré himself by a

consistent hostility would be wrong and oversimplified. To be accurate, one also needs to distinguish, roughly speaking, continental views from national policies and practices. In this chapter, continental views are the ones expressed by the AU.

3.1 *Universal jurisdiction and the AU: A half-hearted love story*

More than once, the AU has reacted passionately against attempts by non-African municipal judicial authorities to bring African high state officials to account for international crimes. The continental organisation thus created the impression of being against the principle of universal jurisdiction. The claim has always been that the concept was abused for political purposes (part 3.1.1 below). Otherwise, the organisation has adopted policies suggesting some kind of support to universal jurisdiction as far as it is to be exercised by African states (part 3.1.2 below).

3.1.1 The AU and universal jurisdiction: Opposition to the principle or to its political abuse?

In 2000, when then Congolese Minister of Foreign Affairs, Abdoulaye N'Dombassi, was indicted by a Belgian investigative judge and a warrant of arrest was issued, Africa perceived the gesture as a neo-colonial move.⁴⁸ The neo-colonial narrative was fed by the fact that the indictment, as well as the arrest warrant, came from Belgium, a former colonial master of the current Democratic Republic of Congo (DRC). The AU's reaction was, however, stronger when a French judge, Jean Louis Bruguière, issued international arrest warrants against nine of President Kagame's close advisors for their alleged responsibility in the downing of the aircraft carrying the late Juvenal Habyarimana on 6 April 1994.⁴⁹ President Kagame himself was not indicted. The French judge thought his diplomatic immunity would not so allow. He invited the ICTR to indict him and get him arrested.⁵⁰ In addition

Belgium court for crimes against humanity, torture, war crimes and other human rights violations committed during his presidency in Chad (2005); the prosecution of Munyeshyaka, the first Rwandan to be investigated in France, though the procedure ended with a 'non-lieu' in 2015; the prosecution and condemnation of Pascal Simbikangwa by French authorities (in appeal) and recently (June 2016), the prosecution and condemnation of Octavien Ngenzi and Tito Barahira, two former Rwandan mayors of the Kabarongo Commune by the Paris Court of Appeal.

⁴⁸ Reydams, L 'The rise and fall of universal jurisdiction,' Working Paper 37, January, 2010, Leuven Centre for Global Governance Studies, 25.

⁴⁹ 'AU Justice Ministers protest abuse of universal jurisdiction,' *New Times*, November, 5, 2008: <http://www.newtimes.co.rw/section/article/2008-11-05/46597/> on 5 April 2017.

⁵⁰ 'Rwanda: Le juge Bruguière met en cause le Président Kagame' *Le Monde*, livraison du 21 novembre 2006 www.lemonde.fr on 25 August 2016.

to its own political and diplomatic action to defeat the move, Rwanda then asked the AU to put on the discussion agenda what it called abuse of universal jurisdiction.⁵¹ Among other outcomes, a commission on the abuse of universal jurisdiction was created on the recommendation made by the 18 April 2008 meeting of the AU Ministers of Justice and Attorneys General.⁵² Based on its report, the Conference of Heads of States and Governments mandated the Chairperson of the AU Commission to submit the issue to the United Nations (UN) Security Council (UNSC) and UN General Assembly. A memorandum to that effect was issued.⁵³ The AU head Commissioner was also required to call for an EU-AU meeting to discuss the issue.⁵⁴ An AU-EU expert group was set up for that purpose. It was co-chaired by Mohamed Bedjaoui on the AU side and the late Antonio Cassese on the EU side. In April 2009, a report was submitted to the executive bodies of both regional organisations.⁵⁵

Although the AU probably overreacted, one cannot deny that, at least in theory, universal jurisdiction is vulnerable to political abuse. According to Bassiouni, even with the best of intentions, universal jurisdiction can be used imprudently.⁵⁶ This can then create unnecessary friction among states, potential abuse of legal processes and undue harassment of individuals prosecuted or pursued for prosecution.⁵⁷ In some way, the potential for abuse seems inherent to the concept itself. For instance, unlike in the instruments creating international tribunals, there is no uniformity among states' universal jurisdiction laws with respect to the definitions of crimes and the circumstances in which jurisdiction may be exercised.

As far as the AU is concerned, two main reasons are behind its oversensitivity to abuse of universal jurisdiction. First, the concept is mostly viewed as pursuing a neo-colonial agenda as a form of judicial imperialism. This is especially so when indictments and prosecutions are coming from authorities of western countries (as is often the case).⁵⁸ Prosecutions by African countries are not immune to that criti-

⁵¹ 'Justice ministers discuss Universal Jurisdiction,' *New Times*, October, 31, 2008. <http://www.newtimes.co.rw/section/article/2008-10-31/5593/> on 5 April 2017.

⁵² Doc. Assembly/AU/14(XI).

⁵³ AU 'Memorandum on the Abuse of the Principle of Universal Jurisdiction', document in edit, 2008 (unpublished). See also, Mubiala, M, 'Chronique de droit pénal de l'Union africaine', 549.

⁵⁴ Décision 199 (XI), Doc. Assembly/AU/Dec. 199 (XI) (2009) 2.

⁵⁵ UA-UE: 'Groupe d'experts techniques *ad hoc* sur le principe de compétence universelle: Rapport', 15 April 2009.

⁵⁶ Bassiouni, 'Universal jurisdiction: Historical perspectives', 82.

⁵⁷ Bassiouni, 'Universal jurisdiction: Historical perspectives', 82.

⁵⁸ Dube, 'The AU Model Law on universal jurisdiction', 454.

cism, though. In the first days of the investigations in the Habré case – long before Senegal was required to act on behalf of Africa – Habré was portrayed by some media outlets as an African being persecuted by ‘reactionary and neo-colonial French circles.’⁵⁹ The criticism was rather strange though. As opposed to Belgium, France technically never performed any judicial act to arrest or extradite Habré. The conspiracy theory was probably based on the supposed good relations France enjoyed with the Idriss Déby regime. The situation is also ironic as France had been a close ally to Habré himself, especially against Muammar Gaddafi.⁶⁰

Secondly, universal jurisdiction is sometimes perceived as an obstacle to peace policies. On this point, the AU’s political stance on universal jurisdiction is the same with regard to the ICC. The AU’s consistent position is that prosecutions based on universal jurisdiction must be pursued in a way that does not impede or jeopardise efforts aimed at promoting peace.⁶¹ In a sense, the ‘no peace without justice’ slogan is perceived as un-African. The same criticism is sometimes framed in the democratic theory paradigm. It is claimed that universal jurisdiction interferes with the choice by democratic governments to forgive rather than prosecute past offenders.⁶² However, as Otilia Maunganidze rightly puts it, the peace versus justice conundrum is a false dichotomy.⁶³ Maunganidze argues that there can only be tension between justice and peace if the latter is understood in the short-term and as something that is simply attained by the cessation of hostilities. On the contrary, if it is thought of in terms of ‘sustainable peace,’ justice and reconciliation become preconditions to it. Peace and justice are therefore two sides of the same coin.⁶⁴

The AU does not, however, reject the concept of universal jurisdiction itself. Rather, efforts are made to Africanise it.

⁵⁹ Salomon A, ‘The politics of prosecution under the convention against torture’ 1 *Chicago Journal of International Law*, 2001,310.

⁶⁰ Brody R, ‘Bringing a dictator to justice: The case of Hissène Habré’ *Journal of International Criminal Justice*,2015, 1.

⁶¹ See, for instance, the Decision on Africa’s Relationship with the International Criminal Court Ext/Assembly/AU/December 1-2 (October 2013), adopted at the AU’s Extraordinary Session on 12 October 2013 in Addis Ababa, Ethiopia.

⁶² Roth K, ‘The case for universal jurisdiction (a response to Kissinger H in The pitfalls of universal jurisdiction)’ 80 *Foreign Affairs* 5, 2001, 153.

⁶³ Maunganidze OA, ‘International criminal justice as integral to peacebuilding in Africa: Beyond the “peace v justice” conundrum’ in Van der Merwe HJ and Kemp G (eds), *International criminal justice in Africa* Konrad Adenauer Stiftung and Strathmore University Press, Nairobi, 2016, 51-54.

⁶⁴ Maunganidze, ‘International criminal justice as integral to peacebuilding in Africa’, 52.

3.1.2 Promoting 'Africanised' universal jurisdiction: The AU Model Law

It is not accurate to suggest that the AU's opposition to incidental exercises of universal jurisdiction by western authorities is driven by a presumed 'traditional hostility' to international criminal justice. It is also not accurate to suggest that Africa is traditionally and inherently opposed to international criminal justice, to begin with. Africa first expressed a desire to prosecute international crimes (apartheid) in the 1970s during the discussion on the African Charter on Human and Peoples' Rights (African Charter).⁶⁵ It is worth recalling that, since 1966, the UN General Assembly has labelled apartheid a crime against humanity⁶⁶ and that the UNSC confirmed that determination eighteen years later.⁶⁷ The Committee of Experts responsible for drafting the African Charter, however, rejected the proposal to include a court with international criminal jurisdiction in its provisions.⁶⁸ Keba M'Baye, one of the lead drafters of the African Charter, argued that the idea to establish an African judicial institution with criminal jurisdiction as part of the human rights charter system was premature, especially since the International Convention on the Suppression and Punishment of the Crime of Apartheid already provided for an international penal court and that the UN was considering establishing an international court to repress crime against mankind.⁶⁹ To the disappointment of African states and the then Organisation for African Unity (OAU), in 1980, the UN rejected the request to create that special court. It was therefore left to states to enact legislation to enable them prosecute suspected perpetrators of apartheid on the basis of a form of universal jurisdiction.⁷⁰

There is, therefore, no evidence to support the claim that pan-African organisations oppose international criminal justice *per se*. They are simply oversensitive to what states perceive to be an abuse of otherwise noble principles, mainly by former colonial masters and for political ends. In an effort to pursue the fight against impunity of international crimes while countering attempts by 'western powers' to

⁶⁵ See M'Baye, 'Introduction' to *Draft African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/1, at para. 4, reprinted in Heyns C (ed), *Human Rights Law in Africa 1999*, Brill, the Hague, 2002, 65.

⁶⁶ UN GA Res 2202 A (XXI), 16 December 1966.

⁶⁷ 18 UN Doc. S/RES/556 (1984) adopted 23 October 1984.

⁶⁸ Ademola, A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24 *The European Journal of International Law* 3, 2013, 936.

⁶⁹ 'Rapporteur's Report of the Ministerial Meeting in Banjul, The Gambia, Organisation of African Unity', at para 13, OUA Doc. CAB/LEG/67/Draft. Rapt. Rpt (II) Rev. 4.

⁷⁰ Articles IV and V, *International convention on the suppression and punishment of the crime of apartheid*, 30 November 1973.

abuse of universal jurisdiction, the AU has promoted a Model Law.⁷¹ The Model Law is one of the responses to a long-standing call for Africa to take ownership of the legal mechanisms to deal with international crimes.⁷²

The Model Law offers a malleable template for developing universal jurisdiction legislation which states can adapt to suit their domestic peculiarities. It also has the potential to ensure that African laws on universal jurisdiction are harmonised in terms of their content, thereby minimising potential clashes similar to those brought about by the universal jurisdiction laws of western states.

Right from its preamble, the Model Law clearly states that African states recognise that the heinous nature of some crimes means that they should not go unpunished.⁷³ As a matter of principle, the declaration was worth making and far from superfluous, given that African states are rather perceived to believe and promote the opposite. The preamble also makes it clear that the Model Law resonates with the AU's right under Article 4(h) of the AU Constitutive Act. It further recognises that the primary responsibility to end impunity and to prosecute offenders rests with states.⁷⁴

The Model Law requires the presence of the suspect on the territory of the prosecuting state before the commencement of the trial. The wording of the relevant article suggests that this is a jurisdictional rather than a defence rights issue:

The court shall have jurisdiction to try any person charged [...] *provided that* such a person shall be within the territory of the state at the time of the commencement of the trial.⁷⁵
(author's emphasis)

From this perspective, the Model Law adopts the so-called narrow version of universal jurisdiction.⁷⁶

The Model Law is silent on whether presence is a pre-requisite for the initiation of universal jurisdiction-based investigations. In other words, investigations can commence without the accused being present. Those investigations can be relevant for extradition purposes. The Princeton Principles follow the same ap-

⁷¹ For an overview of the AU Model Law, see Dube, 'The AU Model Law on universal jurisdiction.'

⁷² In particular, see Dieng, A, 'UN principles and Instruments for Genocide Prevention and their Applicability in Africa', communication à la Conférence internationale sur le thème: 'Non-impunity, truth, justice, and reconciliation in Africa: Opportunities, constraints and implications' (Monrovia, Liberia, 28-29 mai 2009), 9-13 (document inédit).

⁷³ Para 1, Preamble.

⁷⁴ Paragraphs 2, 3 and 4, Preamble.

⁷⁵ Article 4(1), Model Law.

⁷⁶ Dube, 'The AU Model Law on universal jurisdiction', 462.

proach.⁷⁷ In the so-called ‘torture-docket case,’ the South African Constitutional Court emphasised the practical necessity of waving the presence requirement for investigations:

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 [...]. A determination of presence or anticipate presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise [...].⁷⁸

The Model Law protects the sovereignty of states. Its Article 4(2) clearly states that in the exercise of universal jurisdiction, priority should be accorded to the courts of the state in whose territory the crime is alleged to have been committed, provided that the state is willing and able to prosecute. In other words, universal jurisdiction is subsidiary to that of the state of commission. Territorial jurisdiction remains the guiding principle. Interestingly, the article uses the same language as Article 17 of the Rome Statute. The question is how this principle is supposed to be enforced in practice. In proceedings before the ICC, subsidiarity is protected by the admissibility challenge. The procedure the territorial state should follow before the domestic court of the prosecuting state in order to have its priority respected is not so far provided for in the domestic legislation of many states. The other important question is whether the domestic court of the prosecuting state should be expected to be impartial in this regard. Should a dispute arise on that issue, its settlement should follow legal principles of general public international law. The Model Law is not a treaty. Its silence on dispute settlement is therefore only natural.

The Model Law covers the crimes of genocide, crimes against humanity, war crimes, piracy, trafficking in narcotics and terrorism.⁷⁹ As such, the Model Law is unbelievably both progressive and regressive. It is progressive in the sense that it adds genocide to the list of universal jurisdiction crimes. As shocking and surprising as it might sound, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide only provides for territorial jurisdiction and prosecution by an international court.⁸⁰ It is silent on universal jurisdiction. The Model Law, there-

⁷⁷ Principle 1.2.

⁷⁸ *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre and Another* (2014) ZACC 30, 30 October 2014, para 48.

⁷⁹ Article 8 of the Model Law.

⁸⁰ Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide (9 December, 1948) reads as follows: “Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a *competent tribunal of the State in the territory of which the act was committed, or*

fore, strengthens what is believed to be a customary rule of a permissible nature, namely, the right (not the duty) to prosecute genocide based on the universality principle.⁸¹ On the contrary, the Model Law is regressive in that it does not cover trafficking in persons and torture. Given contemporary concerns over the crimes of slave-trading, slavery and torture, the omission is hardly believable. Angelo Dube has suggested that the drafters were of the opinion that the exercise of universal jurisdiction over slave-trading is already established under customary international law and therefore thought that legislating on it would have been superfluous.⁸² This view is unconvincing. Following this line of argument, no single crime would have been put on the list, starting with piracy.

For human trafficking especially, one can hardly comprehend how it could be omitted given the way slavery affected the continent, in the 17th century in particular. As far as torture is concerned, it can only be commended that the Statute of the Extraordinary African Chambers dared to fill the gap.⁸³ Can we infer that the AU had itself realised that the Model Law that it was promoting was incomplete? This conclusion would not be unreasonable.

The latter features of the Model Law suggest that this instrument is not the most progressive one could hope for. It is on the immunity issue, however, that the Model Law is the most restrictive. Article 16(1) of the Model Law provides that foreign state officials entitled to jurisdictional immunity under international law shall not be prosecuted. To be accurate, the rule provides for exceptions in situations where crimes are covered by a treaty to which both the prosecuting state and the state of nationality of such nationals are parties and which prohibits immunity.⁸⁴ If the national state of the accused does not subscribe to such a treaty, the immunity would stand. For such state officials, therefore, immunity is the principle, its inapplicability the exception. The provision stands in stark contrast to the legal positions of some international instruments, including the Rome Statute.

by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' (author's emphasis)

⁸¹ The claim that universal jurisdiction was already part of customary law is, for instance, supported by the Princeton Principle 2, 1.

⁸² Dube, 'The AU Model Law on universal jurisdiction', 460-461.

⁸³ Article 3 du Statut des Chambres Africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1^{er} décembre 1990.

⁸⁴ Article 16(1) states as follows: 'Foreign officials entitled to jurisdictional immunity under international law shall not be charged or prosecuted under this law, except in situations where these crimes are covered by a treaty to which the State and the State of nationality of such officials are parties and which prohibits immunity.'

More interestingly, it contradicts national legislation of some African states that provide for universal jurisdiction in respect of three core crimes: genocide, war crimes and crimes against humanity. Such countries include Kenya,⁸⁵ Mauritius⁸⁶ and South Africa.⁸⁷

Although the wording is not specific enough, the phrase ‘jurisdictional immunities’ seems to suggest that Article 16(1) deals with procedural and not substantive immunity. Substantive immunity from prosecution would exonerate heads of state, diplomats and other officials from criminal responsibility for the commission of serious crimes under international law when these crimes are committed in an official capacity.⁸⁸ Procedural immunities are, on their part, concerned with the position of the official at the time of prosecution and trial and not at the time of the commission of the crime.⁸⁹

Functional or substantive immunity for war crimes and crimes against humanity has been outlawed since the Nuremberg Charter and the judgments of the International Military Tribunals.⁹⁰ As far as contemporary international law is concerned, substantive immunity is excluded for all universal jurisdiction crimes.⁹¹ Princeton Principle No 5 suggests that the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.⁹² However, African domestic laws are not on the same page. For instance, Senegal refused to yield Habré to Chad based on the claim that, as a former head of state, the former Chadian dictator enjoyed absolute immunity for crimes he committed while he was in office.⁹³ The Dakar’s Court of Appeal took the same position with regard to the extradition request from Belgium.⁹⁴ Ademola Abbas suggests that most Af-

⁸⁵ Section 7, *International Crimes Act* (No. 16 of 2008) Laws of Kenya.

⁸⁶ *International Criminal Court Act* (No. 27 of 2011) Laws of Mauritius.

⁸⁷ For South Africa, see Article 4(2)(a) of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 as well as Section 4(3)(a) of South Africa’s *Prevention and Combating of Torture of Persons Act* 13 of 2013, which clearly stipulate that the position or status of the accused and their perceived immunity shall not bar the court from proceeding against them.

⁸⁸ Princeton Principles, Commentary, 48.

⁸⁹ Princeton Principles, Commentary, 48-51.

⁹⁰ Bassiouni C, ‘Universal jurisdiction: historical perspectives’, 82.

⁹¹ Princeton Principles, Commentary, 48-50.

⁹² Princeton principle number 5.

⁹³ Ademola, Abbas, p.938.

⁹⁴ Sangaeta S, ‘Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)’, *Human Rights Law Review*, 2013, 366.

rican countries subscribe to this view.⁹⁵ It was therefore welcome for the Statute of the Extraordinary African Chambers (Chambers' Statute) to exclude substantive immunity as a matter of principle.⁹⁶

The state of the law is a bit different as far as personal or procedural immunity is concerned. In proceedings before national tribunals, procedural immunity remains in effect during a head of state or other official's tenure in office, or for the period during which a diplomat is stationed within a host state.⁹⁷ However, as revealed by the national legislation referred to above, the rule is increasingly being called into question as far as international crimes are concerned.⁹⁸ Before international tribunals, it is now an established rule that procedural immunities are irrelevant.⁹⁹

The regressive character of the Model Law becomes obvious when that instrument declares as one of its main objectives to 'give effect to immunities enjoyed by foreign state officials under international law.'¹⁰⁰ As a part of a harmonising project, the rule invites African states with more progressive universal jurisdiction legislation, that is to say legislations that allow prosecution of foreign officials regardless of their immunities, to change them on that aspect. At the same time, states that still have to legislate on universal jurisdiction are reminded that there is a red line: they cannot allow themselves to prosecute foreign dignitaries. In short, the rule seeks to prevent the formation of an African customary rule disregarding immunities for foreign officials as far as international crimes are concerned. It needs to be emphasised that by so doing, the Model Law does not violate international law. It only prevents its development.

A further attempt by the AU to Africanise universal jurisdiction was the agreement with Senegal to try Habré on behalf of Africa. The issue is discussed in part 4 of this chapter.

⁹⁵ Ademola, 938.

⁹⁶ Article 10(3): '*La qualité officielle d'un accusé, soit comme chef d'Etat et de Gouvernement, soit comme haut fonctionnaire, ne l'exonère en aucun cas de sa responsabilité pénale au regard du présent statut, plus qu'elle ne constitue en tant que telle un motif d'atténuation de la peine encourue.*'

⁹⁷ Princeton Principles, Commentary, 48.

⁹⁸ See footnotes 79, 80 and 81.

⁹⁹ For the ICC, see Article 27(2), *Rome Statute*.

¹⁰⁰ Article 3, (f) of the Model Law.

3.2 *Universal jurisdiction and individual African states: The dawn of a new era?*

As a matter of legislation, universal jurisdiction is not unknown in Africa. A 2012 Amnesty International study found that 37 out of 54 African states provided for universal jurisdiction over one or more international crimes.¹⁰¹ A previous Amnesty International global study of state practice (2001) at the international and national levels concerning universal jurisdiction in 125 countries had demonstrated that almost two-thirds of all states have some legislation permitting their courts to exercise universal jurisdiction over conduct amounting to genocide, crimes against humanity, war crimes, torture and other crimes under international law.¹⁰² On average, African states cannot, therefore, be said to be lagging behind as far as legislation is concerned.

However, much of that legislation is seriously flawed. Some national laws fail to include all crimes under international law, often relying on ordinary crimes, such as murder, in their criminal codes. Others define crimes or principles of criminal law in a manner that is not consistent with international law. A few of them include defences, such as superior orders, prohibited by international law.¹⁰³ In addition, particularly when universal jurisdiction is applied to ordinary crimes under national law, it is subject to other legislative obstacles, including statutes of limitation, dual-criminality, *ne bis in idem* prohibitions, amnesties and official immunities, which are inappropriate with regard to crimes under international law.¹⁰⁴

Though domestic legislation concerning universal jurisdiction in Africa is far from perfect, it is the practical application of this legislation that is the most worrying. As mentioned earlier on in this chapter, Senegal is the only African state that has conducted an entire trial on the basis of universal jurisdiction. However, there have been some encouraging developments on this front. The most remark-

¹⁰¹ These countries are, among others: Algeria, Burkina Faso, Burundi, Cameroon, Ethiopia, Ghana, Niger, Rwanda, Senegal and Uganda. See Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update', 9 October 2012, p. 16. See <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf> on 24 January 2016.

¹⁰² See Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation* (2001). This 750-page study, the first global survey since the *Harvard Research in International Law* (*American Journal of International Law* Supp. 1935, 435), has recently been confirmed with regard to war crimes by the International Committee of the Red Cross, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005).

¹⁰³ Hall CK, 'Universal jurisdiction: Developing and implementing an effective global strategy' in Kaleck W, Singelstein T, Ratner, M and Weiss P (eds) *International Prosecution of Human Rights Crimes*, Springer, New York, 2007, 86-87.

¹⁰⁴ Hall, 'Universal Jurisdiction', 86-87.

able among these is the judgment of the Constitutional Court of South Africa in the Zimbabwe torture docket case.¹⁰⁵ Amongst other interesting features of the case, the Constitutional Court recognised the power of South African police authorities to pursue universal jurisdiction-based investigations despite the absence of the suspect on the South African soil.¹⁰⁶ Whether the police will effectively conduct the investigations remains to be seen, but the judgment is an achievement worth acknowledging on its own merit. One needs, however, to stress that the case only dealt with the duty to investigate and not the duty to prosecute or put on trial.

It would be unrealistic to expect many universal jurisdiction-based trials to be held on the African soil. In Africa, more than in other parts of the world, concern over retaliatory policies leads to a very conservative understanding of the non-interference principle. To take but one example, the African Charter provides for the possibility of any state party referring to the African Commission on Human and Peoples' Rights cases regarding violations happening on the territory of any other state party regardless of the nationality of the victim(s).¹⁰⁷ No single state has ever taken the step so far.¹⁰⁸ African states dislike suing each other unless their national interests are at stake. From this point of view, there seems to be no reasons to expect African states to behave differently with regard to universal jurisdiction, especially in situations where the suspect still enjoys the support of their government. As far as human rights protection is concerned, it is not in the nature of states to be their neighbours' keepers. On that point, as on many others, Habré's trial in Senegal is clearly an exceptional event.

4 The Habré case and universal jurisdiction: A success story to expect again?

In order to prove that universal jurisdiction can work (part 4.2 below), one must assess whether the Senegalese experience with the Habré case is likely to be repeated on the continent. However, it must first be demonstrated that universal

¹⁰⁵ *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre and Another* (2014) ZACC 30, 30 October 2014 ('Zimbabwe Torture Docket Case'). For an analysis of this decision, see Ventura MJ, 'The Duty to Investigate Zimbabwe Crimes against Humanity (Torture) Allegations: The Constitutional Court of South Africa Speaks on Universal Jurisdiction and the ICC Act' 13 *Journal of International Criminal Justice* 4, 2015, 861-889.

¹⁰⁶ Siwingwa E, 'Whither international criminal justice in Africa?' in Van der Merwe HJ and Kemp G (eds) *International criminal justice in Africa*, Konrad Adenauer Stiftung and Strathmore University Press, 2016, 151.

¹⁰⁷ Article 46, *African Charter of Human and Peoples' Rights*.

¹⁰⁸ For that, see the website of the African Commission on Human and Peoples' rights, here: <http://www.achpr.org> on 5 April 2017.

jurisdiction was indeed at play in that case (part 4.1 below). There seems to be some room for debate on this issue, especially as Habré was judged, not by an ordinary criminal court in the Senegalese judicial system, but rather by the Extraordinary African Chambers.

4.1 *The trial of Habré by the Chambers in the Senegalese court system: Universal jurisdiction, the exercise of an AU mandate or both?*

At first sight, one might think that Habré's trial by the Chambers did not involve universal jurisdiction. It could be suggested that, by judging Habré, Senegal was performing a mandate from the AU (part 4.1.1). A deeper analysis reveals, however, that Senegal was effectively exercising universal jurisdiction (part 4.1.2).

4.1.1 Habré's trial by the Chambers: Universal jurisdiction out of the picture?

One could argue that Senegal did not actually try Habré, but rather that, in and through Senegal, the AU did so. That case can be based upon the opinions of Senegalese courts themselves on their jurisdiction to try Habré, the judgment of the Economic Community of West African States Court of Justice (ECOWAS Court), the mandate Senegal received from the AU and the composition of the Chambers that tried Habré.

On 4 July 2000, five months after a Senegalese court, the *Tribunal régional hors-classe de Dakar*, had indicted Habré on torture charges and placed him under virtual house arrest (3 February 2000), an appeals court in Dakar quashed the indictment 'because the crimes were not committed in Senegal.'¹⁰⁹ On 20 March 2001, a ruling from the Court of Cassation 2001 confirmed the judgment of the Appeals Court.¹¹⁰ Senegal then decided to refer the Habré situation to the AU. In January 2006, the AU decided to set up a Committee of Eminent African Jurists to consider all aspects and implications of the Habré case as well as the options available for his trial. By August of the same year, this Committee had reported back and suggested three options. First, that Senegal or Chad should try Habré. Second, an *ad hoc* tribunal could be established in any African country to try Habré or, third, any African state that had ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) could take on the respon-

¹⁰⁹ See République Du Sénégal, Cour d'Appel de Dakar, Chambre d'Accusation, Arrêt n° 135 du 04-07-2000 (copy on file with author). The court did not reach the defendant's other points. See also Brody R, 'The prosecution of Hissène Habré: An African Pinochet' 35 *New England Law Review* 2, 2001, 321.

¹¹⁰ *Ministère Public contre Hissène Habré*, Extraordinary African Chamber of Assises (30 May 2016), I, 6.

sibility and exercise jurisdiction.¹¹¹ As it appears, before Senegal informed the AU of the matter and got the mandate to try Habré, its courts had declared a lack of jurisdiction.

In 2007-2008, Senegal reviewed its Constitution and criminal laws to give jurisdiction to its courts and make the trial possible. In October 2008, Habré petitioned the ECOWAS Court claiming, *inter alia*, that his right not to be prosecuted for acts which were not criminal at the time of their commission would be violated if he were tried pursuant to the legislative reforms that had been undertaken by Senegal. He also claimed that the trial would violate the principle of equality before the law. Quite surprisingly, in a judgment delivered on 18 November 2010, the ECOWAS Court held that any national prosecution of Habré might result in violations of his rights and ordered Senegal to respect ‘the principle of absolute non-retroactivity.’¹¹² In its defence, Senegal had demonstrated that it had referred the case to the AU and got, in response, a mandate to try Habré on behalf of that organisation. The ECOWAS Court responded to the argument by holding that the fulfilment of the AU mandate to try Habré should follow international practice in similar situations. In the eyes of the ECOWAS Court, this meant the establishment of an *ad hoc* international tribunal.¹¹³

Indeed, the AU reaffirmed its mandate to Senegal to try Habré on behalf of Africa. On 30 January 2011, following the ECOWAS Court’s judgment, a decision was taken to initiate consultations with Senegal to ‘finalise the modalities for the expeditious trial of Hissène Habré through a *special tribunal with an international character*.’¹¹⁴ The AU considered the organisation of Habré’s trial to fall within its jurisdiction based on Articles 3(h), 4(h) and 4(o), of its Constitutive Act.¹¹⁵ Mutoy Mubiala considers that by doing so, the AU was creating a new principle of ‘regional jurisdiction’ for the crimes listed in the latter two articles.¹¹⁶

¹¹¹ African Union, Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, July 2006, 5.

¹¹² *Habré v Senegal*, Court of Justice of the Economic Community of Western African States, 18 November 2010, para 58.

¹¹³ *Habré v Senegal*, ECOWAS Court, 58.

¹¹⁴ Decision on the Hissène Habré Case, 30 January 2011, Assembly/AU/December 340 (XVI) at 9. (author’s emphasis)

¹¹⁵ Mubiala M, ‘Chronique de droit pénal de l’Union africaine. Vers une justice pénale régionale en Afrique’ *Revue Internationale de droit pénal* (vol. 83), 2012, 547.

¹¹⁶ Mubiala M, ‘Chronique de droit pénal de l’Union africaine’, 548.

The Chambers consist of four structures.¹¹⁷ International presence, however, limited to two judges from member-states of the AU other than Senegal, chairing respectively the trial and the Appeals chambers while the two judges of the other chambers are Senegalese.¹¹⁸ The initial draft of the Chambers' Statute had made the Court predominantly international but Senegal vigorously opposed it.¹¹⁹ No serious author suggests today that the Chambers are a fully international tribunal, despite the fact that the AU-Senegal agreement claims they are of an 'international character.'¹²⁰ Mubiala sees in the Chambers some kind of a hybrid tribunal.¹²¹ This is not a hard case to make. Although there is no comprehensive definition of such a tribunal, Williams has established that hybrid tribunals have certain defining features: a criminal judicial function; temporary nature; participation of international judges; international assistance in financing the tribunal; jurisdiction over international crimes and national crimes; and the involvement of a party other than the affected state.¹²² The Chambers met all these criteria.¹²³

4.1.2 Universal jurisdiction as the true foundation of Senegalese legal power to try Habré

From an international law perspective, the arguments above are not difficult to defeat. International judicial and quasi-judicial bodies have found, quite repeatedly, that Senegal did enjoy jurisdiction to try Habré as a state party to the CAT.¹²⁴ Senegal's problem was that it had failed to exercise that jurisdiction. In its 20 July 2012 judgment, the ICJ ordered Senegal to start proceedings against Habré without delay or extradite him to Belgium or another state enjoying jurisdiction to try him for the alleged crimes.¹²⁵ The UN Committee against Torture had made a request in

¹¹⁷ Article 2, *Rome Statute*.

¹¹⁸ Article 11, *Rome Statute*.

¹¹⁹ Mubiala M, 'Vers une justice pénale régionale en Afrique', 554.

¹²⁰ Article 1(4) of the Agreement.

¹²¹ Mubiala, 'Chronique de droit pénal de l'Union Africaine', 554.

¹²² Williams S, *Hybrid and internationalized criminal tribunals: Selected jurisdictional issues*, Hart, London, 2012, 249.

¹²³ For the criminal judicial function, see article 3 of the Chambers' statute; for the temporary nature of the chambers, see Article 37 of the Statute; for the participation of international judges, see Article 11 of the Statute; for the international assistance in financing the Tribunal, see Articles 3 and 4 of the AU-Senegal agreement; for the jurisdiction over international crimes and national crimes, see Articles 3 and 4 of the statute; for the involvement of parties other than the affected state, the mere fact that the trial was held in Senegal and not in Chad establishes enough that criterion.

¹²⁴ ICJ, *Belgium v Senegal*, §83-88; CAT, *Communication No. 181/2001: Senegal*, 19/05/2006, CAT/C/36/D/181/2001, §9.3-9.12

¹²⁵ *Belgium v Senegal*, para 122.

the exact same terms some years earlier.¹²⁶ Long before the ICJ judgment, Senegal and Chad had been found to have jurisdiction to try Habré by an AU's Committee of Eminent African Jurists.¹²⁷ The finding was based on the fact that both states had ratified the CAT and had a link with the suspect.¹²⁸ Senegal was, however, deemed to be 'the most suitable country to hold the trial.'¹²⁹ This follows as Senegal had the accused in its custody. In addition, it was not reasonable to expect a fair trial for Habré in Chad given that the Government had built its legitimacy partly on the demonisation of his person.¹³⁰ In some decisions, AU organs even found that Senegal had a legal obligation to try Habré in accordance with the CAT, the decision of the UN Committee against Torture, as well as the mandate it received from the AU.¹³¹ More than once, Senegal itself stated that lack of funds was the only hindrance to the prosecution of Habré's crimes.¹³² Therefore, from an international law perspective, Senegal did enjoy jurisdiction to try Habré based on the universality principle.

As for the ECOWAS Court's judgment in the Habré case, it can, with respect, be argued that the Court erred. By holding that the principle of non-retroactivity was a legal obstacle to Habré's trial, the ECOWAS Court did not take into consideration the nature of the crimes for which the former Chadian dictator was a suspect. As far as international crimes are concerned, customary international law, case law and even conventional law are quite explicit in allowing prosecution regardless of the time when the relevant national rules entered into force. What matters is that they were prohibited under international law at the time that they were committed. One example is the International Covenant on Civil and Political Rights.¹³³ National courts have taken similar positions.¹³⁴ It is indeed widely admitted in doctrine that

¹²⁶ Communication No 181/2001: Decision of the Committee against Torture under Article 22 of the Convention. *Souleymane Guengueng et Autres c. Senegal*, §10.

¹²⁷ Report of the Committee of Eminent African Jurists on the Case of Hissène Habré', AU Committee of Eminent African Jurists (24 May 2006), 3.

¹²⁸ AU Committee of Eminent African Jurists on the Case of Hissène Habré' 3.

¹²⁹ Neldjingaye K, 'The trial of Hissène Habré in Senegal and its contribution to International Criminal Law,' in Chacha M & Bignon J (ed), *Prosecuting international crimes in Africa*, Pretoria University Law Press, Pretoria, 2011, 187.

¹³⁰ Brody, 'The prosecution of Hissène Habré', 332.

¹³¹ Decision on the Hissène Habré Case, 1 July 2011, Assembly/AU/December 371 (XVII) at 3.

¹³² By November 2010, international donors, including Belgium, had committed 8.6 million euros to cover the costs of Habré's trial. Details of the donor arrangements can be accessed at http://www.hrw.org/sites/default/files/related_material/Table%20ronde%20donateurs%20document%

¹³³ Article 15(2), ICCPR: 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.'

¹³⁴ In the Eichmann case, the accused strongly objected to the retroactive application of the Punishment Law but his objection was dismissed by both the District Court of Jerusalem and the Supreme Court of

with respect to serious crimes under international law, national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.¹³⁵ The CAT entered into force for Senegal on 26 June 1987.¹³⁶ Given that the complaints against Habré included a number of serious offences allegedly committed after that date, Senegal was under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Doing so would not have violated the non-retroactivity principle. The ICJ went a step further in *Belgium v Senegal*. It held that Senegal could even prosecute Habré for acts that were committed before 26 June 1987, although it was not obliged to do so under the CAT.¹³⁷

One important legal question concerns Senegal's legal obligation following the ECOWAS Court's judgment. On the one hand, as an ECOWAS Member-State and party to its founding Treaty, Senegal is bound by judgments of the ECOWAS Court and must take the necessary measures to ensure their execution.¹³⁸ On the other, Senegal was bound by its obligations pursuant to the CAT. The dilemma was exacerbated by the fact that there is no formal hierarchy between sources of international law. In *Belgium v Senegal*, the ICJ saw no dilemma whatsoever. It held that 'Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice.'¹³⁹ By so deciding, the ICJ established (or recognised) some form of precedence of CAT over international law instruments such as treaties creating regional organisations. Methodologically speaking, the conclusion was only reached because of the *jus cogens* status of the prohibition against torture, which the ICJ refers to in its judgment.¹⁴⁰ In the same vein, the ICJ held that neither the lack of funds nor the referral of the Habré's situation to the AU could justify Senegal's delay in discharging its obligation.¹⁴¹

Israel on the grounds that the crimes with which Eichmann was charged were prohibited under international law at the time they were committed (Supreme Court of Israel, *Attorney General v Eichmann* (1961) 36 ILR277, 288-83 (1968).

¹³⁵ Princeton Principle 3. Reliance on Universal Jurisdiction in the Absence of National Legislation, 30.

¹³⁶ 26 June 1987 is the date the Convention against torture entered into force after it had been ratified by 20 States as it is provided for by article 27, 1 of the convention, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. The same date applies to Senegal because it has ratified the convention on 21 June 1986, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SEN&Lang=EN on 5 April 2017.

¹³⁷ *Belgium v Senegal*, 102.

¹³⁸ Article 15(4) Revised Treaty of Economic Community of West African States 1993, 2373 UNTS 1; and Article 22(3) Protocol on the Community Court of Justice 1991, A/P.1/7/91.

¹³⁹ *Belgium v Senegal*, 111.

¹⁴⁰ *Belgium v Senegal*, 99.

¹⁴¹ *Belgium v Senegal*, 112.

As far as the AU's mandate is concerned, the truth is that it did not affect Senegal's rights and obligations pursuant to CAT. Senegal enjoyed jurisdiction to prosecute Habré before the so-called mandate, and it kept enjoying it afterwards. A view expressed by Belgium and followed by the ICJ was that Article 7 of the CAT (the *aut dedere aut judicare* obligation) imposes obligations only on a state (in this case Senegal) and not a continent. Therefore, whatever the AU would decide on the matter could not free Senegal from its obligations.¹⁴² Whether the AU can even give a member-state such a mandate and the procedure to follow for that is beyond the scope of this chapter.

The apparent endorsement of the ECOWAS Court's judgment by the AU was also immaterial. As mentioned above, an AU Committee had already held that Senegal was legally bound to try Habré.¹⁴³ It can, therefore, be argued that the AU endorsed the ECOWAS Court's judgment, and the internationalisation it suggested, for merely political reasons. First, the AU had no reason to oppose a sub-regional court's finding. What mattered was that Habré would be tried in Africa, by an African body. Senegal was one of the options. It was actually even the most viable, as suggested earlier on in this chapter. Alternatives to Senegal had been envisioned and no legal reason had been put forward to oppose them. They would have been discussed further had the Senegalese option been abandoned for one reason or another. One of them was Rwanda.¹⁴⁴ Second, the AU wanted to make the most of the case, politically speaking. In that regard, getting the process to look continental was the best option. The opportunity of sending an image of a continent united against impunity was too precious to miss. The AU seized it to prove the continent's willingness to punish the most heinous crimes of international concern.

The most serious argument against the characterisation of the Habré case as an exercise of universal jurisdiction by Senegal would, therefore, be the hybrid character of the Chambers (as discussed above). However, given the extraordinarily weak international presence in the court and the fact that the Chambers' Statute clearly states that the Chambers are created within the Senegalese court system, some analysts see the Chambers as a 'national court.' It is for this very reason that

¹⁴² See Belgium's Note Verbale of 11 January 2006, discussed in *Belgium v Senegal*, 25.

¹⁴³ Decision on the Hissène Habré Case, 1 July 2011, Assembly/AU/December 371 (XVII), 3.

¹⁴⁴ Kemp G, 'Taking stock of international criminal justice in Africa – Three inventories considered' in Van der Merwe B (ed), *International criminal justice in Africa: Challenges and opportunities* Konrad Adenauer Stiftung, Nairobi, 2014, 26.

they consider the Chambers as an innovation in international criminal law.¹⁴⁵ It is reasonably arguable that the real legal basis for the Chambers is in Senegalese law and not the agreement between Senegal and the AU to establish the Chambers. One can, therefore, argue that despite the significant international support they enjoyed, both financially and in terms of personnel, the Chambers were domestic institutions that formed part of the Senegalese legal system. Thus, it is Senegal that prosecuted Habré, with some international assistance, and in accordance with its mandate under the AU as well as its obligations under CAT and in accordance with the judgment of the ICJ.¹⁴⁶ In addition, the Chambers applied both the Chambers' Statute and Senegalese domestic law, especially for procedural matters.

As Owen Fiss wrote some years before the trial started, the national courts of Senegal asserted universal jurisdiction, just as the Belgium courts would have if Habré had been tried there.¹⁴⁷ The AU mandate ensures that the Chambers are acting 'on behalf of Africa.' However, legally speaking it is not that mandate that entrusted Senegal with jurisdiction to try Habré. As discussed above, the AU itself never envisioned giving a mandate to a state enjoying no jurisdiction, for example, a state not party to the CAT. This is because it knew that jurisdiction was deriving from other sources of international law and not from the mandate itself.

Universal jurisdiction was therefore at play in the Habré trial in Senegal. But how easily can the experience be repeated in Senegal or elsewhere in Africa?

4.2 *Chances of similar trials in the future*

There is no question that many African states, like Senegal, are vested with jurisdiction to try torture-related crimes wherever they are suspected to have been committed. However, this does not, in itself, make future trials probable on the basis of the universality principle. Aaron Salomon, commenting on the Pinochet case, wrote that it is only in unusual circumstances that the political forces that tend to prevent successful prosecutions can be subverted. Those circumstances include an

¹⁴⁵ See Schabas W, 'Senegal's Chambres africaines extraordinaires to judge Habré', 5 February 2013, on <http://humanrightsdoctorate.blogspot.com/2013/02/senegals-chambres-africaines.html> on 5 April 2017.

¹⁴⁶ See also the dissenting opinion of Judge Xue, Belgium Senegal, who argues (at para. 42) that establishment of a special tribunal by the African Union would not be a breach of Article 7(1) by Senegal because 'neither the terms of [CAT] nor the State practice in this regard prohibit such an option'. Quoted by Shah, para. 365.

¹⁴⁷ Fiss O, 'Within reach of the state: Prosecuting atrocities in Africa' 31 *Human Rights Quarterly*, 2009, 65.

uncontested entry into the court system, an independent judiciary and strong public pressure.¹⁴⁸ In the case of Habré, the combination of ingredients that made the trial possible are not easy to gather for every suspected criminal deserving a trial. They involve internal political conditions in the prosecuting state (part 4.2.1 below), external interest and pressure, and even luck (part 4.2.2 below). Nevertheless, the means to increase the likelihood of universal jurisdiction trials in Africa do exist. This, however, would require significant reforms (part 4.2.3 below).

4.2.1 A conducive political environment

From the outset, it was Senegal's democratic tradition, its relatively independent judiciary and its leadership role on international rights issues that made a successful prosecution even conceivable.¹⁴⁹ Had Habré fled to, and been residing in one of many other African countries, chances are that victims would not have even tried to file complaints. Indeed, quite a significant number of complaints against former African dictators in exile in other African countries have received little feedback, if any at all, from authorities of hosting states.¹⁵⁰

Senegal's political specialness is also demonstrated by its ability to overcome the tacit opposition to Habré's trial by President Abdoulaye Wade's regime, which took the reins of power in April 2000.¹⁵¹ President Wade's hostility to the trial of Habré was first demonstrated by the questionable support he gave to Madické Niang, Habré's counsel, after appointing him as one of his closest advisors.¹⁵² Indeed, President Wade appointed Niang as his special advisor on judicial matters, while allowing him to continue his legal practice, including his defence of Habré.¹⁵³ When the Senegalese Bar Association ruled that Niang could not continue to appear before courts while serving the State, President Wade promptly reappointed Niang as a paid judicial consultant to the Government.¹⁵⁴ Commentators saw the rather unusual move as a subterfuge purporting to allow Niang to both work with Wade and represent Habré and other clients.¹⁵⁵

¹⁴⁸ Salomon A, 'The Politics of Prosecutions under the Convention against Torture' *Chicago Journal of International Law*, 2001, 313.

¹⁴⁹ Brody, 'The prosecution of Hissène Habré', 323.

¹⁵⁰ The most infamous example is Mengistu Hailé Mariam, former Ethiopian dictator living in a quiet exile in Zimbabwe since 1991.

¹⁵¹ Abdoulaye Wade was elected President of Senegal after a second round of elections held on 19 March 2000. He took office on 1 April 2000.

¹⁵² Brody, 'The prosecution of Hissène Habré', 328.

¹⁵³ Brody, 'The prosecution of Hissène Habré', 328.

¹⁵⁴ Brody, 'The prosecution of Hissène Habré', 328.

¹⁵⁵ Brody, 'The prosecution of Hissène Habré', 328.

President Wade's hostility to Habré's trial was also made obvious by numerous incidents of interference in the appointments on judicial functions. On 30 June 2000, the Superior Council of the Magistracy presided over by President Wade and his Minister of Justice, transferred Judge Demba Kandji, who was investigating the Habré case, from his post as chief investigating judge of the Dakar Regional Court to become Assistant State Prosecutor at the Dakar Court of Appeals.¹⁵⁶ Judge Kandji was thus removed from the Habré investigation. There can be no doubt that his transfer was a reprisal for his handling of the Habré case.¹⁵⁷ At that time, Judge Kanji was compared to the Spanish Judge Baltasar Garzón by the press.¹⁵⁸ During the same meeting, the President of the Indicting Chamber, Cheikh Tidiane Diakhaté, before whom the Habré dismissal motion was *sub judice*, was elevated to the State Council. The re-appointment of this judge, only days before he was to rule on the case, similarly appeared to be an effort to manipulate the Judiciary.¹⁵⁹

After President Wade left power, the new political elite were more open to Habré's trial. A commitment to implement the ICJ judgment in *Belgium v Senegal* was quickly taken. Probably by coincidence – just as President Wade had appointed Madické Niang, Habré's lawyer, as one of his closest advisors – President Macky Sall chose Sidiki Kaba, a former victims' lawyer in the first stages of the Habré case, as Minister of Justice. This is not to suggest that Kaba was appointed to make the trial happen. However, no one can realistically deny that as a former victims' lawyer, a renowned human rights activist¹⁶⁰ and the serving President of the Assembly of States Parties to the ICC, Sidiki Kaba, as a Minister of Justice, was in a moral position to facilitate the holding of the trial or at least not to undermine it.

4.2.2 An unprecedented external interest and good will

From human rights groups to foreign governments, the world showed an interest in getting the trial to go ahead. Rights groups supported the victims' actions in Chad, Belgium and Senegal as well as before international bodies. Obviously, this was in part due to the very symbolic character of the would-be case, the most interesting feature being that it would involve a former Head of State. It can reasonably be assumed that a less prominent suspect would have attracted less attention.

¹⁵⁶ Brody, 'The prosecution of Hissène Habré', 329.

¹⁵⁷ Brody, 'The prosecution of Hissène Habré', 329.

¹⁵⁸ See 'Un juge au-dessus de tout soupçon', *Jeune Afrique l'Intelligent*, February 15-21, 2000, 22, quoted by Brody, 'The prosecution of Hissène Habré', 329.

¹⁵⁹ Brody, 'The prosecution of Hissène Habré', 330.

¹⁶⁰ President of the FIDH from 2001 to 2007.

The involvement of foreign states was also very decisive. Belgium was the most invested State. In November 2000, three victims of Habré's regime, who had acquired Belgian nationality, filed a criminal complaint against Habré in the District Court of Brussels.¹⁶¹ They based their complaint on both the CAT and the Belgian Law of 16 June 1993 concerning the punishment of grave breaches of international humanitarian law, amended in 1999 to include universal jurisdiction over crimes against humanity and genocide.¹⁶² However, despite several requests, Senegal never extradited Habré. Instead, Senegal claimed that its referral of the situation to the AU was in accordance with the spirit of the *aut dedere aut punire* principle as provided for in Article 7 of the CAT.¹⁶³

Belgium's interest in the case led it to lodge the matter with the ICJ. When, on 20 July 2012, the ICJ unanimously decided that Senegal should, without further delay, either submit the case of Habré to its competent authorities for the purpose of prosecution or extradite him,¹⁶⁴ the message was that legal and political manoeuvres to delay prosecutions were no longer acceptable. Regionalising the issue, for instance, by making it 'an African problem,' could not justify delays in bringing Habré to book.

Judicial and quasi-judicial pressure also included the finding of the UN Committee against Torture in 2006 that Senegal had breached Articles 5(2) and 7 of the CAT by not establishing jurisdiction over crimes of torture where the alleged perpetrator was in its territory and by not prosecuting Habré.¹⁶⁵

Chad, as Habré's home country, also showed undeniable good will towards his prosecution. It first waived the former President's immunity.¹⁶⁶ From a legal perspective, whether Habré still enjoyed any immunity for crimes committed while in office or whether the waiver was even necessary, is a separate question.¹⁶⁷ As

¹⁶¹ *Belgium v Senegal*, para 19.

¹⁶² Following political pressure and the ICJ's judgment in the *Arrest Warrant Case (Democratic Republic of Congo v Belgium)*, ICJ Reports 2002 3, Belgium repealed the law in 2003 and replaced it with a law that provided for a more restrictive form of extraterritorial jurisdiction for international crimes: see Reydams L, 'Belgium reneges on universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' 1 *Journal of International Criminal Justice*, 2003, 679.

¹⁶³ *Belgium v Senegal*, para 73.

¹⁶⁴ *Belgium v Senegal*, para 122.

¹⁶⁵ *Guengueng and others v Senegal* (181/01), Merits, CAT/C/36/D/181/2001 (2006); 13 IHRR, 975.

¹⁶⁶ Gaeta P, 'Ratione materiae immunities of Former Heads of States and international crimes: the Hissène Habré case', 1 *Journal of International Criminal Justice*, 2003, 186.

¹⁶⁷ Gaeta Paula discusses the issue in "Ratione materiae immunities of Former Heads of States and international crimes: the Hissène Habré case", 1 *Journal of International Criminal Justice*, Oxford University Press, Oxford, 2003, 186-196.

putative as the immunity may have been, waiving it was an undeniable sign of good will. Chadian authorities also allowed and cooperated with investigations in Chad.¹⁶⁸

Financial contributions to the trial were another sign of international good will. For many years, Senegal stated that any trial of Habré would require substantial funds, which it would not be able to mobilise without the assistance of the international community.¹⁶⁹ The international community responded to this call. For fifteen years, it funded the political and legal work that preceded the trial and provided the Chambers with the \$11.4 million they needed.¹⁷⁰ It is true that trials of the kind are excessively costly. The prosecution of Charles Taylor, the former Liberian President, stood at \$50 million, while the annual budget of the Sierra Leonean justice sector is about \$13 million.¹⁷¹ The high cost of international criminal prosecutions derives mainly from the excruciating evidentiary processes.¹⁷²

Expecting such a level of commitment, goodwill and involvement for every trial to hold in the future would be naive. It is also worth mentioning that with all this support and the untiring efforts of survivors and victim's families, the process took fifteen years to conclude. Expectations of new trials of that kind are therefore to be kept reasonable. There are, however, ways to make prosecutions based on universal jurisdiction more likely to occur in the future.

4.2.3 Way forward

If the exercise of universal jurisdiction is to become a reality in Africa and for it to play its part in the struggle against impunity, legal reforms and a series of other policies are needed. Legal reforms should first amend the Model Law. The list of crimes covered should be extended to conform to customary international law. As mentioned in this chapter, this means include trafficking in persons and torture. Rules concerning immunity should also be changed. As discussed above, this means that there should be no immunities for crimes subject to universal jurisdiction. Although treaty and customary law still grants immunity to a number of dignitaries before foreign courts, some African countries already have legislation that rejects immunity. The Model Law should, therefore, inspire the remaining countries to follow that route.

¹⁶⁸ Brody, 'Bringing a dictator to justice', 6.

¹⁶⁹ *Belgium v Senegal*, para 13.

¹⁷⁰ Brody, 'Bringing a dictator to justice', 8.

¹⁷¹ Ademola, 944.

¹⁷² Ademola, 944.

At state level, inadequate legislations should be reviewed. To give an example, around 37 African states endorse definitions of international crimes that do not align with accepted definitions under international law.¹⁷³ Laws adopting such definitions should be reviewed. At the same time, reforms to strengthen national judiciaries in order to make them more independent and more effective should be undertaken. As discussed above, more than any other judicial processes, universal jurisdiction-based trials are vulnerable to politicisation, both internally and in interstate relations.

Police and judicial cooperation frameworks should be adopted and promoted. It is a fact that mutual legal assistance agreements are exceptional in Africa. On a sub-regional level, agreements, if they exist, are usually weak.¹⁷⁴ Examples include the Southern African Development Community's Protocol on Mutual Legal Assistance in Criminal Matters (2002) and ECOWAS' Protocol on Extradition (2002).¹⁷⁵ These treaties do not reflect specific exceptions that generally apply to international crimes. For instance, international human rights law recognises that states can prosecute international crimes retroactively under domestic law so long as they constituted offences under international law at the time of their commission. Also, the requirement of 'dual criminality' does not generally apply to such crimes. The two treaties do not provide for these exceptions.

Extraditing suspects and gathering evidence are known to be particularly challenging in universal jurisdiction trials. As far as extradition is concerned, legal provisions do exist only in some areas of continental law.¹⁷⁶ Effective legal frameworks should, therefore, be put in place, both at the continental and sub-regional levels.

The other very serious practical obstacles to universal jurisdiction procedures, not only in Africa but also in other areas of the world such as Europe, is the slowness of arrest procedures.¹⁷⁷ If African states were to adopt an 'African Arrest War-

¹⁷³ See Amnesty International, 'Universal Jurisdiction: A preliminary survey of Legislation around the world – 2012 Update', 9 October 2012, p. 22 *et seq.* <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf> on 24 January 2016.

¹⁷⁴ See, for instance, the relevant treaties in ECOWAS and SADC.

¹⁷⁵ For the SADC, see the *Protocol on Mutual Legal Assistance in Criminal Matters* (2002), entered into force on 1 March 2007; and the *Protocol on Extradition* (2002), entered into force on 1 September 2006. For the ECOWAS, see the *ECOWAS Convention on Extradition* (1994), entered into force on 8 December 2005.

¹⁷⁶ See African Unity ("OAU") *Convention on the Prevention and Combating of Terrorism* (1999) (into force since 6 December 2002); the *AU Convention on Preventing and Combating Corruption* (2002) (into force since 5 August 2006).

¹⁷⁷ Hall, 'Universal Jurisdiction', 87.

rant' procedure, this could help solve the problem. Since the launch of the AU Passport,¹⁷⁸ the aforementioned proposal is sounding somewhat less farfetched.

Specialised international criminal law units should be set up, both within police and prosecution bodies. A few African states already have special investigations and prosecution units for these crimes. Indeed, members of the criminal justice systems of most states are not familiar with international law, particularly regarding universal jurisdiction. To solve that problem, inspiration should then be taken from Uganda. In July 2008, the Government of Uganda created the 'International Crimes Division' (ICD) as a special division of its High Court. With specialised personnel, the ICD's mission is to try the perpetrators of war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes.¹⁷⁹

Finally, in order for the fight against impunity to be effective, the notion that African national courts, police and prosecution bodies are not to be entrusted with trying international crimes must come to an end and be relegated to history books.

5 Conclusion

The purpose of this chapter was to assess the promise of universal jurisdiction as a route to justice and as a tool to ending impunity for international crimes in Africa. After presenting the concept, the chapter stressed the added value of the universality principle when compared to legal frameworks of international courts and tribunals. A particular focus was put on its more extensive scope in terms of crimes it covers and on the fact that it is less constrained by time limitations.

The chapter also dealt with Africa's attitude(s) towards universal jurisdiction. The discussion of policies and politics around the concept distinguished the national and continental levels. The unbalanced view, according to which Africa systematically opposes universal jurisdiction, was challenged. Indeed, policy and political positions of the AU show that the continent opposes not the concept *per se*, but rather what it perceives as its political abuse, especially by western and former colonial powers. This is best evidenced by the fact that the AU has been promoting its own version of universal jurisdiction, namely, the Model Law.

¹⁷⁸ The African Union Passport was formally launched during the 27th African Union Summit in Kigali, Rwanda, July 2016.

¹⁷⁹ For a detailed presentation, see Maunganidze OA, 'Uganda's International Crimes Division: A step in the right direction' in Van der Merwe B (ed), *International criminal justice in Africa: Challenges and opportunities* Konrad Adenauer Stiftung, Nairobi, 2014, 57-82.

This chapter has also presented the merits and shortcomings of the Model Law. The most progressive aspect of the Model Law is that it covers a large number of crimes of concern to Africa, not elsewhere prosecutable via universal jurisdiction. This is in no way to suggest that the Model Law is perfect from that point of view. Regrettably, human trafficking and torture are not covered under the Model Law despite being established customary international crimes and despite Africa's history with slavery. The chapter criticised the Model Law's unclear position on complementarity. The Model Law position on procedural immunities for state officials was highlighted as its most regrettable feature. It was stressed that this position conflicts with domestic legislation in many African states.

At state level, some positive developments were noted, namely, the ruling of the Constitutional Court of South Africa allowing the investigation of Zimbabwean suspected torturers despite their absence from the South African soil; and the trial of Habré in Senegal.

The chapter also identified the lessons that could be learned from the Habré case as far as universal jurisdiction is concerned. The Habré case was looked at as a process. The biggest merit of the case is for the trial to have taken place at all. The trial and condemnation of Habré showed that accountability for international crimes is not a vain aspiration. The message is that accountability for international crimes committed while in power can be achieved, even if the perpetrator is a former head of state, even before a foreign court, and even in Africa. Thus, being out of the reach of the ICC no longer offers a guarantee of impunity for a perpetrator.

The other lesson from the case as a process is that universal jurisdiction trials are far from easy to hold in Africa. It took fifteen years, millions of dollars, political and judicial involvement of numerous external stakeholders, including Belgium, the AU, international judicial bodies, including the ICJ, and a lot of good will from Chad and Senegal in order for the trial to proceed. To be realistic, the chances for such trials to be held on a regular basis are limited. The chapter put forward a number of ways to increase the prospect of such trial in future. These suggestions involve, but are not limited to, legal reforms and the creation of institutional mechanisms.

As stated from the outset, for trials like Habré's to be truly meaningful, they need to be more than just symbolic. They also need to be likely to occur. People in power will not be dissuaded from committing international crimes if they believe that only bad luck can bring them to account.

CHAPTER 2

THE AFRICAN UNION AND THE INTERNATIONAL CRIMINAL COURT: WHAT TO DO WITH NON-PARTY HEADS OF STATE

EKI YEMISI OMOROGBE

Abstract

In 2009 and 2010, the International Criminal Court (ICC) issued warrants for the arrest of Omar Al Bashir of Sudan, after the UN Security Council (UNSC) referred the armed conflict in Darfur to it. This chapter examines the legal issues surrounding the refusal by the African Union (AU) to endorse co-operation by its member states in arrests pursuant to these warrants. The AU's central legal argument made explicit in 2012 has been that incumbent heads of non-party states are entitled to immunity from arrest in international law, and that that immunity has not been affected by the Rome Statute of the International Criminal Court. This chapter will argue that, from a legal perspective, the AU's position has plausibility, as the ICC has struggled to explain why arrest warrants are inherently enforceable relative to non-member states. It shows that this room for disagreement has permitted the AU to maintain its usual presumption in favour of incumbent leaders. It concludes that the UNSC and the ICC should accept the validity of the AU's concerns, and take measures that would allow a definite legal basis for them to be identified. Without that, the arrest of the heads of state of non-party states is likely to prove difficult in Africa.

UNION AFRICAINE ET COUR PENALE INTERNATIONALE : QUE FAIRE AVEC LES CHEFS D'ETAT DES PAYS NON-PARTIES

Résumé

Par le renvoi du Conseil de sécurité de l'ONU à la Cour pénale internationale suite aux conflits armés au Darfour, la dernière a émis en 2009 et 2010 des mandats d'arrêts contre Omar Al-Bachir du Soudan. Cet article examine les questions juridiques relatives au refus de l'Union africaine d'approuver la coopération de ses Etats-membres dans l'exécution de ces mandats d'arrêts. L'argument juridique principal de l'Union africaine rendu explicite en 2012, est que les Chefs d'Etats en fonctions des pays non-membres bénéficient d'immunité contre l'arrêt en vertu du droit international, et que cette immunité n'a pas été touchée par le Statut de Rome. Du point de vue juridique, cet article reposera sur l'argument que la position de l'Union africaine est plausible alors que la CPI cherche à expliquer pourquoi les mandats d'arrêt peuvent, par nature, être exécutés contre des chefs d'états inculpés des Etats non-membres. Il montera que cette divergence a permis l'Union africaine de maintenir sa présomption habituelle en faveur des leaders en fonctions. Il conclura en précisant que le Conseil de sécurité de l'Onu et la CPI devraient accepter la validité des préoccupations de l'Union africaine, et prendre des mesures qui permettront l'identification d'une base juridique définitive pour ces préoccupations. Sinon, l'exécution des mandats d'arrêt contre les chefs d'état des pays non-membres s'avère plus difficile en Afrique.

1 Introduction

The October 2016 announcements by the governments of Burundi, Gambia and South Africa of their intention to withdraw from the International Criminal Court (ICC) increased concerns about its future and international criminal law in

Africa.¹ Prior to that, in June 2015, Omar Al Bashir, President of Sudan, visited Johannesburg to attend an African Union (AU) summit. South Africa is a party to the Rome Statute of the International Criminal Court (Rome Statute). In deciding not to arrest Al Bashir during his stay, South Africa chose to ignore two arrest warrants issued by the ICC, arising out of the conflict in Darfur.² Similarly, the Government refused to comply with an order of the South African High Court that the national authorities should prevent Al Bashir's departure until an application brought by the Southern African Litigation Centre for his arrest pursuant to the ICC warrants, and South Africa's legislation implementing the Rome Statute.³

After Al Bashir's departure, the South African Government made it clear that its actions were the result of the AU's ongoing dispute with the ICC.⁴ The core of the disagreement between the AU and the ICC concerns the status of heads of states that have not ratified the Rome Statute.⁵ That dispute, which has been ongoing since 2008, is the subject of this chapter.

In contrast with previous literature, this chapter offers an account of how the dispute has progressed in the intervening years. It sets out to explain why the AU has adopted its stance, and without justifying the AU's political position, it takes the position that the AU's legal reasoning is coherent. It shows that the question of Al Bashir's immunities remain unresolved for and within African states, and concludes that the AU's doubts need to be addressed by the UN Security Council (UNSC) or the UN General Assembly (UNGA) or failing that, by the Assembly of State Parties to the Rome Statute.⁶

¹ 'Gambia joins South Africa and Burundi in exodus from the International Criminal Court' *The Independent*, 26 October 2016.

² It also disregarded reminders of its obligation to arrest AlBashir issued by the ICC after the invitation to him: see *Al Bashir* (Decision following the Prosecutors' Request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir) ICC-02/05-01/09-242, PTC II, 13 June 2015, (3)-(11).

³ Bowcott O and Grierson J, 'Sudan president barred from leaving South Africa' *Guardian*, 15 June 2015, 15.

⁴ South African Government, 'Statement on the Cabinet Meeting of 24 June 2015' 25 June 2015, 6.

⁵ This does not negate the fact that before the collapse of the Kenyan cases at the ICC, the AU demanded the deferral of the trial of President Uhuru Kenyatta of Kenya, a state party of the ICC, and issued a resolution to the effect that *no sitting African head of state* should appear before an international court.

⁶ A similar dispute would arise in 2011 in relation to the UNSC's referral of Libya, a non-state party, to the ICC in respect of on-going armed conflict in that state (UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (2011)). On 27 June 2011, the ICC issued an arrest warrant for Muammar Gaddafi, the incumbent Head of State. That led to similar disputes on immunities of incumbent heads of non-party states. As it had with AlBashir, the AU adopted a policy of non-cooperation in the arrest of Gaddafi. The matter did not proceed much beyond that - Gaddafi died later the same year. See AU Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)' (30 June-1 July 2011) Assembly/AU/Dec. 366(XVII), 6.

The chapter is arranged as follows. Section 2 considers the relationship between the AU and the ICC in general terms. It argues that, despite an ostensibly shared interest between the two institutions in ensuring international justice, the AU's ambition to ensure peace as well as justice, coupled with its *de facto* policy of favouring incumbent leaders, are problematic for the success of the ICC in Africa. Section 3 discusses the ICC's issuing of arrest warrants against Al Bashir and the response of the AU to these warrants. Section 4 considers the ICC rulings against Chad, Democratic Republic of the Congo (DRC) and Malawi and why these states and other AU members are obliged to comply with ICC co-operation requests. Section 5 evaluates the positions of the ICC and the AU on the key question whether the current heads of state of non-parties retain immunity from prosecution.

The chapter as a whole argues that, in order to address the credible arguments of the AU concerning heads of state of non-parties, it is necessary to provide a more definite basis for such arrests in international law than is currently on offer.

2 The AU and the ICC

When the Rome Statute was under consideration, the then Organisation of African Unity (OAU) strongly supported its establishment. In February 1998, the OAU Council of Ministers urged its 53 member states to participate in the Rome conference on the ICC, and to support the adoption of the Statute.⁷ The OAU itself endorsed the principle of the ICC within the June 1998 conference that agreed to the Rome Statute.⁸ In the event, 43 out of 53 African states were involved in the negotiations on the Rome Statute, and on 17 July 1998, more than 40 of them voted in favour of its adoption.⁹ Following that, the OAU Assembly in July 2000 called on states to ratify the Rome Statute for the security of the African region.¹⁰ Indeed, the AU was itself established in the same year as the ICC (2002), at least partly for similar reasons. Its creation was discussed from 1999 onwards due to a recognition

⁷ OAU, 'Dakar Declaration for the Establishment of the International Criminal Court in 1998'; 'Report of the Secretary General on the Twenty First Session of the OAU Labour and Social Affairs Commission DOC. CM/2975 (LXVIII)', 4-7 June 1998, CM/DEC.419 (LXVIII), 7.

⁸ 'Summary Record of the 6th Plenary Meeting' UN Diplomatic Conference (17 June 1998) UN Doc A/CONF.183/SR.6, Mr Maluwa (Observer for the OAU) 104, 115-118.

⁹ The vote was not officially recorded. This estimate is from 'Resolution on Ratification of the Treaty on the International Criminal Court, Banjul, 31 October 1998' in AU, 'Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights 1998-1999', 12-14 July 1999, AHG/215 (XXXV) 26.

¹⁰ OAU, 'Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) Solemn Declaration', 10-12 July 2000, AHG/Decl.4 (XXXVI) [14].

that the OAU had failed to provide an adequate response to intra-state human rights abuses and violations of international criminal law.¹¹

The background to this support for the principle of the ICC was that, starting in the 1990s, there had been a number of protracted armed conflicts in Africa. Several of these – including those that started in Liberia in 1989, in Sierra Leone and Somalia in 1991, in Rwanda in 1994, and in Zaire/DRC in 1996 – had seen extreme violence used against civilians.¹² After the mass killings in Rwanda in 1994, the OAU showed enthusiasm for the creation of a permanent international court that could punish those responsible for grave crimes and deter future abuses.¹³

At the same time, African states have long been ambivalent in their support for international tribunals. Following the genocide in Rwanda, the UNSC established the International Criminal Tribunal for Rwanda (ICTR) in November 1994 under its Chapter VII powers, meaning all states had a duty to cooperate with it.¹⁴ While Cameroon, Ivory Coast, Kenya and Zambia cooperated with the ICTR in its early years of operation, other African states were suspicious of it and refused to cooperate in the arrest and transfer of key suspects in their jurisdiction.¹⁵ A turning point in the case of the ICTR came with the OAU's endorsement of the Tribunal in 1997.¹⁶ After that, cooperation improved, with Benin, Burkina Faso, Mali, Namibia, South Africa, and Togo, among others, involved in the arrest and transfer of suspects, and the Central African Republic (CAR), Rwanda and Senegal assisting the transfer of key witnesses.¹⁷ Despite that, in 2002, the ICTR Prosecutor reported Rwanda to the UNSC for non-cooperation in the transfer of witnesses and investigations into crimes committed by the rebel Rwandan Patriotic Army in 1994 (when Paul

¹¹ Mindzie MA, 'Intervention and protection in African crisis situations: Evolution and ethical challenges' 29 *Criminal Justice Ethics*, 2010, 174; Omorogbe EY, 'Can the African Union deliver peace and security?' 16 *Journal of Conflict and Security Law*, 2011, 35.

¹² Jackson R, 'Violent internal conflict and the African states: Towards a framework of analysis' 20 *Journal of Contemporary African Studies*, 2002, 29.

¹³ 'Summary Record of the 6th Plenary Meeting', 116.

¹⁴ UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

¹⁵ 'Second Annual Report of the International Criminal Tribunal for Rwanda', 7 November 1997, UN Doc S/1997/868 [62]; OAU International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide*, IPEP, 2000, 18.16.

¹⁶ See for example, OAU, 'Statement of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution on the Situation in the Great Lakes Region', 27 March 1997, Central Organ/MEC/AHG/Decl. (I) Ex (13).

¹⁷ OAU, International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide*, 18.16; 'Third Annual Report of the International Criminal Tribunal for Rwanda', 23 September 1998, UN Doc S/1998/857, 145-147.

Kagame, Head of State of Rwanda since 2000, led it).¹⁸ In 2011, the Prosecutor reported Kenya and Zimbabwe to the UNSC for withholding cooperation in arresting or tracking down key suspects.¹⁹

African states have also proved reluctant to cooperate with the Special Court for Sierra Leone (SCSL), created by a treaty between the UN and Sierra Leone on 16 January 2002, at the end of the conflict in that state. In March 2003, the SCSL indicted Charles Taylor, then President of Liberia on charges of, *inter alia*, war crimes and crimes against humanity during the conflict in Sierra Leone. The indictment was made public by the SCSL Prosecutor on 4 June 2003 as ceasefire negotiations began in Ghana, between Taylor's Government and two rebel groups, aimed at ending the 14-year civil conflict in Liberia. Ghana failed to arrest Taylor, and he returned to Liberia.²⁰ Nigeria's President Obasanjo then offered Taylor asylum, on condition that Taylor resign from office and stop interfering in Liberian domestic affairs.²¹ Reflecting regional support for the settlement, in mid-2003 and mid-2004, the AU Executive Council of Foreign Ministers congratulated Nigeria for granting asylum to Taylor and promoting peace in Liberia.²² For two and a half years, Taylor then lived in Nigeria, until he was arrested on 29 March 2006, at the request of the Liberian Government. Taylor was then returned to Liberia, where the UN Mission in Liberia transferred him into the custody of the SCSL.²³ The lesson from the Taylor case was that the West African states had a preference for a regional solution, which achieved peace. It was only when Taylor posed a threat to regional security, as a result of his continued involvement in the politics of Liberia and Guinea, that he was arrested and handed over to the SCSL.²⁴

¹⁸ 'Report of the Prosecutor of the International Criminal Tribunal for Rwanda', 15 August 2002, UN Doc S/2002/938, Annex. In response, the Security Council reminded Rwanda of its obligation of cooperation, 18 December 2002, UN Doc S/PRST/2002/39.

¹⁹ 'Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as of 12 May 2011)', 18 May 2011, UN Doc S/2011/317, 55-56; 'Surrender Fugitive, Zim told' *News Day*, 14 June 2011.

²⁰ 'Taylor not under any form of arrest – Agypong' *Modern Ghana*, 4 June 2003.

²¹ On the above see, AU, 'Report of the Interim Chairperson on the Peace Process in Liberia', 29 August 2003, Central Organ/MEC/AMB/3.(XCIV), 1-6. 'Nigeria warns exiled Taylor' *BBC News*, 17 September 2003.

²² AU, 'Decision on the Situation in Liberia' (8 July 2003) EX.CL/Dec.44 (III), 2; Decision on Liberia (25 June -3 July 2004) EX.CL/Dec.152 (V), 4.

²³ 'Nigeria to give up Charles Taylor' *BBC News*, 25 March 2006; 'Ex-leader extradited to Liberia' *BBC News*, 29 March 2006.

²⁴ 'Nigeria warns exiled Taylor' (n 20); 'Liberia wants Taylor exile review' *BBC News*, 29 July 2005.

In the particular case of the ICC, several reasons for the AU's subsequent reluctance to give it full assistance may be suggested. One is the principle of pan-African solidarity, which dates from the OAU period.²⁵ That principle is reflected in Article 3(a) of the AU Constitutive Act in the objective of 'greater solidarity between African countries.'²⁶ The principle of solidarity is linked to the OAU and AU history of opposition to all forms of colonialism and neo-colonialism.²⁷ This is relevant because while the ICC has on-going active investigations with respect to non-African situations, its prosecutions have to date been exclusively focused on Africa, with all its 23 cases arising out of nine situations in Africa.²⁸ It is true that the states in question referred five of these situations to the ICC: Uganda (2004)²⁹, DRC (2004)³⁰, CAR (2004 and 2014)³¹ and Mali (2012).³² Two situations – Sudan (2005)³³ and Libya (2011)³⁴ – were however referred by the UNSC, while the others – Kenya (2010)³⁵ and Ivory Coast (2011)³⁶ were initiated by the Prosecutor of the ICC. This exclusive focus on African states has led to criticism that the ICC is operating in a biased and selective manner. For example, the then AU Chair and Prime Minister of Ethiopia, Hailemariam Desalegn, declared in May 2013 that: 'The intention was to avoid any kind of impunity...but now the process has degenerated into some kind of race hunting'.³⁷

Secondly, the AU's preferred solution to intra-state armed conflicts has been mediation and reconciliation. In particular, that has led it to its preference for a political solution to crises, power sharing agreements between incumbents and rebels,

²⁵ Preamble and Art. II(1)(a)-(b) and II(2), *Charter of the Organisation of African Unity*, in force 13 September 1963, 479 UNTS 39.

²⁶ Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc CAB/LEG/23.15 (entered into force May 26, 2001) (hereinafter AU Constitutive Act).

²⁷ Preamble and Art. II(1)(d) and III(6); OAU, 'Declaration of the Assembly of Heads of State and Government of the Organisation of African Unity on the Political and Socio-Economic Situation in Africa and the fundamental Changes Taking Place in the World', 9–11 July 1990, AHG/Decl.1 (XXVI) [12].

²⁸ ICC, Cases: Defendants, <https://www.icc-cpi.int/Pages/cases.aspx> on 8 April 2017.

²⁹ ICC, Situation in Uganda, ICC-02/04, <https://www.icc-cpi.int/uganda> on 8 April 2017.

³⁰ ICC, Situation in the Democratic Republic of the Congo, ICC-01/04, <https://www.icc-cpi.int/drc> on 8 April 2017.

³¹ ICC, Situation in the Central African Republic, ICC-01/05, <https://www.icc-cpi.int/car>, and ICC, Situation in the Central African Republic, ICC-01/14, <https://www.icc-cpi.int/carII> on 8 April 2017.

³² ICC, Situation in the Republic of Mali, ICC-01/12, <https://www.icc-cpi.int/mali> on 8 April 2017.

³³ ICC, Situation in Darfur, Sudan, ICC-02/05, <https://www.icc-cpi.int/darfur> on 8 April 2017.

³⁴ ICC, Situation in Libya, ICC-01/11, <https://www.icc-cpi.int/libya> on 8 April 2017.

³⁵ ICC, Situation in the Republic of Kenya, ICC-01/09, <https://www.icc-cpi.int/kenya> on 8 April 2017.

³⁶ ICC, Situation in the Republic of Cote d'Ivoire, ICC-02-11, <https://www.icc-cpi.int/cdi> on 8 April 2017.

³⁷ Laing A, 'International Criminal Court is 'hunting' Africans' *Daily Telegraph*, 27 May 2013.

and the formation of inclusive regimes in which incumbents would continue to play a key role. The AU's fear is that ICC judicial intervention, especially in the context of an ongoing conflict, may (further) destabilise a state and neighbouring states, and undermine or complicate efforts to negotiate peace. Or, where a conflict is ended, ICC intervention might serve to reignite violence between opposing groups. The ICC however is unwilling to allow peace and security concerns to affect its decision-making, preferring to leave that to the UNSC.³⁸

A third factor is the AU's marked tendency to protect the position of incumbent leaders, as far as possible. One of the founding principles of the AU is the 'condemnation and rejection of unconstitutional changes of governments'.³⁹ The application of that principle against *coups d'état* that might advance human rights and democracy in states and in favour of leaders who amend the constitution to extend term limits, has led to the AU being labelled a 'club of incumbents', just as the OAU was once dismissed as a 'club of dictators'.⁴⁰ The key difficulty is that peaceful transfers of power remain the exception in the African region. Certainly, as at April 2016, ten serving heads of African states had been in power for more than 22 years, and six of those occupied office for more than 30 years.⁴¹ The AU's pro-incumbent position has been reflected in its opposition to ICC action against *all* current heads of state, including where the state is a party to the Rome Statute, or peace and security would not be at risk from ICC intervention.

3 The arrest warrants for President Al Bashir

The process leading to the issuance of arrest warrants relating to Al Bashir began with an International Commission of Inquiry appointed in 2004 by then UN Secretary-General, Kofi Annan, to investigate violations of international humani-

³⁸ See, for example, Moreno-Ocampo L, 'The International Criminal Court: Seeking global justice' 40 *Case Western Reserve Journal of International Law*, 2008, 215, 221-224; ICC-OTP, 'Policy Paper on Preliminary Examinations', 2 November 2013, 69.

³⁹ Article 4(p), AU Constitutive Act.

⁴⁰ See Omorogbe EY, 'A club of incumbents? The African Union and *coups d'état*' 44 *Vanderbilt Journal of Transnational Law*, 2011, 123.

⁴¹ Teodoro Obiang Nguema (Equatorial Guinea) 36 years (since 3 August 1979); José Eduardo dos Santos (Angola) 36 years (since 20 September 1979); Robert Mugabe (Zimbabwe) 35 years (since 1980); Paul Biya (Cameroon) 33 years (since 6 November 1982); Yoweri Museveni (Uganda) 29 years (since January 1986); Mswati III (Swaziland) 29 years (since April 1986); Omar Al Bashir (Sudan) 26 years (since June 1989); Idris Deby (Chad) 25 years (since December 1990); Yahya Jammeh (Gambia) 22 years (since 1994); Dennis Sassou Nguesso (Republic of the Congo) 32 years in total (from 1979-1992), and (1997-date). See 'Africa's longest-serving leaders' <http://www.timeslive.co.za/africa/2015/10/27/Africas-longest-serving-leaders> on 11 January 2017.

tarian law and international human rights law by all parties to the Darfur conflict.⁴² In February 2005, the Commission reported that grave violations of international humanitarian law and human rights had been committed – and were then ongoing – against the Zaghawa, Fur and Massalit ethnic groups in Darfur. The Commission also found that these violations were principally the responsibility in particular of the Government of Al Bashir, and of its ally the Arab Janjaweed militia, and that they met the thresholds in Articles 7(1), 8(1) and 8(2) of the Rome Statute.⁴³ Having concluded that the Sudanese justice system was unable and unwilling to address the situation in Darfur, the Commission recommended that the UNSC refer the matter to the ICC.⁴⁴ That was then done by the UNSC, acting under Chapter VII of the UN Charter through Resolution 1593, adopted on 31 March 2005. Resolution 1593 covered the situation in Darfur from 1 July 2002 only, as that was the date on which the Rome Statute entered into force.⁴⁵

Sudan itself signed the Rome Statute, but it has never ratified it. The passages in Resolution 1593 concerning its addressees are therefore of particular significance. Firstly, the Resolution stated that the UNSC ‘Decides that the Government of Sudan and all other parties to the conflict shall comply fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this Resolution’. This implied that Sudan had obligations of co-operation deriving from the UN Charter, notwithstanding its non-ratification of the Rome Statute. Secondly, in respect of other states, Resolution 1593 ‘while recognizing that States not party to the Rome Statute have no obligation under the Statute’, ‘urge[d] all States and concerned regional and other international organisations to cooperate fully’. This second passage suggested that the UNSC was preserving the position of states other than Sudan that were *not* parties to the Rome Statute. The Resolution was however silent as to a third aspect of the situation, which would become the basis of the dispute with the AU: the position of states party to the Rome Statute, if called upon to take action in relation to a non-party state.

To date, the ICC has issued five arrest warrants arising out of the Darfur conflict, relating to four members of Sudan’s Government, or of its allies, as follows:

⁴² The appointment of the Commission was made pursuant to UNSC Res. 1564, 18 September 2004, S/RES/1564, 12.

⁴³ UN, ‘Report of the International Commission of Inquiry on Darfur to the Secretary-General’, 1 February 2005, UN Doc S/2005/60, 6 and 586.

⁴⁴ UN, ‘Report of the International Commission of Inquiry on Darfur to the Secretary-General’ 586-589.

⁴⁵ UNSC Res. 1593, 31 March 2005, S/RES/1593 passed with 11 votes in favour, 0 against and with abstentions by Algeria, Brazil, China and the United States.

- On 27 April 2007, for Ahmad Harun, Sudan’s Minister of State for Humanitarian Affairs, in respect of alleged war crimes and crimes against humanity committed when he was Minister of State for the Interior of Sudan;⁴⁶
- Also on 27 April 2007, for Ali Muhammad Ali Khushayb, an alleged Janjaweed militia leader in Darfur;
- On 4 March 2009, for Omar Al Bashir, Head of State of Sudan, for war crimes and crimes against humanity;⁴⁷
- On 12 July 2010, also for Omar Al Bashir, for genocide;⁴⁸ and
- On 1 March 2012, for Abdel Raheem Hussein, Sudan’s Defence Minister, in respect of war crimes and crimes against humanity allegedly committed when he was Minister of the Interior for Sudan, and the Sudanese President’s Special Representative in Darfur.⁴⁹

The AU has long preferred a political resolution of the Darfur conflict. Firstly, the AU-led peace mediation process in Darfur led to the signing of a humanitarian ceasefire agreement in 2004, and peace agreements in 2006 and 2011 between the Sudanese Government and some rebel factions which included provisions on power sharing and protected the position of the Government in the medium term.⁵⁰ Secondly, with the consent of the Sudanese Government, the AU deployed peacekeepers to the Darfur region from May 2004, in order to monitor the ceasefire agreements. From 31 December 2007, this would be part of an AU/UN hybrid peacekeeping force in Darfur (UNAMID), established under UNSC Resolution 1769 (2007).⁵¹ The UNSC has continued to renew UNAMID’s mandate, most recently until 30 June 2017.⁵²

⁴⁶ *Ahmed Harun and Ali Khushayb* (Warrant of Arrest for Ahmed Harun) ICC-02/05-01/07-2, PTC 1, 27 April 2007.

⁴⁷ *Al Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1, PTC 1, 4 March 2009.

⁴⁸ *Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95, PTC 1, 12 July 2010. In March 2009, the Court had declined to issue an arrest warrant in respect of a charge of genocide because it did not find enough grounds to believe that crime had been committed. That part of the decision was overturned on appeal.

⁴⁹ *Hussein* (Decision on the Prosecutor’s application under Article 58 relating to Abdel Raheem Muhammad Hussein) ICC-02/05-01/12-1-Red, PTC 1, 1 March 2012.

⁵⁰ See Agreement on Humanitarian Ceasefire on the Conflict in Darfur (signed 8 April 2004, N’djamena, Chad); Chapter 1 Article 1-16, Darfur Peace Agreement, signed 5 May 2006, Abuja, Nigeria; and Chapter II, Doha Document for Peace in Darfur (DDPD), signed 14 July 2011.

⁵¹ UNSC Res 1769, 31 July 2007, UN Doc S/RES/1769.

⁵² UNSC Res 2296, 29 June 2016, UN Doc S/RES/2296.

The AU initially remained silent about the ICC investigations into the Darfur conflict between 2005 and 2008, and neither did it object to the issuing of arrest warrants for Harun and Khushayb in 2007.⁵³ Because of its broader position, however, the AU expressed significant reservations about the Prosecutor's July 2008 application for an arrest warrant against Al Bashir. On 21 July 2008, the AU Peace and Security Council declared that an arrest warrant would undermine the peace process in Darfur, and constitute a threat to peace and reconciliation in the Sudan and the region.⁵⁴ Accordingly, the AU Peace and Security Council requested the UNSC to use the power in Article 16 of the Rome Statute to defer the ICC investigation and prosecution of Al Bashir, in the interests of peace and security in Darfur and the rest of Sudan.⁵⁵

The AU request for deferral was noted, but not acted upon, by the UNSC, when it renewed the mandate of UNAMID on 31 July 2008.⁵⁶ At that time, there was a split within the UNSC with Russia and China favouring deferral and the United States opposing it.⁵⁷

Faced with the inaction of the UNSC, on 3 February 2009, the AU Assembly again declared:

... in view of the delicate nature of the peace processes underway in the Sudan, approval of this application [for an arrest warrant] would seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.⁵⁸

That was followed by an AU Assembly decision that AU member states should not cooperate with the ICC in the arrest and surrender of Al Bashir.⁵⁹ The AU Peace and Security Council, which mandates AU missions, adopted the same policy on 21 July 2009, signalling it would not authorise troops to arrest Al Bashir.⁶⁰ The AU policy has subsequently been restated many times by the AU Assembly.

⁵³ See generally, Goldstone R, 'Does the ICC target Africa?' 2 *International Bar Association Equality of Arms Review*, 2009, 3.

⁵⁴ AU, 'Communique', 21 July 2008, PSC/MIN/Comm (CXLII), 9.

⁵⁵ AU, 'Communique', 21 July 2008. This communique was annexed to 'Letter from the African Union to the President of the Security Council', 21 July 2008, UN Doc S/2008/481.

⁵⁶ UNSC Res 1828, 31 July 2008, UN Doc S/RES/1828, 2. The resolution was passed by a vote of 14 in favour, none against and 1 abstention (United States).

⁵⁷ For the position of the Russian Federation, China and the United States, see UNSC Verbatim Record, 31 July 2008, UN Doc S/PV.5947, 3, 6 and 8 respectively.

⁵⁸ AU, 'Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan', 3 February 2009, Assembly/AU/Dec. 221(XII), 2.

⁵⁹ AU, 'Decision on the Report of the Commission on the Meeting of State Parties to the Rome Statute on the International Criminal Court (ICC)', 3 July 2009, Assembly/AU/Dec.245 (XIII) Rev.1, 10. Chad entered a reservation to this paragraph.

⁶⁰ AU, 'Communique', 21 July 2009, PSC/PR/COMM (CXCVIII), 14.

To date, the AU's policy of non-co-operation has enjoyed broad acceptance by African states members of the AU and ICC. As a result, Al Bashir has made a series of visits to ICC Member States in Africa:

- in July 2010, to N'djamena, Chad for a meeting of the leaders of the Community of Sahel-Saharan States (CEN-SAD);⁶¹
- in August 2010, to Nairobi, Kenya, for a ceremony to celebrate the inauguration of a new constitution, at the invitation of President Mwai Kibaki;⁶²
- in May 2011, to Djibouti, for the inauguration of President Ismail Guelleh;⁶³
- in August 2011, to N'djamena, Chad, for the swearing-in ceremony of President Idriss Deby;⁶⁴
- in October 2011, to Lilongwe, Malawi, for the Common Market for Eastern and Southern Africa (COMESA) trade summit;⁶⁵
- in February 2013, to N'djamena, Chad for a CEN-SAD summit;⁶⁶
- in May 2013, to N'djamena, Chad, for a Greenbelt Conference of CEN-SAD;⁶⁷
- in July 2013, to Abuja, Nigeria, for a special summit of AU Heads of State and Government on HIV/AIDS, Tuberculosis and Malaria;⁶⁸
- in February 2014, to Kinshasa, DRC, for a COMESA trade summit;⁶⁹
- in March 2014, to Um-Jaras, Chad, for a forum of border tribes between Chad and Sudan;⁷⁰ and
- in June 2015, to Johannesburg, South Africa, for an AU summit.

⁶¹ See Rice X, 'Chad refuses to arrest Omar al-Bashir on genocide charges' *Guardian*, 22 July 2010.

⁶² 'Court worry at Omar al-Bashir's Kenya trip' *BBC News*, 28 August 2010.

⁶³ 'Djibouti becomes Third ICC Member to Receive Sudanese President' *Sudan Tribune*, 7 May 2011.

⁶⁴ 'EU criticizes Bashir's visit to Chad despite ICC warrant' *Sudan Tribune*, 8 August 2011.

⁶⁵ 'Omar al-Bashir arrest request rejected by Malawi' *BBC News*, 14 October 2011.

⁶⁶ See *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 Ahmad Al-Bashir) ICC-02/05-01/09-151, PTC II, 26 March 2013, 10.

⁶⁷ Coalition for the International Criminal Court, 'Darfur Victims Ignored as Chad Hosts Al-Bashir Yet Again', 10 May 2013.

⁶⁸ Soniyi T and Oyedele D, 'FG Insists on AU Resolution as CSOs Approach Court to Get Al-Bashir Arrested', *This Day*, 16 July 2013.

⁶⁹ *Al Bashir* (Decision Regarding Omar Al-Bashir's Visit to the Democratic Republic of the Congo) ICC-02/05-01/09-186, PTC II, 26 February 2014, 7-8.

⁷⁰ See *Al Bashir* (Report of the Registry on the Decision regarding Omar Al-Bashir's potential visit to the Republic of Chad) ICC-02/05-01/09-200, PTC II, 5 May 2014.

4 The ICC legal position on immunities

this section considers the ICC's rulings regarding the issue as to whether it has jurisdiction over heads of a states or governments of states that are not party to the Rome Statute, and as to why state parties are obliged to cooperate with the ICC in the arrest of Al Bashir.

4.1 *The ICC's 2009 ruling*

In its ruling of 4 March 2009 concerning the first arrest warrant for Al Bashir, the ICC found that Al Bashir's position as current Head of State of a non-party state had 'no effect on the Court's jurisdiction.'⁷¹ In reaching that conclusion, it relied upon four 'considerations'.⁷² First, according to the Preamble to the Rome Statute, one of the Treaty's 'core goals' is to end impunity for the perpetrators of the most serious crimes.⁷³ Secondly, in order to achieve that goal, the immunity of a head of state is removed, in accordance with Article 27 of the Rome Statute.⁷⁴ Thirdly, principles of general international law and of national laws of states – which would have implied that immunity was retained – could only be resorted to where there is a gap in the written law, i.e. the Rome Statute, and instruments adopted under it.⁷⁵ Finally, in referring the matter to the ICC under Article 13(b) of the Rome Statute, the UNSC accepted investigation and trial under the Rome Statute framework.⁷⁶ The implication of the ICC's decision is that following a UNSC referral, a non-party head of state is bound under the Rome Statute, including Article 27, which removes immunities.

⁷¹ Prosecutor v *Al Bashir* (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, PTC 1, 4 March 2009, 41.

⁷² Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 42-45.

⁷³ Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 42.

⁷⁴ Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 43.

⁷⁵ Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 44.

⁷⁶ Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 45.

4.2 *The ICC's Chad, Malawi and DRC rulings*

The ICC has since considered the issue as to whether state parties are obliged to cooperate with it in the arrest of Al Bashir. Following the ICC Registrar's report of the non-cooperation of Chad and Malawi in 2011, and DRC in 2014 (see above, section 3), the ICC gave each of these states the right to be heard on why they had failed to comply with the cooperation requests in the context of possible referral to the UNSC for non-cooperation.⁷⁷ On 12 December 2011, 13 December 2011, and 9 April 2014, respectively, the ICC found Malawi and Chad and the DRC in breach of their obligations to cooperate under the Rome Statute.⁷⁸ Having found the states non-compliant, the ICC requested the UNSC, and the Assembly of State Parties to the Rome Statute, to take action as appropriate.

In their defence, Chad, Malawi, and the DRC argued that they acted in line with the AU position that national authorities have no right to arrest an incumbent head of a non-party state. While Chad and Malawi argued that they had to follow the AU decision in any event, the DRC maintained that it had been placed in a 'complex, ambiguous and major situation' in light of the fact that the DRC is a party to the Rome Statute and equally a member of the AU.⁷⁹ Malawi and the DRC submitted different arguments on the effect of the Rome Statute on Al Bashir's immunities. Malawi's position was that the Rome Statute provisions including the waiver of immunity are inapplicable to Sudan as it is not party to the Rome Statute.⁸⁰ In contrast,

⁷⁷ *Prosecutor v Al Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139, PTC I, 12 December 2011, 47; (Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-140-tENG, PTC I, 13 December 2011, [14]; Democratic Republic of the Congo (Decision on Cooperation) ICC-02/05-01-09-195, PTC II, 9 April 2014, 7-8.

⁷⁸ *Prosecutor v Al Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 47; 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 Ahmad Al-Bashir, 14; Democratic Republic of the Congo (Decision on Cooperation), 16 and 34.

⁷⁹ *Prosecutor v Al Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 8; 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 Ahmad Al-Bashir, 7; Democratic Republic of the Congo (Decision on Cooperation), 11-12.

⁸⁰ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 8.

the DRC argued that it was unable to execute the ICC warrant of arrest because the ICC had not obtained a waiver of immunities from Sudan, as required by Article 98(1).⁸¹

In its rulings, the ICC's firstly found that Chad, DRC and Malawi ought to have brought the issue of Al Bashir's immunity before it, arguing that it has the sole authority to make a finding on its own jurisdiction. By not doing so, the states failed to comply with their obligations under the Rome Statute, including a general obligation to cooperate with the ICC to resolve the issue.⁸² In addition, the failure of these states to arrest and surrender Al Bashir, thus preventing the ICC's exercise of its powers and functions, itself constituted a failure to cooperate.⁸³ In other words, in the absence of consultation with the ICC, states must execute its requests.

In addition to these findings, each of the judgments included a consideration of the AU's broadly stated justification for its non-cooperation policy.⁸⁴ The ICC concluded that the AU, Chad, DRC and Malawi were not entitled to rely on Article 98(1) of the Rome Statute to justify non-compliance with co-operation requests. But the ICC differed between judgements as to whether customary international law immunities of non-party states is retained, and as to whether ICC jurisdiction automatically creates an exception to immunity at the national level.

In the Chad and Malawi decisions, states must comply with ICC cooperation requests because heads of state have no immunity in proceedings before international courts.⁸⁵ In reaching that conclusion, the ICC traced a customary rejection of immunity in international law to the post-World War II period.

⁸¹ DRC Cooperation (n 66), 18-19.

⁸² Article 86, *Rome Statute*; Decision on the refusal of Malawi (n 66), 10-12; Decision on the refusal of Chad (n 66), 10-11; Democratic Republic of the Congo (Decision on Cooperation), 17.

⁸³ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 10; 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 Ahmad Al-Bashir, 9 and 14; Democratic Republic of the Congo (Decision on Cooperation), 17.

⁸⁴ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 13-15; (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 Ahmad Al-Bashir), 12-14.

⁸⁵ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 37; 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 Ahmad Al-Bashir, 13-14.

The ICC gave as examples courts which did not recognise official position immunities in the post-World War II era including; the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East in Tokyo, the International Criminal Tribunal for Yugoslavia, and the ICTR.⁸⁶ The ICC held that international law has further evolved since the *Arrest Warrants* case, which was concerned only with immunity at national level.⁸⁷ According to the ICC, it is now accepted practice to prosecute heads of states before international courts, as had been done in the cases of Slobodan Milosevic (at the ICTY), Charles Taylor (at the SCSL), and Muammar Gaddafi, Laurent Gbagbo, and now Al Bashir (all at the ICC).⁸⁸ For the ICC, the renunciation of immunity by 120 States, which are party to the Rome Statute showed widespread acceptance of the custom.⁸⁹ In addition, the ICC located its jurisdiction over incumbent heads of state to the UNSC's referral.⁹⁰ As in its 2009 ruling, the ICC inferred the UNSC's intended effect and founded its jurisdiction on a general awareness that referrals by the UNSC, some of which were not party to the Rome Statute, might lead to a prosecution of heads of state who might ordinarily have immunity from prosecution.⁹¹

That led the ICC to decide that no conflict exists between customary international law obligations and the request of the ICC to its state parties to arrest and

⁸⁶ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 22-32 and 38-39; (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 Ahmad Al-Bashir), 13-14.

⁸⁷ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 33-36; Chad, 13-14 Re *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) (2002) ICJ Rep 3.

⁸⁸ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 39.

⁸⁹ *Prosecutor v Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 40; (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 Ahmad Al-Bashir), 13-14.

⁹⁰ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 36.

⁹¹ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir.

surrender Al Bashir to the Court.⁹² As the ICC put it in its *Malawi* ruling, any other interpretation of Article 98(1) ‘would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute.’⁹³ For the ICC, immunities are irrelevant in respect of prosecutions before international courts and also for any act of cooperation by states, which is essential for those proceedings.⁹⁴ In other words, states, which are party to the Rome Statute, must give effect to the ICC’s arrest warrants against Al Bashir.

For our purposes, the most novel aspect of the decision in the DRC matter was the ICC’s consideration of how Articles 27 and 98(1) of the Rome Statute can be read alongside one another.⁹⁵ The ICC, relying on the *Arrest Warrants* case, distinguished national from international jurisdiction, and concluded that an exception to immunities at the international level is provided for under Article 27(2).⁹⁶ In its assessment, the Rome Statute is a multilateral treaty governed by the rules of the Vienna Convention on the Law of Treaties, and as such cannot impose obligations on third parties without their consent.⁹⁷ That led the ICC to conclude that its jurisdiction and the automatic removal of immunities should be confined to state parties.⁹⁸ That automatic removal of immunity does not extend to non-state parties, and a head of state of a non-state party may be immune from prosecution. To prevent other states from acting inconsistently with their international obligations towards

⁹² Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13-14 and 43; 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 Ahmad Al-Bashir, 13.

⁹³ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 41.

⁹⁴ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 44.

⁹⁵ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 23.

⁹⁶ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 25.

⁹⁷ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 26.

⁹⁸ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir.

a non-state party, the Rome Statute requires the Court to first obtain a waiver or lifting of immunity of its head of state.⁹⁹ This interpretation, which is consistent with the wording of the UNSC resolutions and with the requirements of Article 98 of the Rome Statute, avoided any conflict of obligations on member states in respect of the breach of states and diplomatic immunities.

The ICC went on however to conclude that the pre-requisite of a waiver of immunities is inapplicable in this specific case. It referred to Resolution 1593 (2005), in which the UNSC obliged Sudan to cooperate fully with the ICC and its Prosecutor and to provide any necessary assistance. The cooperation required under the Resolution included the lifting of immunities, as any other interpretation would render the UNSC decision 'senseless'.¹⁰⁰ The ICC decided that the requirement for a waiver under Article 98(1) had been overridden by virtue of the language used in Resolution 1593, and the UNSC had implicitly waived Al Bashir's immunities, so that there was no obstacle to the DRC executing the arrest warrants for him.¹⁰¹ This led the ICC to comment that the continued assertion of immunity by the AU and international obligations derived from the AU position was in conflict not only with the Rome Statute but also with the UN Charter.¹⁰² The ICC reminded the DRC, and other AU states, that, in accordance with Articles 25 and 103 of the UN Charter, their obligations under the UN Charter should prevail over their obligations under the AU Constitutive Act.¹⁰³

In other words, the referral resolution had twin effects. Under it, state parties are required to prioritise their obligations under a UNSC resolution over any owed to the AU, and are bound to arrest Al Bashir irrespective of the ICC's failure to follow the procedure required in Article 98(1).

⁹⁹ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 27.

¹⁰⁰ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 29.

¹⁰¹ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir.

¹⁰² Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 28 and 30.

¹⁰³ Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 30-31.

The AU has rejected these propositions.¹⁰⁴ In a decision of the AU Assembly on 30 January 2012, it reaffirmed the AU policy of non-cooperation, referred to Article 98(1) of the Rome Statute and the immunity of heads of non-party States, and requested that the UNSC defer the ICC proceedings against Al Bashir.¹⁰⁵ Crucially, in a January 2015 decision on the ICC, the AU Assembly declared that customary international law provides immunities for incumbent leaders and requested that the UNSC withdraw its referral of Sudan.¹⁰⁶

5 Evaluation of ICC and AU positions

It can be seen therefore that the ICC's rulings concerning the arrest of non-party heads of state have put forward two distinct theories. In the *Chad and Malawi* rulings, the focus was on a claimed exemption from the customary law immunity of heads of state in the case of international courts and tribunals. By contrast, in the *DRC* ruling, the ICC's focus was on the argument that the UNSC referral implied a lifting of immunity.¹⁰⁷ These two justifications for the arrest of incumbent heads of state pursuant to ICC warrants are examined in turn here to show that questions remain on the issue of Al Bashir's immunity.

5.1 No immunity before international courts and tribunals

From above, it is clear that the position of the ICC is that the immunity of a non-party head of state is no bar to its jurisdiction. This is debateable. In the first place, the International Court of Justice's (ICJ) decision in the *Arrest Warrants*

¹⁰⁴ AU Press Release, 'On the Decisions of Pre-Trial Chamber I of the International Criminal Court', 9 January 2012, No 002/2012, 2. The AU has not responded directly to the Court's ruling concerning the Democratic Republic of Congo. But, in January 2015 and January 2016 respectively, the AU Assembly praised the DRC and South Africa on their support for the AU position. AU, 'Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court', 30-31 January 2015, Assembly/AU/Dec.547(XXIV) [18]; AU 'Decision on the International Criminal Court', 30-31 January 2016, Assembly/AU/Dec.590(XXVI) [3].

¹⁰⁵ AU, 'Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court', 29-30 January 2012, Assembly/AU/Dec.397(XVIII), 3 and 6-8.

¹⁰⁶ AU, 'Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court', 30-31 January 2015, Assembly/AU/Dec.547(XXIV), 7 and 17(e).

¹⁰⁷ Judges on Malawi and Chad cases: Sanji Mmasenono Monageng (presiding Judge); Sylvia Steiner; Cuno Tarfusser. Judges on DRC case: Ekatarina Trendafilova (Presiding Judge), Hans-Peter Kaul, and Cuno Tarfusser. ICC-Presidency, 'Decision on the Constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Cote d'Ivoire situations' ICC-02/05-01/09-143 (15 March 2012).

case left open the question of whether jurisdiction can arise where an international tribunal is set up under a treaty to which a state is not party.¹⁰⁸

Secondly, the ICC's reliance on the precedent of other international courts and tribunals in its ruling in *Chad* and *Malawi* is open to question, because the ICC is established by treaty. It is true that other international courts and tribunals have treated official capacity as irrelevant for the purposes of investigating and prosecuting serious offences, but their jurisdiction was otherwise established. The jurisdiction of the International Military Tribunal at Nuremberg was founded on the consent of the Allies, as effective sovereign in post-War Germany, to the prosecution of German nationals.¹⁰⁹ The jurisdiction of the International Military Tribunal for the Far East in Tokyo was founded on the consent of the state of nationality of the defendant.¹¹⁰ The ICTY and ICTR were founded on the UN Charter enforcement powers of the UNSC in Resolutions 827 (1993) and 955 (1994) respectively.¹¹¹ The method of creation of these tribunals under the UN Charter framework for peace and security has significant mandatory effects. It made *all* UN member states party to the ICTY and ICTR statutes under which the immunities of heads of states are expressly lifted, and *all* states obliged to cooperate in the arrest and transfer of accused persons to these tribunals.¹¹² In contrast, UNSC Resolution 1593 recognised the different positions of states party to the Rome Statute vis-à-vis those that are not, including the duty of state parties to cooperate fully with their obligations under the Rome Statute. That cooperation would include actions, in line with Part IX of the Rome Statute, in relation to arrest and surrender (see its Article 89), in relation to the obtaining and preservation of evidence, and the protection of witnesses (see its Article 93) and any other assistance requested by the ICC, which is not prohibited under national law (Article 93(1)), reinforcing the idea that any cooperation would also be subject to Article 98. Additionally, the ICC's reliance on the cases of *Milosevic* at the ICTY, *Taylor* at the SCSL, and *Gbagbo* at the ICC is misplaced. Though *Milosevic* and *Taylor* were indicted while in office, the prosecution of these three persons began only after they were no longer in office.¹¹³

¹⁰⁸ (*Democratic Republic of Congo v Belgium*) (Judgment)(2002) ICJ Rep 3, 61; Williams S and Sherif L, 'The arrest warrant for President Al-Bashir: Immunities of incumbent heads of state and the International Criminal Court' 14 *Journal of Conflict and Security Law*, 2009, 71, 76.

¹⁰⁹ Morris M, 'High crimes and misconceptions: The ICC and non-party states' 64 *Law and Contemporary Problems* 1, 2001, 13, 38.

¹¹⁰ Morris M, 'High crimes and misconceptions: The ICC and non-party states' 13, 37.

¹¹¹ Morris M, 'High crimes and misconceptions: The ICC and non-party states' 35-36.

¹¹² See Articles 6(2) and 28, *Statute of ICTR*; Articles 7(2) and 29, *Statute of ICTY*.

¹¹³ See Williams and Sherif, 'The arrest warrant for President Al-Bashir', 73.

Thirdly, even if we accept that a UNSC referral can have the effect of extending the jurisdiction of the ICC to cover non-party states, it does not follow that the immunity of the head of a non-party state is removed, and these precedents referred to by the ICC fail to establish that.¹¹⁴ It is generally accepted that the UNSC can withdraw immunity from a head of state.¹¹⁵ However, that has not happened in this case. Critically, at a 2012 UNSC open debate on peace and security focusing on the ICC, Russia declared that the question of immunities of high-ranking members of government had not been considered by the UNSC in resolutions 1593 (Sudan) and 1970 (Libya) and that international law immunities of incumbent heads of state remain unless the contrary is explicitly stated in a UNSC resolution.¹¹⁶ Russia's observer delegation repeated this assertion at a subsequent meeting of the Assembly of State Parties.¹¹⁷ Interestingly, these statements have gone unchallenged by other UNSC members. Nor has the UNSC responded when states have hosted Al Bashir or the ICC has referred African states to it for breach of Rome Statute obligations.¹¹⁸ This suggests that the UNSC may be conflicted on Al Bashir's immunities.¹¹⁹

Fourthly, and more generally, there is room to question the ICC's conclusion that there is a new rule of customary international law permitting the prosecution of incumbent heads of state before international criminal courts and tribunals – particularly when the AU, a regional organisation representing 54 states, rejects that position. Additionally, there is a lack of full support for the Rome Statute, including among permanent members of the UNSC with China, Russia and the USA refusing to ratify the treaty. Critically, the Rome Statute makes clear that the ICC does not have unlimited powers or jurisdiction over all states.¹²⁰ Finally, Article 98 also places limits on the exercise of the powers of the ICC in situations in which the question of immunities arise. This limitation exists irrespective of the nature of the crime.

¹¹⁴ Akande D, 'ICC issues detailed decision on Bashir's immunity (at long last) but gets the law wrong', EJIL: *Talk!* 15 December 2011.

¹¹⁵ Schabas WA, *An introduction to the International Criminal Court*, 3ed, Cambridge University Press, New York, 2007, 232.

¹¹⁶ UN Security Council, Provisional Agenda of the 6849 Meeting, (17 October 2012) UN Doc S/PV.6849, 20.

¹¹⁷ 'Statement of the delegation of the Russian Federation (Observer State) at the Twelfth session of the Assembly of State Parties to the Rome Statute of the International Criminal Court', 21 November 2012, 2.

¹¹⁸ *Al Bashir*, Decision on the Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan, ICC-02/05-01/09-227), PTII, 9 March 2015, 17; Decision on the Non-Compliance of the Republic of Chad (n 55), 22.

¹¹⁹ On this point, see also Ventura MJ, 'Escape from Johannesburg?' 13 *Journal of International Criminal Justice*, 2015, 995, 1021.

¹²⁰ Du Plessis M, 'Complementarity and Africa: The promise and problems of international criminal justice' 17 *African Security Review* 4, 2008, 154, 156.

Given that the Rome Statute recognises immunities existing under international law in Article 98, the AU argument that the waiver of immunities under Article 27 is applicable only to states that have ratified the Rome Statute is clearly sustainable. The problem in the *Chad* and *Malawi* cases, and the issuance of arrest warrants for Al Bashir, is that the ICC failed to make clear how Articles 27 and 98 of the Rome Statute operate alongside each other.¹²¹ As we have seen, the general argument was indeed accepted by the ICC in the *DRC* case, and by the South African Supreme Court of Appeal in domestic proceedings.¹²²

5.2 *Implicit lifting of immunity by the UNSC*

Difficulties also arise with the argument of the ICC in the *DRC* case that the UNSC referral of the situation in Darfur had the effect of implicitly waiving Al Bashir's head of state immunity.¹²³ In essence, the proposition the ICC put forward was that a UNSC referral would put a non-party state in analogous position as one which had ratified the Rome Statute.¹²⁴ It is difficult to accept that interpretation, given Russia's comments to the UNSC and the ASP in 2012 discussed above.

In any event, it is difficult to discern the intent to waive immunity from the language of Resolution 1593. Indeed, the duty 'to cooperate fully' imposed by the UNSC is open to the opposite reading, namely, that Sudan *itself* would have to act if a prosecution were to be made effective. Sudan's duty, which originates under the UN Charter, is to provide assistance to the ICC in its investigations and execute the arrest warrant for Al Bashir. It may also be obliged to consider the ICC's request to waive Bashir's immunity, but as a sovereign state cannot be forced to do so. A direction by the UNSC to states to act is by far the more obvious meaning of the reference to co-operation in Resolution 1593.

Furthermore, if implicit authorisation is possible, and was intended, one would expect that to be reflected in the subsequent actions of the UNSC. Instead, it has repeatedly failed to respond to the ICC when it has referred African states to it for breach of Rome Statute obligations. Its silence when it comes to censure of states

¹²¹ Akande D, 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' 7 *Journal of International Criminal Justice* 2, 2009, 333, 337.

¹²² *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre* 867/15 (2016) ZASCA 17(15 March 2016), 66-85.

¹²³ De Hoogh A and Knottnerus A, 'ICC issues new decision on Al-Bashir's immunities – But gets the law wrong ... again' *EJIL: Talk!* 18 April 2014.

¹²⁴ De Hoogh and Knottnerus, 'ICC issues new decision on Al-Bashir's immunities'.

failing to arrest Al Bashir suggests that it does not have a clear policy of removing Al Bashir's immunities itself.

6 Conclusion

This chapter has shown that the AU has a plausible case that the ICC cannot insist on the arrest and surrender of the heads of state of non-party states. The result is that the AU is able to provide a legal rationale for the policy of protecting incumbent leaders – to which it anyway has a strong tendency. The current state of affairs must be considered problematic not only because the international criminal justice system is prevented from operating effectively, but also because it reinforces the tendency of African leaders to value their incumbency above all else. The AU's protection of incumbent leaders, irrespective of their democratic credentials and human rights records, poses a danger to the stability of African states and the well-being of the peoples of the continent.

Much of the responsibility for the current conflict between the AU and the ICC lies with the UNSC. Having referred the situations in Darfur to the ICC, it then failed to engage with the question of deferral in the interests of peace and security. It has not clarified whether its resolutions are intended to affect the immunities of incumbent heads of states. Overall, the UNSC is willing to call upon the ICC when it suits it to do so, but is reluctant to confirm that the ICC has effective jurisdiction over the officials of states not party to the Rome Statute. It is difficult not to link its reluctance on the latter point to the fact that three of the five permanent members of the UNSC (China, Russia and the USA) are themselves not parties to the Rome Statute. These states have demonstrated a lack of consistent support to the ICC. As we have seen, in 2012, Russia disagreed with the ICC on the question of Al Bashir's immunity. Similarly, Al Bashir visited Beijing in 2011, at the invitation of China's President, Xi Jinping.¹²⁵ These two states, in 2008, also supported the AU on the issue of deferral for Al Bashir.¹²⁶ More generally, since 2006, the USA has been entering into bilateral agreements with other states, under which they agree not to surrender each other's nationals to the ICC.¹²⁷ By January

¹²⁵ 'Sudan's Omar Al-Bashir meets China President Hu Jintao' *BBC News*, 29 June 2011. On China, see Jia BB, 'China and the International Criminal Court: Current situation' 10 *Singapore Yearbook of International Law*, 2006, 1, 6-7 and 11.

¹²⁶ See UN Doc. S/PV.5947, Vitaly Churkin, Russian Federation, 3, and Wang Guangya, China, 6.

¹²⁷ On the United States, see Fairlie MA, 'The United States and the International Criminal Court post-Bush: A beautiful courtship but an unlikely marriage' 29 *Berkeley Journal of International Law*, 2011, 529. The following African ICC Member States have signed Article 98 agreements with the US: Be-

2013, the USA had negotiated these agreements with 29 African state parties to the Rome Statute.¹²⁸

How might the situation be resolved so as to unequivocally permit the ICC to take action against the heads of state of non-parties, going forward? One option is for the UNSC or the UNGA to issue an unambiguous statement to the effect that referral under Article 13(b) implies the waiver of immunity in relation to all officials of the state(s) in question. If that is unattainable, or considered too radical a solution, a second option would be for the Assembly of State Parties to refer the matter to the ICJ, relying upon the provision in Article 119(2) of the Rome Statute.¹²⁹ Otherwise, an amendment to Article 98 to the Rome Statute could be sought, something which – by virtue of its Article 121(4) – would bind all parties once ratified by seven-eighths of the Assembly of State Parties. Without such a solution, the opposition of the AU ‘club of incumbents’ towards ICC prosecution of non-party heads of states is likely to have a sufficient legal basis to persist indefinitely, raising questions about the future role of the ICC in Africa. This conclusion is supported by the recent rejection of the ICC by three African states.

nin, Botswana, Burkina Faso, Burundi, Central African Republic, Congo, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Liberia, Malawi, Mauritius, Nigeria, Senegal, Sierra Leone, Uganda, Zambia. See Kelley J, ‘Who keeps international commitments and why? The International Criminal Court and bilateral surrender agreements’ 101 *American Political Science Review* 3, 2007, 573, 574.

¹²⁸ The latest information available to the author is that only 5 African states, Kenya, Mali, Niger, South Africa, and Tanzania, have not entered into non-surrender agreements with the US. United States Department of State, ‘Treaties in Force on 1 January 2013.’

¹²⁹ This possibility arises where there is a disagreement between two or more Member States as to the interpretation or application of the Rome Statute. It is to be read together with the statement in Article 119(1): ‘Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.’

CHAPTER 3

STATE DEFIANCE, TREATY WITHDRAWALS AND THE RESURGENCE OF AFRICAN SOVEREIGN EQUALITY CLAIMS: HISTORICISING THE 2016 AU-ICC COLLECTIVE WITHDRAWAL STRATEGY

HUMPHREY SIPALLA

Abstract

African states, sitting in college at the African Union (AU) have, since their first reactions to the arrest warrants issued against Sudanese President Omar Al Bashir in 2009, been threatening to withdraw from the Rome Statute. However, while individual African state-practice has consistently shown dissonance between what is declared in college and what obtains in individual state-practice, African states' discontent with the Rome Statute system, whatever the varied opinions on its validity, cannot be easily dismissed. At its January and July 2016 Assembly, the AU, continuing its long held call for African states to withdraw from the Rome Statute, adopted resolutions indicating its most operational intent to so withdraw. In October 2016, Burundi, South Africa and The Gambia made much publicised steps towards withdrawing from the Statute in quick succession.

It is not unusual for states to threaten or use withdrawal from international agreements to express discontent with the obligations of the legal regime created by such agreements.

This chapter attempts to historicise the AU collective withdrawal threats through a three part analysis. First, using a comprehensive review of relevant AU Assembly decisions between 2009 and 2016, we will consider how prominent collective withdrawal threats have been in the larger AU Assembly discourse on the three international criminal justice processes that have been the subject of Assembly attention, that is, the International Criminal Court (ICC), the abuse of the principle

of universal jurisdiction and the Hissène Habré case. The key finding here is that the larger AU discourse does not betray a focus on withdrawal. Rather, the main AU Assembly concern seems to be an effort to fight a perceived disregard by the United Nations Security Council (UNSC) for African sovereign equality.

Second, we will review the history of treaty withdrawals, dating from the League of Nations in the 1920s, in order to understand the pattern of state defiance of influential but politically inexpedient international obligations, before both international organisations and international jurisdictions. This will include a short review of state defiance that led, rather, to treaty amendments and court backlash.

Third, we will return to the perceived disregard for African sovereign equality and briefly review African state practice in this regard. Historicising the defiant acts of states should allow us to place the AU collective withdrawal threats in context and see that the current challenges to the jurisdictional authority of the ICC are not altogether unknown to international jurisdictions and may not constitute an existential crisis in international law, but rather, are part of the usual ‘incoherent’ development of international law.

DEFIANCE ETATIQUE, RETRAIT DU TRAITE ET RESURGENCE DES RECLAMATIONS POUR L'EGALITE SOUVERAINE DE L'AFRIQUE : HISTORIQUE DE LA STRATEGIE DE RETRAIT COMMUN DE LA CPI PAR L'UNION AFRICAINE

Résumé

Suite à l'émission du mandat d'arrêt en 2009 contre Omar Al-Bachir, le président soudanais, les pays africains, lors des réunions collégiales de l'Union africaine (UA), menacent de se retirer du Statut de Rome. Toutefois, bien que la pratique individuelle d'un pays africain montre systématiquement une dissonance entre ce qui est déclaré lors de la réunion collégiale et ce qui est obtenu dans la pratique individuelle de l'état, le mécontentement des pays africains vis-à-vis le Statut de Rome ne peut pas être facilement rejeté, même s'il y a des opinions variées sur sa validité. Lors de ses réunions en janvier et en juillet 2016, l'Union africaine a continué à faire appel aux pays africains de se retirer du Statut de Rome et a adopté des résolutions indiquant son intention plus opérationnelle de s'en retirer. En octobre 2016, le Burundi, l'Afrique du Sud et la Gambie se sont retirés l'un après l'autre du Statut de Rome.

Il n'est pas inhabituel que des Etats menacent de se retirer des accords internationaux pour exprimer leur mécontentement avec les obligations du régime juridique créées par de tels accords. La dénonciation d'un traité, est avant tout, la logique conclusion du droit souverain d'être tirée. Cette pratique varie du retrait des organisations internationales à la compétence des juridictions internationales.

Dans ce chapitre, nous allons retracer historiquement les menaces de retrait collectif de l'UA par une analyse en trois parties. Tout d'abord, à l'aide d'un examen exhaustif des décisions pertinentes de l'Assemblée de l'UA entre 2009 et 2016, nous examinerons les principales menaces de retrait collectif qui se sont manifestées dans le discours de l'Assemblée de l'UA sur les trois processus internationaux de justice pénale qui ont fait l'objet de l'attention de l'Assemblée, cet-a-dire, la Cour pénale

internationale (CPI), l'abus du principe de la compétence universelle et l'affaire Hissène Habré. La conclusion clé ici est que le discours de l'UA ne montre pas un accent sur le retrait. Au contraire, la principale préoccupation de l'Assemblée de l'UA semble être un effort pour lutter contre un mépris perçu par le Conseil de sécurité des Nations unies (CSNU) pour l'égalité souveraine africaine.

Deuxièmement, nous examinerons l'histoire des retraits de traités, datant de la Société des Nations dans les années 1920, afin de comprendre d'un modèle de méprise étatique de ses obligations internationales influentes mais impolitiques, devant les organisations internationales et les juridictions internationales. Cela comprendra une brève revue de la défiance de l'État qui a conduit, plutôt, aux amendements aux traités et à la réaction des tribunaux.

Troisièmement, nous reviendrons sur le mépris perçu de l'égalité souveraine africaine et examinerons brièvement la pratique des États africains à cet égard. L'historisation de tels actes provocateurs devrait nous permettre de voir que les défis actuels à l'autorité juridictionnelle de la CPI ne sont pas tout à fait inconnus des compétences internationales et ne peuvent constituer de crise existentielle du droit international, mais plutôt, une partie du développement «incohérent » en matière du droit international.

1 Introduction

[US Chief Justice] John Marshall has made his decision. Now let him enforce it.¹

Since 2008, African states, under the collegial umbrella of the African Union (AU), have expressed disaffection with the institutions and models of international criminal justice. Beginning with a spirited protest against the exercise of universal jurisdiction by European states and later directed at the International Criminal Court (ICC), African states have made clear their willingness to defy the system of

¹ Statement attributed to US President Andrew Jackson (1832). Although considered apocryphal, it represents a classic example of executive defiance of court decisions that are deemed to be politically inexpedient. <<http://www.pbs.org/wnet/supremecourt/antebellum/history2.html>> on 21 February 2016. Here, Jackson was reacting to US Supreme Court decision, *Worcester v Georgia*, 31 US (6 Pet.) 515 (1832), affirming Native American limited sovereignty. It is noteworthy that it is the same 'Marshall court' that handed down the famous *Marbury v Madison*, 5 US 137 (1803) appropriating powers of judicial review of courts over Acts of Congress.

accountability for international crimes. 2016 was a year of tumultuous events on this front. In January and July 2016, the AU Assembly decided to reinvigorate its long considered mass withdrawal from the Rome Statute,² albeit with some resistance from certain states.

With the AU not being party to the Rome Statute,³ AU Assembly threats of Rome Statute withdrawal could have been dismissed as legally immaterial. Yet, in October 2016 alone, Burundi, South Africa and The Gambia made important steps towards withdrawal from the Statute, with similar indications from Kenya, Uganda and Namibia. Botswana, Burkina Faso, the Democratic Republic of Congo (DRC), Nigeria, Senegal, and Tanzania, on the other hand, publicly asserted their commitment to the Rome Statute. These events have caused much public and scholarly debate, with fears of a Rome Statute collapse in Africa.⁴ Yet, it is opined here that much of this debate has been had without requisite historical reflection. What, if anything, can we learn from the history of treaty withdrawals and state defiance of international obligations, and of AU objections to the current practice model of international criminal justice?

In this chapter, we will attempt to historicise state defiance and withdrawals from international agreements and organisations. This attempt aims to place such defiant acts as part of the general incoherent development of international law.⁵

The scope of this reflection excludes the merits and demerits of collective or individual withdrawals. Rather, we will limit ourselves to placing in historical context, the relevant AU Assembly discourse, the threat or actual withdrawal from international conventions or organisations as the preferred tool of the defiant state and its relation to international rule of law, and a resurgent assertion of Africa's right to effective sovereign equality.

² Adopted 17 July 1998, 2187 UNTS 3.

³ By contrast, the AU has acceded to the 1992 United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107, and its 1997 Kyoto Protocol, 2303 UNTS 148 and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD). See Thirteenth Ordinary Session of the Assembly of the Union (13AUA), July 2009, Assembly/AU/Dec.248(XIII), *Decision on the accession of the African Union to the United Nations Framework Convention on Climate Change (UNFCCC) and The Kyoto Protocol*; 13AUA, Assembly/AU/Dec.255(XIII), *Decision on the African Union accession to the United Nations Convention to Combat Desertification (UNCCD)*.

⁴ Barrie S, 'ICC turmoil as African nations withdraw' *Australian Institute of International Affairs*, 16 November 2016.

⁵ '... complete unity has never existed in international law; and its development has always been uneven.' Schwebel S, 'The proliferation of international tribunals: Threat or promise?' in Andemas M and Fairgrieve D (eds) *Judicial review in international perspective: Liber amicorum Lord Slynn of Hadley*, Kluwer Law, 2000, 5.

To be clear, the AU does not consider its opposition to the existing structures of international criminal justice as contrary to its commitment to justice. The relevant AU Assembly decisions on the question have almost consistently avowed the AU's 'commitment to fight impunity in conformity with the provisions of Article 4(h) and 4(o) of the Constitutive Act of the African Union⁶ and; underscore [d] the importance of putting the interests of victims at the centre of all actions in sustaining the fight against impunity.'⁷ The AU Assembly has also, in the same breath, repeatedly called on member states to ratify the Protocol on Amendments to the Protocol of the African Court of Justice and Human Rights adopted in Malabo

⁶ Adopted 11 July 2000, 2158 UNTS 3.

⁷ 12AUA, *Decision on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of the Sudan*, Assembly/AU/Dec.221(XII), 1-3 February 2009, paras.6-8. See also, 11AUA, *Decision on the report of the Commission on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.199(XI), para.3; 12AUA, Assembly/AU/Dec.213(XII), *Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction*, para.3; 13AUA, *Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.245(XIII)Rev.1, July 2009, para.4; 14AUA, *Decision on the report of the second meeting of States Parties to the Rome Statute on the International Criminal Court (ICC)*, Assembly/AU/Dec.270(XIV), 2 February 2010, para.3; 14AUA, *Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.271(XIV), para.4; 14AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.272(XIV), para.2; 15AUA, *Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.292(XV), 25-27 July 2010, para.2; 15AUA, *Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.296(XV), para.2; 15AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.297(XV), para.2; 16AUA, *Decision on the implementation of the decisions on the International Criminal Court*, Assembly/AU/Dec.334(XVI), 30-31 January 2011, para.2; 16AUA, *Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.335(XVI), para.2; 16AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.340(XVI), para.4; 17AUA, *Decision on the implementation of the Assembly decisions on the International Criminal Court*, Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para.2; 17AUA, *Decision on the Hissène Habré Case*, Assembly/AU/Dec.371(XVII), para. 2; 18AUA, *Decision on the progress report of the Commission on the implementation of the Assembly decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.397(XVIII), 29-30 January 2012, para.2; 18AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.401(XVIII), para.3; 19AUA, *Decision on the implementation of the decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.419(XIX), 15-16 July 2012, para. 2; 21AUA, *Decision on international jurisdiction, justice and the International Criminal Court (ICC)*, Assembly/AU/Dec.482(XXI), 26-27 May 2013, para.2 [NB: Botswana entered a reservation on this Decision]; Extraordinary AUA, *Decision on Africa's relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1(Oct.2013), 12 October 2013, para.2; 22AUA, *Decision on the progress report of the Commission on the implementation of the decisions on the International Criminal Court*, Assembly/AU/Dec.493(XXII), 30-31 January 2014, para.2; 24AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.546(XXIV), 30-31 January 2015, para.2; 24AUA, *Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.547(XXIV), para.2; In 25AUA, Assembly/AU/Dec.586(XXV), no commitment to fighting impunity was mentioned; 26AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.590(XXVI), 30-31 January 2016, para. 2(i); 27AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.616(XXVII), 17-18 July 2016, para. 2(i).

on 27 June 2014.⁸ In fact, the AU's drive to vest the African Court of Justice and Human Rights (Merged Court or ACJHR) with criminal jurisdiction originates from its opposition to the abuse of the principle of universal jurisdiction.⁹

The chapter is divided into three parts. The first part recalls the history of African states' collegial protests against the current model of international criminal justice from 2008 to 2016. In particular, it also traces the development of the discourse concerning objections and withdrawal threats during this period. The second part traces the history of state-practice on treaty withdrawals. Some attention is given to withdrawals from treaties establishing international organisations of a certain centrality to harmonious international life. The third part discusses the international rule of law and the resurgence of African sovereign equality discourse.

2 African Rome Statute withdrawal threats and other protests (2008-2016)

International criminal justice and its attendant law have always been highly contested. The earliest suggestions of international criminal prosecutions arose in the negotiations for the post-war Treaty of Versailles.¹⁰ Actual attempts to create an international criminal court date back to when the League of Nations adopted the 1938 Convention for the Creation of an International Criminal Court¹¹ as part of efforts to reconcile states over the prosecution of suspects of *high profile political assassinations*. While the United Nations (UN) was created after the 1939-45 war with the resolve to 'save succeeding generations from the scourge of war',¹² the post-war Nuremberg and Tokyo prosecutions were not without their critics – they

⁸ 24AUA, *Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.547(XXIV), para.15, 17(b); 26AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.590(XXVI), para. 2(i); 27AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.616 (XXVII), para.2(v).

⁹ 12AUA, *Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.213(XII), para.9; 15AUA, *Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.292(XV), para.5.

¹⁰ Schabas W, 'The United Nations War Crimes Commission's proposal for an international criminal court,' 1-<https://openaccess.leidenuniv.nl/bitstream/handle/1887/37246/Schabas_The%20United%20Nations%20War%20Crimes%20Commissions%20Proposal%20for%20an%20International%20Criminal%20Court.pdf?sequence=1> on 5 February 2017 (also published in 25(1) *Criminal Law Forum*, June 2014, 171-189).

¹¹ Drafted as complementary to the 1937 Convention for the Prevention and Punishment of Terrorism. See Saul B, 'Defining terrorism: A conceptual minefield' Sydney Law School Legal Studies Research Paper No. 15/84, September 2015, 3.3; Schabas, 'The UNWCC proposal', 2.

¹² Preamble 1, *Charter of the United Nations*, adopted 26 June 1945, 1 UNTS XVI.

faced accusations of ‘victor’s justice’.¹³ Understandably, post 1945 efforts to create a permanent international criminal court suffered the vagaries of the Cold War until the 1990s, when in the wake of the Yugoslavian and Rwandan genocides, the UN Security Council (UNSC) set up the international tribunals for the Former Yugoslavia and Rwanda.¹⁴ By then, renewed interest in the criminal suppression of mass atrocity and war crimes led to the adoption of the Rome Statute in 1998.¹⁵

African states initially took particular interest in the creation of the ICC. They participated actively in the Rome Statute negotiations, and Senegal was the first state to ratify the new Treaty. Even African states not represented at the Rome Conference initially embraced the Rome Statute.¹⁶ African states were also the first to refer the situations in their countries to the ICC: Uganda (29 January 2004),¹⁷ Democratic Republic of Congo (19 April 2004),¹⁸ Central African Republic (CAR) (7 January 2005)¹⁹. Earlier on 18 April 2003, Cote d’Ivoire had made a declaration recognising the jurisdiction of the ICC, which it later confirmed on 14 December 2010.²⁰

¹³ Lock T and Riem J, ‘Judging Nuremberg: The laws, the rallies, the trials’ 6(12)*German Law Journal*, 2005, 1821. The authors report on a conference to commemorate the 60 anniversary of the International Military Tribunal trials. The authors relate conference debates that present both for and against arguments on the question.

¹⁴ See also, Cassese A, ‘International criminal courts’ in *Cassese’s international criminal law*, 3ed, Oxford University Press, Oxford, 253-270; Crawford J, *Brownlie’s principles of public international law*, Oxford University Press, Oxford, 2012, 672-687.

¹⁵ For a discussion on how accusations of victor’s justice, entailing a breach of the principle *nulla crimen sin lege praevia*, have dogged international criminal tribunals including the ICTY and ICTR, see Wasinski J, ‘Distant sound of thunder: International criminal jurisdiction of the African Court’ in Stormes J et al (eds) *Transitional justice in post-conflict societies in Africa*, Paulines Publications Africa, Nairobi, 2016, 182-198. See also, Frulli M, ‘Jurisdiction *ratione personae*’ in Cassese A, Gaeta P and Jones W (eds) *The Rome Statute of the International Criminal Court: A commentary*, Oxford University Press, Oxford, 527-528. Cassese is quick to remind us that ‘whether or not [the addition of new offences in the London Agreement] was done in breach of the principle of *nullum crimen sine lege*, it is a fact that since 1945 those crimes gradually became proscribed by customary international law.’ Cassese, ‘International criminal courts’, 258. Crawford argues that ‘the promise that the [Nuremberg Charter principles] would be treated as international law’ aimed at ‘[redeeming] the apparent selectivity and retrospectivity of Nuremberg.’ Crawford, *Brownlie’s principles of public international law*, 671.

¹⁶ Nyawo cites The Gambia, Equatorial Guinea, Seychelles and Somalia. Nyawo J, ‘Through Antonio Gramsci’s lens: Understanding the dynamic relationship between the AU and the ICC’ in Stormes J et al (eds) *Transitional justice in post-conflict societies in Africa*, Paulines Publications Africa, Nairobi, 2016, 223.

¹⁷ ICC, ‘Situation in Uganda: ICC-02/04’-<<https://www.icc-cpi.int/uganda>> on 20 February 2017.

¹⁸ ICC, ‘Situation in the Democratic Republic of Congo: ICC-01/04’-<<https://www.icc-cpi.int/drc>> on 20 February 2017.

¹⁹ ICC, ‘Situation in the Central African Republic: ICC-01/05’-<<https://www.icc-cpi.int/car>> on 20 February 2017.

²⁰ ICC, ‘Situation in the Republic of Cote d’Ivoire: IC-02/11’-<<https://www.icc-cpi.int/cdi>> on 20 February 2017.

Mali conducted a self-referral to the ICC on 13 July 2012,²¹ while Comoros referred the situation resulting from the attack on 31 May 2010 by Israeli Defence Forces on its flag-bearing ship that was among the ‘Gaza Flotilla’ on 14 May 2013.²² On 30 May 2014, the CAR made a further referral to the Court for events from May 2012.²³ Gabon, which had ratified the Rome Statute on 20 September 2000, referred the situation in that country to the ICC on 21 September 2016 for events since May 2016.²⁴

Individual African state-practice has shown *dissonance* between what is declared in college and what obtains in practice. In fact, subsequent to the first threat of mass withdrawal in 2013,²⁵ CAR and Gabon referred themselves without entering reservations to AU Assembly decisions. James Nyawo attributes this continuing ratification of the Rome Statute and referral of cases by African states (citing Tunisia, Cote d’Ivoire, Mali and the Comoros), despite AU protestations, to the Gramscian understanding of hegemony. Here, both consent and coercion are deployed by the dominant force to sustain its preferred order.²⁶

2.1 *Antecedents of the AU-ICC-UNSC²⁷ clash*

The stage for a protracted controversy between the AU and the international structures related to international criminal justice was set on 31 March 2005 when the UNSC referred the situation in Darfur to the ICC, Sudan being a non-state party

²¹ ICC, ‘Situation in the Republic of Mali: ICC-01/12’-<<https://www.icc-cpi.int/mali>> on 20 February 2017.

²² ICC, ‘Preliminary examination: Registered vessels of Comoros, Greece and Cambodia’-<<https://www.icc-cpi.int/comoros>> on 20 February 2017.

²³ ICC, ‘Situation in the ICC, ‘Situation in the Central African Republic II: ICC-01/14’-<<https://www.icc-cpi.int/carII>> on 20 February 2017.

²⁴ ICC-OTP, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic’ 29 September 2016 -<<https://www.icc-cpi.int/Pages/item.aspx?name=160929-otp-stat-gabon>> on 15 November 2016.

²⁵ Patel K, ‘Kenya’s threat to withdraw from the ICC: What will SA do?’ *Daily Maverick*, 8 October 2013; ‘African Union summit on ICC pullout over Ruto trial’ *BBC News*, 20 September 2013. Although publicly discussed, the mass withdrawal threat is not mentioned in the formal AU Assembly decisions of May and October 2013, an indication of the divisive nature of the proposal.

²⁶ See generally, Nyawo, ‘Through Antonio Gramsci’s lens’, 216-233. Nyawo’s reflection on why states would bind themselves to restrictive international obligations recall those of Andrew Moravcsik in ‘The origins of human rights regimes: Democratic delegation in post-war Europe’ 54(2) *International Organization*, Spring 2000, 217-252.

²⁷ As we shall later discuss from our analysis of the official AU discourse, perceptions of UNSC fairness are at the very centre of this clash.

to the Rome Statute.²⁸ This action did not seem to elicit any reaction from the AU Assembly.

Spirited protests in the AU against international criminal justice structures rather began with objections²⁹ to the action by European states to institute criminal proceedings against high-ranking African state officials using universal jurisdiction^{30, 31}. In fact, the AU Assembly requested the Commission of the African Union

²⁸ It is instructive that Sudan has consistently been opposed to the Rome Statute system, and joined the US, Israel, Libya, Iraq, China and Syria in voting against the adoption of the Statute at the Rome Conference. Cassese A, 'International criminal courts', 263.

²⁹ 11AUA, Assembly/AU/Dec.199(XI); 12AUA, Assembly/AU/Dec.213(XII). This included urging active African participation in discussions on the scope and application of the principle of universal jurisdiction of the Sixth Committee during the sixty-seventh session of the United Nations General Assembly (UNGA) pursuant to UNGA Res. A/Res/64/L117 on the scope and application of the principle of universal jurisdiction, adopted 16 December 2009, (19AUA, Assembly/AU/Dec.420(XIX), para.2), the elaboration of the Report of the AU-EU Technical Ad-hoc Expert Group on the Principle of Universal Jurisdiction, 2009, a call for the vesting of the African Court with jurisdiction over international crimes 'such as genocide, crimes against humanity and war crimes' (12AUA, Assembly/AU/Dec.213(XII), para.9) and the elaboration of the AU Model Law on Universal Jurisdiction, May 2012.

³⁰ Universal jurisdiction is the principle of law by which a state can claim exercise of jurisdiction over crimes that were committed neither in its territory nor by its national, and therefore lacking any traditional jurisdictional link. Having been established centuries ago for the quite sensible aim of combating piracy, it has since evolved to cover the crimes of 'international concern', namely; genocide, war crimes and crimes against humanity. However, when crimes are tried by an international court, such prosecutions of 'international jurisdiction' are considered distinct from universal jurisdiction. It is noteworthy, however, that at the Rome Conference, the majority of states supported the proposal that the ICC be vested with universal jurisdiction, only for strong US, Chinese and Russian resistance to needlessly scuttle it – these have not ratified the Statute anyways. See Wasinski, 'Distant sound of thunder', 209, citing Zwaneburg M, 'The Statute for an International Criminal Court and the US: Peacekeepers under fire?' 10(1) *European Journal on International Law*, 136 and Schabas W, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2004, 75.

³¹ Wasinski lists the following: Spain, *Obiang Nguema et al*, Audencia Nacional, Central Examining Magistrate No. 5 (23 December 1998); France, *SOS Attentas et Beatrice Castelnau d'Esnault c Gadafi* Court of Cassation (13 March 2001); Belgium, *Public Prosecutor v Ndobasi*, Court of Appeal of Brussels (16 April 2002); United Kingdom, *Re. Mugabe*, Bow Street Magistrate's Court (14 January 2004); the Netherlands, a criminal complaint lodged against Paul Kagame on 4 April 2014. See Wasinski, 'Distant sound of thunder', 180, note 2. See also, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16 November 2010, ICJ Reports 2010, 635; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422; and most recently, ICJ Press Release, 'The Republic of Equatorial Guinea institutes proceedings against France with regard to "the immunity from criminal jurisdiction of [its] Second Vice-President in charge of Defence and State Security, and the legal status of the building which houses [its] Embassy in France"' 14 June 2016, No.2016/18. It is arguable that the ire of the AU, via Rwanda, was however attracted by the arrest of a Rwandese state official enjoying diplomatic immunity, Rose Kabuye, on 10 November 2008 in Frankfurt while on official visit and transferred to France to answer charges of complicity in the Rwandan Genocide. This followed warrants of arrest issued by then French investigating judge Jean-Louis Bruguière in October 2006 against nine senior Rwandan officials

(AU Commission) and the African Commission on Human and Peoples' Rights (African Commission) to study and report back on the implications of vesting the then recently proposed 'Merged Court',³² with criminal jurisdiction over international crimes in February 2009.³³ This was a month before the first arrest warrant against a sitting African head of state was issued.³⁴ While it can be argued that African states presumably knew of the coming warrant against Sudanese President Omar Al Bashir³⁵ prior to their formal issuance, it is the perceived abuse of universal jurisdiction that took centre stage in AU protests against international criminal justice in 2008.

2.2 AU-ICC-UNSC clash (2009-2016)

In February 2009, the 12th AU Assembly pronounced itself on its objections to the ICC for the first time. Prior to this, and despite the 2005 UNSC referral, the AU Assembly had addressed only the Hissène Habré case and the perceived abuse of the principle of universal jurisdiction.³⁶ By the February 2009 Assembly, the ICC Pre-Trial Chamber was considering Sudan situation indictments, including against sitting President Omar Al Bashir. The warrants of arrest against President Bashir came on 4 March 2009 and 12 July 2010 respectively.

including President Paul Kagame. A subsequent inquiry by his successor, Marc Trévidic, reversing the earlier conclusions was published in 10 January 2012. These French-Rwandese clashes led to the first in a series of formal protests by the African Union (AU) in the Decision on Abuse of the Principle of Universal Jurisdiction in 2008, and the establishment of a joint AU-EU panel. See Council of the European Union, *The AU-EU expert report on the principle of universal jurisdiction*, Brussels, 2009, 8672/1/09.

³² The AU Assembly had only adopted the 'Merged Court' Protocol in July 2008. See 11 AUA, *Decision on the single legal instrument on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice*, Assembly/AU/December 196(XI).

³³ 12AUA, Assembly/AU/Dec.213(XII).

³⁴ Wasinski, 'Distant sound of thunder', 198.

³⁵ See, retelling of a discussion between US Special Envoy to Sudan Richard Williamson and then ICC Chief Prosecutor Luis Moreno Ocampo in 2008 illuminating this possibility. The exchange, told by Williamson, thus went: 'I told him that it would be a bad idea – that an arrest warrant would not be productive. I told him not to go after the top. It limits the options of how we can move forward. He said: "my job's easier than yours. I'm like a train moving down the track and I just follow the evidence." That's how he characterized it. I said "I'm afraid you might hurt the institution you are trying to build." We agreed to disagree.' See Bosco D, *Rough justice: The International Criminal Court in a world of power politics*, Oxford University Press, 2014, 143, cited in Asin J, 'The 'great escape': In pursuit of President Al Bashir in South Africa' 2(1) *Strathmore Law Journal*, August 2016, 165.

³⁶ A review of the collection of decisions and declarations of the AU Assembly between 2005 and 2009 (available at AU, 'Decisions and declarations of the Assembly' -<<https://au.int/web/en/decisions/assembly>> indicates this.

To get a better view of the objectionable matters that drove the AU Member-State defiance that led to the October 2016 withdrawals steps, we turn to the relevant AU Assembly decisions. In the 17 AU Assembly sessions between 2009 and 2016, the AU-ICC-UNSC clash has been addressed 15 times, with no relevant AU Assembly decision adopted at the 20th and 23rd Assembly sessions in January 2013 and June 2014³⁷ respectively.

In these 15 decisions, the AU Assembly has (in order of frequency as a measure of priority): urged the UNSC (25 times) to defer cases against sitting heads of state (Sudan, Kenya and Libya),³⁸ and later, demanded withdrawal of the Sudan referral (10 times in just 4 decisions)³⁹; urged African states to speak with one voice at international fora in order to protect African interests (21 times)⁴⁰; sought to amend the Rome Statute (19 times)⁴¹; reiterated AU's commitment to fighting impunity (16 times)⁴²; challenged the discretion of the ICC bench and Office of the Prosecutor of the ICC (OTP) (15 times)⁴³; asserted the view that criminal proceedings against African leaders may jeopardise fragile peace processes (14 times)⁴⁴; called on AU members not to cooperate with the ICC, particularly with regard to the Bashir arrest warrant (14 times)⁴⁵ and the Kenyan situation (twice)⁴⁶; and linked AU-ICC concerns to the abuse of universal jurisdiction and the expansion of the ACJHR to include a criminal jurisdiction (12 times).⁴⁷

³⁷ Curiously, session 23 adopted the Malabo Protocol. 23AUA, *Decision on the draft legal instruments*, Assembly/AU/Dec.529(XXIII), para.2(e).

³⁸ 12AUA, para.3; 13AUA, para.9; 14AUA, para.10; 15AUA, para.4; 16AUA, paras.3 and 6; 17AUA, paras.3-4 and 6; 18AUA, paras.3-4; 19AUA, para.4; 21AUA, para.3; Extraordinary AUA, paras.10(iii) and 10(ix); 22AUA, paras.4, 6, 7 and 8; 24AUA, paras.3 and 17(d); 26AUA, paras.2(ii, iii) and 8; 27AUA, para.2(ii).

³⁹ 24AUA, para.17(e); 25AUA, paras.2(ii) and 5(i,ii); 26AUA, paras.2(iii), 5(i,ii) and 8; 27AUA, paras.2(iii) and 5(iii, a).

⁴⁰ 14AUA, para.6; 15AUA, para.7; 16AUA, para.9; 17AUA, para.8; 18AUA, para.9; 19AUA, paras.8 and 9; 21AUA, para.5; 22AUA, paras.3 and 12(i),(ii); 24AUA, paras.6, 10 and 13; 25AUA, para.4; 26AUA, paras.2(iv), 6, 10(i) and 11(i); 27AUA, para.5(i, ii).

⁴¹ 13AUA, para.8(i, ii); 14AUA, paras.2(i,ii), 5, 7 and 8; 15AUA, para.8; 16AUA, paras.7 and 8; 22AUA, paras.11 and 12(i); 24AUA, paras.11 and 17(a); 26AUA, para.7; 27AUA, para.5 (i), (ii) and (iii.c,d).

⁴² See note 7 above.

⁴³ 13AUA, para.8(vi); 14AUA, para.2(iii); 16AUA, para.4; Extraordinary AUA, paras.10(x) and 17(d); 24AUA, paras.4(a), 17(e), 18 and 19; 25AUA, para.2(i); 26AUA, paras.2(ii), 2(iv), 4 and 5; 27AUA, para.3.

⁴⁴ 12AUA, para.2; 13AUA, para.3; 16AUA, paras.5 and 6; 17AUA, paras.5 and 6; 21AUA, paras.4 and 5; Extraordinary AUA, paras.3, 5, 6, 7,10(i) and 10(vii).

⁴⁵ 13AUA, para.10; 15AUA, paras.5 and 8; 16AUA, paras.4 and 5; 17AUA, para.5; 18AUA, paras.7 and 8; 18AUA, para.7; 21AUA, para.3; 26AUA, paras.3 and 4; 27AUA, para.2(iv, v).

⁴⁶ Extraordinary AUA, para.10(i) and 10(xi).

⁴⁷ 13AUA, para.5; 19AUA, para.11; 21AUA, para.8; Extraordinary AUA, paras.3 and 10(iv, v); 22AUA, para.13; 24AUA, paras.14, 15 and 17(b); 26AUA, para.11(ii); 27AUA, para.2(v).

By contrast, the AU Assembly has: affirmed (8 times) their view on the applicability of sovereign immunities under the Rome Statute system based on reading of Article 27 and 98(1)⁴⁸ and more so, for states not party to the Statute⁴⁹, including considering seeking an advisory opinion from the International Court of Justice (ICJ) on the question of immunities of heads of state and senior state officials of states not party to the Rome Statute (twice)⁵⁰; lamented OTP misconduct (8 times)⁵¹; sought to amend the ICC Rules of Procedure and Evidence or secure understandings on its interpretation (7 times)⁵²; urged member-states to ‘balance, where applicable, their obligations to the African Union (AU) with their obligations to ICC,’ (thrice)⁵³; urged the conclusion of bilateral immunity agreements among African states under Rome Statute Article 98 (twice)⁵⁴; supported Libya’s (once)⁵⁵ and Kenya’s belated claim to complementarity (thrice)⁵⁶; encouraged legal and judicial cooperation among member-states (once)⁵⁷; and requested member-states wishing to refer cases to the ICC to inform and seek the advice of the AU (once).⁵⁸

Significantly, the AU Assembly has asserted (thrice) a right to ‘take any further actions’ to preserve African state stability, dignity and sovereignty, which can be understood as a suggestion of mass withdrawal⁵⁹ and overtly threatened withdrawal (twice).⁶⁰

⁴⁸ 13AUA, paras.8(iv) and 10; 18 AUA, para.6; Extraordinary AUA, paras.4, 5, 9 and 10(vii); 24 AUA, paras.4 and 7.

⁴⁹ 14AUA, para.2(iv).

⁵⁰ 18AUA, para.10; 19AUA, para.3.

⁵¹ 13AUA, para.11; 15AUA, para.9; 17AUA, para.6; 24AUA, paras.4(b) and 8; 26AUA, para.9(i, ii); 27AUA, para.3.

⁵² 13AUA, para. 8(iii, v); Extraordinary AUA, para.10(vi); 22AUA, para.10; 24AUA, para.4(a); 26AUA, para.7; 27AUA, para.5(i).

⁵³ 15AUA, Assembly/AU/Dec.296(XV), para.6; 18AUA, para.5; 19AUA, para.5.

⁵⁴ 18AUA, para.7; 19AUA, para.7.

⁵⁵ 19AUA, para.6.

⁵⁶ 17AUA, para.4; 21AUA, para.6 (see also para.7). ‘Belated’ as the Kenyan Parliament had, prior to the ICC OTP *proprio motu* seizure of the Kenyan situation, debated and discarded the option of setting up a local tribunal to try suspects of the 2007-8 post-election violence (PEV) in 2009 as recommended by the Commission of Inquiry into PEV (CIPEV). CIPEV *Final report*, 15 October 2008, Part IV; also, Asaala EO, ‘The ICC factor in transitional justice in Kenya’ in Ambos K and Maunganidze O (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa*, Universitätsverlag Gottingen, Gottingen, 2012, 120-143, especially, 124-134.

⁵⁷ 13AUA, para.6.

⁵⁸ Extraordinary AUA, para.10(viii).

⁵⁹ 13AUA, para.12; 22AUA, para.9; 24AUA, para.17(c).

⁶⁰ 26AUA, para. 10(iv); 27 AUA, para. 5(iii. b).

Several remarks can be made from the above analysis. First and most striking is that overt and disguised withdrawal threats formally appear so rarely as to suggest their relative lack of priority to the AU Assembly. Rather, UNSC disregard and disrespect for the immunity of high state officials are most prominent, in both the universal and ICC jurisdiction contexts.

While AU Assembly frustration over UNSC dismissal of its concerns is markedly high throughout the period under review, the official documents record a decrease in concern over dismissal at the Rome Statute Assembly of State Parties (ASP), especially from around the 12th ASP, while at the same time registering an increase in forthright language over conduct of the ICC. The latter begins with explicit references to the OTP but moves more towards harsh criticism of the ICC bench as the cases against the Kenyan President and his Deputy progress beyond the investigation stage largely controlled by the OTP. It can be argued that AU Assembly decision language then becomes more conciliatory to the ICC as the concerted official African action at the November 2013 12 ASP bears fruit for the Assembly's views on the limits of ICC jurisdiction. In fact, references to the need to maintain a common position among African states at the ASP become more prominent from 2014.

What remains consistent through the period under review is the dismay, frustration and later angst at UNSC dismissal of AU concerns and the central problem of sovereign immunities that predated the AU-ICC-UNSC clash.

It is against this background, we opine, that the rise of AU withdrawal threats needs be seen. Assuming that the phrase 'take any further action' was AU diplomatic speak for mass withdrawal,⁶¹ it is instructive that such language appears only thrice, with a lull between July 2009 and January 2014. Overt mention of withdrawal on the other hand is absent in the relevant decisions until January 2016, which is also the first time the AU Assembly meets after the Bashir fiasco in South Africa and the formation of the Open-Ended Ministerial Committee, composed of full powers bearing foreign ministers, to follow-up on the relevant Assembly decisions.

Among the best illustrations of *dissonance* that lends credence to the view that AU discourse is more political than legal is the conduct of Chad. In only the second AU Assembly decision on the ICC and the first after the arrest warrant against President Bashir was issued, Chad entered a reservation to the clause that called

⁶¹ 'Take any necessary measures' is the UNSC language authorising coercive action under UN Charter Chapter VII.

on AU member-states to not cooperate with the ICC on arresting Bashir.⁶² In 2008, the Chadian Government was under the threat of an armed coup from elements opposed to the Itno regime that were considered to have close ties with Khartoum.⁶³ However, after Bashir mended the fences with his neighbour, he has been received in N'djamena twice, much to the chagrin of the ICC⁶⁴ and to the commendation of the AU Assembly.⁶⁵

2.3 A mass withdrawal roadmap

Among the matters considered at the January 2016 AU Assembly was the much anticipated first time invocation of the AU's right to intervene in Burundi under Article 4(h) of the Constitutive Act.⁶⁶ However, the AU Assembly instead made its first official mention of collective withdrawal from the Rome Statute, thus receiving significant media attention.⁶⁷

The January 2016 Assembly's Decision on ICC included the following language:

DECIDES The Open-ended Ministerial Committee's mandate will include *the urgent development of a comprehensive strategy including collective withdrawal from the ICC* to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision.⁶⁸

⁶² 13AUA, para.10.

⁶³ Ngarmbassa M, 'Chad threatens to strike rebels inside Sudan' *Reuters*, 5 January 2008; 'France condemns Chad rebels, accuses Sudan' *Sudan Tribune*, 3 February 2008; 'Chad, Sudan sign peace deal' *CNN*, 13 March 2008.

⁶⁴ ICC-02/05-01- Pre-trial I Chamber decision of 27 August 2010 informing UNSC and ASP of Bashir's visit to Chad and Kenya.

⁶⁵ 16AUA, para.5; 21AUA, para.3. While an affirmation of the AU view of international justice threatening fragile peace processes, opinion on the validity of this view is not unanimous. See Maunganidze OA, 'International criminal justice as integral to peacebuilding in Africa: Beyond the 'peace v justice' conundrum', in Van der Merwe HJ and Kemp G (eds) *International criminal justice in Africa*, Strathmore University Press, Nairobi, 2016, 47-62.

⁶⁶ By affirming the AU Peace and Security Council (AU PSC) Communiqué PSC/PR/COMM.(DLXV) of 17 December 2015 authorising 'the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU).' However, in a complete change of tact, the Assembly, in electing states to the 15 open seats to the AU PSC, included Burundi. See 'Five decisions from the 26 AU Summit' 10 February 2016, Institute for Peace and Security Studies, Addis Ababa University-<http://www.ipss-addis.org/new-ipss/news-events/five_decisions_from_the_26th_au_summit/> on 6 March 2016.

⁶⁷ Kinyanjui M, 'African Union backs Uhuru's call to withdraw from the Rome Statute' *Daily Nation*, 31 January 2016; Editorial 'Leaving ICC is not an option for Africa' *Daily Nation*, 31 January 2016; AFP, 'African Union members back Kenyan plan to leave ICC' *The Guardian*, 1 February 2016.

⁶⁸ 26AUA, Assembly/AU/Dec.590(XXVI) *Decision on the International Criminal Court*, para. 10(iv). (author's emphasis)

The reporting of the collective withdrawal strategy was itself clouded in mystery in the immediate aftermath of the AU Assembly.⁶⁹ Although initially reported as a *fait accompli* decision to collectively withdraw from the Rome Statute, later reporting clarified that the AU Assembly ‘endorse[d] having its Open-Ended Committee of African Foreign Ministers on the ICC consider a roadmap on possible withdrawal’.⁷⁰ The Open-Ended Ministerial Committee was mandated to engage the UNSC ‘on the previous decision for deferral of the ICC proceedings against President Omar al-Bashir of Sudan and Kenya’s Deputy President William Ruto in accordance with Article 16 of the Rome Statute.’⁷¹

And with this clarification, it seemed that this ‘roadmap’ was truly nothing but the usual hype. ‘African states are not planning to pull out of the Rome Statute after all.’⁷² The move was deemed as

just the latest in a long-running anti-ICC campaign led by Sudan’s President Omar al-Bashir and Kenya’s President Uhuru Kenyatta and deputy William Ruto – all of whom have been charged by the ICC Prosecutor with committing grave crimes. Withdrawal from the Statute would have no impact on cases currently pending before the Court.⁷³

However, subsequent events would seem to indicate a more fundamental concern. On 8 February 2016, barely a week after the AU Assembly, the AU Commission Acting Chairperson, Erastus Mwencha,⁷⁴ informed the February 2016 UNSC President of the AU’s reiterated decisions seeking the abovementioned deferrals, expressed regret that ‘these requests have either not been acted upon or have been turned down’ and informed the UNSC of the Committee’s intended visit to New York in March 2016 to ‘engage the UNSC on all issues that have been consistently raised by the African Union.’⁷⁵

⁶⁹ Oluoch F, ‘Africa: Mystery of the “Resolution” at Addis African Union Summit to walk out of ICC’ *The East African*, 6 February 2016.

⁷⁰ Keppler E, ‘Dispatches: On Africa and the ICC, don’t buy all the hype’ *Human Rights Watch Dispatches*, 1 February 2016.

⁷¹ Oluoch, ‘Africa: Mystery of the “Resolution.”’

⁷² ‘African States will not withdraw from the Rome Statute contrary to media reports’ *Journalists for Justice*, 11 February 2016.

⁷³ ‘6 facts about the African Union Summit and the ICC’ *#globalJUSTICE*, 4 February 2016.

⁷⁴ By letter BC/U/159/02.16.

⁷⁵ See Letter of the Permanent Observer Mission of the African Union to the United Nations in New York, NY/AU/POL/14/104/16. See also, ‘AU writes to UN Security Council over termination of Ruto and deferral of Bashir cases’ *Journalists for Justice*, 19 February 2016.

At the subsequent July 2016 Ordinary Session of the AU Assembly in Kigali, while the AU Assembly formally decided to support the continued work of the Open Ended Ministerial Committee ‘on the development of a comprehensive strategy including on a collective withdrawal from the ICC’,⁷⁶ there was stronger opposition to the mass withdrawal project among AU member-states.⁷⁷ Clearly, the matter itself was not laid to rest. Predictably, it fell to the individual states to act.

Kenya’s Parliament had, in September 2013, approved a motion to withdraw but this was not acted upon.⁷⁸ In June 2016, a bill was tabled to repeal the domesticating 2007 International Crimes Act, but this matter has, as at November 2016, stalled.⁷⁹

On 18 October 2016, Burundi’s President assented to a law that authorised ICC withdrawal.⁸⁰ On 21 October 2016, South Africa deposited its notification of withdrawal with the UN Secretary General.⁸¹ On 24 October 2016, The Gambia also announced its withdrawal.⁸² These announcements rocked public and diplomatic discourse and stirred some soul searching,⁸³ including within the ICC.⁸⁴ ASP President and Senegalese Justice Minister Sidiki Kaba called for ‘dialogue with the nations which want to leave the ICC. For that we must listen to their concerns, their recriminations and their criticism.’⁸⁵ South Africa’s withdrawal, in particular, drew strong reactions, including from neighbouring state Botswana.⁸⁶ While Namibia’s

⁷⁶ 26AUA, Assembly/AU/Dec.616(XXVII), para. 5(iii)(b).

⁷⁷ 27AUA, Assembly/AU/Dec.616(XXVII), para.5(iii,b). Reservations entered by Cabo Verde, Burkina Faso, DRC Senegal. No state entered a reservation to the earlier 26AUA, Assembly/AU/Dec.590(XXVI), para.10(iv) first officially endorsing mass withdrawal.

⁷⁸ Zimeta G, ‘What Kenya’s withdrawal means for the international criminal court’ *The Guardian*, 6 September 2013.

⁷⁹ Njagi J, ‘Kenya moves closer to pulling out of ICC’ *Daily Nation*, 8 June 2016; Ayaga W, Otieno S, ‘Kenya yet to decide on ICC withdrawal’ *The Standard*, 24 October 2016; Mathenge O, ‘Jubilee renews push to have Kenya withdraw from ICC’ *The Star (Kenya)*, 24 October 2016.

⁸⁰ Van Trigt E, ‘Africa and withdrawal from the ICC’ *Peace Palace Library Blog*, 28 October 2016; also, AFP, ‘Burundi notifies United Nations of ICC pull out’ 27 October 2016.

⁸¹ Van Trigt, ‘Africa and withdrawal from the ICC’; BBC, ‘South Africa begins withdrawal from International Criminal Court’ *Daily Nation*, 21 October 2016.

⁸² Van Trigt, ‘Africa and withdrawal from the ICC.’

⁸³ Owiso R, ‘South Africa’s intention to withdraw from the Rome Statute of the International Criminal Court: Time to seriously consider an African alternative?’ *AfricLaw.com*, 28 October 2016.

⁸⁴ ‘ICC wants dialogue with African nations set to quit’ *Daily Monitor Uganda*, 25 October 2016.

⁸⁵ ‘ICC wants dialogue with African nations set to quit’ *Daily Monitor Uganda*.

⁸⁶ Republic of Botswana, Ministry of Foreign Affairs, ‘Statement on the withdrawal of South Africa from the Rome Statute of the ICC’ 25 October 2016; ‘South Africa opposition party challenges ICC withdrawal in court’ *Reuters*, 25 October 2016.

Cabinet had approved a withdrawal recommendation in November 2015,⁸⁷ it is yet to formally withdraw. Uganda too has indicated interest in withdrawing.⁸⁸

At the UN General Assembly in October 2016, Kenya led Burundi and Sudan in a sharp critique of the ICC.⁸⁹ Tanzania, Nigeria and Senegal however publicly affirmed their support for the ICC.⁹⁰ By this point, it was clear that while frustration over perceived dismissal of African concerns was widespread and long held, clear divisions existed over what ‘further actions’ need be taken.

The discourse on AU objections to the conduct of international criminal justice has been uneven and incoherent. And so, it may be worthwhile to contemplate the history of threats of or withdrawals from international agreements. Granted, it is highly likely – nay, it is certain⁹¹ – that, even if the current spate of withdrawals continues and is further endorsed at the January 2017 AU Assembly, not all African state parties to the Rome Statute would exercise their right to withdraw under Article 127(1) of the Rome Statute.

The foregoing review of Assembly decisions has allowed us to confirm the low priority of Rome Statute withdrawal to the AU Assembly relative to the perceived disregard for African sovereign equality, mostly by UNSC dismissal of AU concerns. This seems to suggest that withdrawal becomes a latter day tool of the state displeased with the political ramifications of the conduct of international institutions. Could this be a peculiar occurrence in international law? To answer this question, we now turn to international law history in the 20th Century. This should allow us to see whether the dissonance of African state practice and use of withdrawal threats to assert larger political concerns has any trend over time and space.

3 State practice on defiance and treaty withdrawals

This chapter’s central aim is to place in the context of history, the AU’s January 2016 threat to withdraw en masse from the Rome Statute in order to understand its import in the larger practice of states. This limited historical survey below is

⁸⁷ Shinovene I, ‘Cabinet affirms ICC withdrawal’ *The Namibian*, 24 November 2015.

⁸⁸ Mwangi C, ‘ICC meeting turns out to be doleful affair’ *Daily Nation*, 19 November 2016. Reporting also on the Russian signature withdrawal and Philippine withdrawal threat announced at the November 2016 ASP.

⁸⁹ Kelley KJ, ‘Kenya criticises ICC as other African countries defend it’ *Daily Nation*, 1 November 2016.

⁹⁰ Kelley, ‘Kenya criticises ICC as other African countries defend it’.

⁹¹ See public statement by Tanzania’s Foreign Minister, Augustine Mahiga in Mwakyusa A, ‘Dar reiterates support for ICC’ *Daily News Tanzania*, 17 February 2016; ‘Tanzania is not withdrawing from the Rome Statute’ *Journalists for Justice*, 18 February 2016.

done with regard to defiance of international jurisdictions, and of international organisations.

3.1 *Tantrums and withdrawals from the competence of international jurisdictions*

No less a body than the ICJ suffered definitive defiance by the US over its reparations demands for violating Nicaraguan sovereignty in *Military and Paramilitary Activities*.⁹² This 1986 ICJ decision offers probably the most high-profile case of a defiant state withdrawing from an international jurisdiction after losing a case (the US withdrew after losing at the preliminary stage). In 2012, Colombia, angered by the ICJ's affirmation of Nicaraguan sovereignty over disputed Caribbean islands and waters in *Territorial and Maritime Dispute*,⁹³ withdrew its acceptance of the Court's jurisdiction by denouncing the 1948 American Treaty on Pacific Settlements (ironically, the Pact of Bogota).

Predictably, human rights law features prominently in the abovementioned examples of state withdrawals. When the Human Rights Committee (CCPR) -the treaty monitor for the International Covenant on Civil and Political Rights (ICCPR) - issued its General Comment 24 on Invalidity of Reservations to the ICCPR in 1994, the US and UK issued strenuous challenges.⁹⁴

In 1997, North Korea attempted to withdraw from the ICCPR, which lacks an express withdrawal provision,⁹⁵ following a resolution of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities that was critical of its human rights practice.⁹⁶

The CCPR also drew the ire of Trinidad and Tobago by insisting that its death penalty practice was subject to its review. In 1998, Trinidad and Tobago withdrew

⁹² *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14.

⁹³ *Territorial and maritime dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624.

⁹⁴ See, US and UK observations transmitted by letters dated 28 March 1995 and 21 July 1995 UN Doc A/50/40 in response to CCPR General Comment 24.

⁹⁵ The Vienna Convention on the Law of Treaties provides that, in such instances, a treaty is not subject to withdrawal unless 'it is established that the parties intended to admit the possibility' or it is so implied in 'the nature of the treaty.' Article 56(1). See also, Human Rights Committee, *General Comment 26*, affirming the deliberate nature of omission of withdrawal provisions. See as well, Viljoen's discussion on this, and its link to the withdrawal of signature, relevant, in the present discussion to the US (2002) and Russia (2016). Viljoen F, *International human rights law in Africa*, Oxford, 2012, 27.

⁹⁶ UN Doc. E/CN.4/Sub.2/1997/50, 5 November 1997, Resolution 1997/3, cited in Viljoen, *International human rights law in Africa*, 28. The UN Secretary General responded: thus: 'a withdrawal from the Covenant would not appear possible' unless all state parties so agree. Viljoen, *International human rights law in Africa*, 28, citing UN Doc. E/CN.4/1998/2.

its acceptance of the (First) Optional Protocol to the ICCPR (ICCPR OP), thereby rejecting the CCPR's complaint procedure competence, again over adverse findings against it.⁹⁷ Trinidad however re-acceded to the Treaty but with a reservation excluding the consideration of death penalty matters, which the CCPR rejected.⁹⁸ Trinidad then denounced the ICCPR OP in 2000.

Simultaneously, Trinidad and Tobago was also facing similar challenges to its mandatory death penalty practice before the Inter-American Court on Human Rights. In resisting the determination made in *Hilaire, Constantine and Benjamin*,⁹⁹ in May 1998, Trinidad and Tobago announced its denunciation of the American Convention on Human Rights (ACHR), blaming the Inter-American Court on Human Rights (Inter-American Court) for delayed proceedings that prevented implementation of the death penalty within municipal legal time limits.¹⁰⁰ The Inter-American Court nonetheless went on to rule on the case.

Venezuela, defying the Inter-American Court over executive interference with judicial independence in *Apitz Barbera et al*¹⁰¹ denounced the ACHR in 2012, thus effectively withdrawing from the competence of the Inter-American Court.¹⁰² In the above instances of the US, Venezuela and Colombia, the withdrawals of competence may be seen as *ex post facto* attempts to defeat implementation of the courts' decisions.

Significant to our context of redress for victims of mass atrocities, in May 1999, the Government of then Peruvian President Alberto Fujimori attempted to withdraw Peru's acceptance of the Inter-American Court's competence, but this was defeated on a technicality.¹⁰³

⁹⁷ For instance, *Smart v. Trinidad and Tobago*, Communication 572/1995, CCPR/C/63/D/672/1995, 29 July 1998.

⁹⁸ In the examination of *Kennedy v. Trinidad and Tobago*, Communication 845/1999, CCPR/C/67/845/1999, 31 December 1999, as cited in Viljoen, *International human rights law in Africa*, 28. Four CCPR members dissented.

⁹⁹ *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs)* Judgment of 21 June 2002.

¹⁰⁰ Amnesty International, 'Trinidad and Tobago's unprecedented withdrawal from the American Convention on Human Rights becomes effective on 26 May 1999' Public statement, 21 May 1999.

¹⁰¹ *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela (Preliminary Objection, Merits, Reparations and Costs)*, Judgment of 5 August 2008.

¹⁰² IACHR Press release 'IACHR deeply concerned over result of Venezuela's denunciation of the American Convention' 10 September 2013.

¹⁰³ IACtHR, *Ivcher-Bronstein v. Peru*, Judgment of 24 September 1999 (Competence), paras.32-54 and 56(1,b). Peru had attempted to only withdraw the competence of the Court while not denouncing the Convention, which was deemed impermissible. See also, Pascualucci JM, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge, 2013, 145. Pascua-

The European Court of Human Rights (European Court) also faces the real challenge of the United Kingdom (UK) repealing its Human Rights Act and withdrawing its acceptance of its competence. The UK has been most defiant¹⁰⁴ over the European Court's decision in *Hirst*,¹⁰⁵ where a blanket denial of prisoner voting rights was found to be inconsistent with the (European) Convention on the Protection of Fundamental Rights and Freedoms.¹⁰⁶

In light of the aforementioned developments, it comes as no surprise that the African Court on Human and Peoples' Rights (AfCHPR) has also had to contend with a withdrawal of acceptance of competence. Rwanda, State Party to the AfCHPR Protocol from 6 June 2003, had made its declaration under AfCHPR Protocol Article 34(6) granting access to individuals and NGOs to seize the AfCHPR on 22 June 2013.¹⁰⁷ However, on 1 March 2016, sixteen months after the AfCHPR received an application by Victoire Ingabire, a controversial political figure, Rwanda withdrew its Article 34(6) Declaration, and requested the Court to suspend hearings involving Rwanda, including the *Ingabire case*, until it reviews its Declaration.¹⁰⁸

In its ruling on the question, the AfCHPR noted the lack of denunciation or withdrawal provisions in the African Charter, its AfCHPR Protocol and on Article 34(6) Declarations. However, it clarified that such Declarations are unilateral acts not subject to the law of treaties, thus the Vienna Convention on the Law of Treaties is directly inapplicable but may be analogously relied upon when appropriate. Drawing from earlier discussed *Ivcher-Bronstein v Peru*, the AfCHPR affirmed the validity¹⁰⁹ of the withdrawal but rejected the view that such valid withdrawal by

lucci cites Cassel D, 'Peru withdraws from the Court: Will the Inter-American human rights system meet the challenge?' *Human Rights Law Journal*, 199, 173, suggesting Peru wished to avoid adverse findings in *Constitutional Court v Peru*, (no 55 of 1999) in which three Peruvian Constitutional Court justices were challenging their removal for ruling against Fujimori's attempt to run for another term of office.

¹⁰⁴ Former UK Prime Minister, David Cameron, speaking to Parliament in 3 November 2010 stated 'It makes me physically ill even to contemplate having to give the vote to anyone who is in prison.' Holehouse M, 'David Cameron: I will ignore Europe's top court on prisoner voting' *The Telegraph*, 4 October 2015; Aldridge A, 'Can "physically ill" David Cameron find a cure for his European law allergy?' *The Guardian*, 6 May 2011.

¹⁰⁵ *Hirst v. the United Kingdom (no.2) (Grand Chamber)*, 6 October 2005 (Appl.no. 74025/01). Curiously, the UK has implemented the vast majority of ECtHR decisions. Jeffrey Jowell puts the figure at 28 out of 29 decisions. International conference on transformative constitutions, 9-11 June 2014, Nairobi, organised by Katiba Institute, KHRC, Judicial Training Institute.

¹⁰⁶ 4 November 1950, 213 UNTS 222.

¹⁰⁷ AfCHPR, *In the matter of Ingabire Victoire Umuhzo v. Rwanda*, Ruling on the effects of the withdrawal of the declaration under Article 34(6) of the Protocol, Application 003/2014, 3 June 2016, para. 51; read along with AfCHPR, *Ingabire v Rwanda*, Corrigendum to Ruling, 5 September 2016.

¹⁰⁸ *Ingabire v. Rwanda*, Ruling of 3 June 2016, paras. 1 and 18.

¹⁰⁹ Even on this point, the Court was not unanimous. Justices Ramadhani and Niyungeko voted against the holding on the validity of Rwanda's Declaration withdrawal. *Ingabire v. Rwanda*, para.69(ii).

unilateral act can be allowed to take effect immediately. Such immediate effect would threaten juridical security and can therefore only be allowed to take effect after a year.¹¹⁰ It further, like the Inter-American Court, affirmed its continuing jurisdiction over pending cases.

The foregoing discussion demonstrates that it is not unusual for states to threaten or use withdrawal from international agreements to express discontent with the treaty's legal obligations. Treaty denunciation, such states assert, is after all the logical concurrent of the sovereign right to consent to be bound. These withdrawals and withdrawal attempts have however not deterred the concerned international jurisdictions, but rather spurred judicial clarification of the limits of withdrawal decisions. Despite their varied reasons, the clear common ground is state displeasure at adverse and politically inexpedient findings. At the very least, they indicate that the ICC is not lonely in facing threats of withdrawal. Yet Africa also boasts of three international courts within its sub-regional formations. Is the foregoing affirmation of defiant state practice against political inexpedient findings also practised by African states against their own sub-regional courts?

3.2 *Instances of defiance not including withdrawals*

The three African sub-regional courts, the East African Court of Justice, (EACJ), the Court of Justice of the Economic Community of West African States (ECOWAS CCJ) and Tribunal of the Southern Africa Development Community (SADC T), have all suffered stringent defiance for adverse findings.

In reaction to a case limiting municipal discretion on political charged matters,¹¹¹ Kenya sought in 2006-7 to amend the EAC Treaty to limit access of private litigants to the EACJ, establish an appellate chamber and introduce a procedure for removing judges.¹¹² In a matter of weeks, the relevant amendments were approved and enacted by the various EAC organs and partner-states.¹¹³

¹¹⁰ *Ingabire v Rwanda*, Ruling of 3 June 2016, paras.63-65.

¹¹¹ *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006, paras.2-5; Alter J, Gathii J and Helfer R, 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' 27 *The European Journal of International Law*, 2 (2016), 301-303.

¹¹² Alter, Gathii and Helfer, 'Backlash against international courts in West, East and Southern Africa', 304. Kenya had first unsuccessfully attacked the integrity of the Kenyan judges on the EACJ. See Alter, Gathii and Helfer, 303, citing *inter alia*, *Attorney Gen. of Kenya v. Anyang Nyong'o*(2007).

¹¹³ Alter, Gathii and Helfer, 304. At this time, Kenya, Uganda and Tanzania were the only EAC member states.

Given that Kenya's drive to weaken the EACJ was in reaction to adverse findings in *Nyong'o v Kenya*, it was somewhat unsuccessful as the EACJ affirmed its position in the earlier ruling and, pursuant to political pressure from partner-states,¹¹⁴ Kenya complied with the orders to reform its municipal election of members to the East African Legislative Assembly.¹¹⁵ The Appellate Chamber, which had been earmarked for 'pro-government jurists,'¹¹⁶ initially gave indications of being more conservative than the First Instance Chamber.¹¹⁷ Yet, even in the more contentious issue of whether the EACJ can exercise a human rights jurisdiction without the explicitly required additional protocol to so empower it,¹¹⁸ both chambers have concurred, and on 28 July 2015, the Appeals Chamber 'equivocally held that it has "jurisdiction to interpret the Charter [African Charter on Human and Peoples' Rights herein the African Charter] in the context of the [EAC] Treaty.'"¹¹⁹

In a similar reaction to the *Chief Manneh* and *Saidykhan* cases,¹²⁰ The Gambia, having boycotted proceedings at the ECOWAS CCJ and lost on the merits, submitted proposals in September 2009 to the ECOWAS Commission seeking to amend the Court's 2005 Supplementary Protocol¹²¹ to introduce further restrictions on the Court's jurisdiction and admissibility of cases thereof. However, this attempt was roundly rejected by ECOWAS and serves as a singular exception of the trend in our present discussion and strengthened the Court's position. The Gambia has continued to defy execution of the said judgements.¹²²

¹¹⁴ Alter, Gathii and Helfer, 305, Citing Nyamboga N, 'East Africa: Partner states decline to support Kenya's plea' *East African Standard*, 9 May 2007.

¹¹⁵ Alter, Gathii and Helfer, 305-306.

¹¹⁶ Alter, Gathii and Helfer, 304.

¹¹⁷ Alter, Gathii and Helfer, 306, citing its strict view of the two months limit for filing cases introduced in the 2007 amendments in *Omar Awadh and 6 Others v Attorney General of Uganda*, Appeal No. 2 of 2012 (App. Div.), (2013), as opposed to the First Instance Chamber's application of the doctrine of continuing violations to defeat said limit in *Independent Medical Unit v Attorney General of Kenya*, Reference No. 3 of 2010 (1st Inst. Div.), (2011).

¹¹⁸ Article 27(2), Treaty for the Establishment of the East African Community (EAC Treaty) 1999, 2144 UNTS 255. In *Katabazi v Secretary General of the E. African Community*, Reference No. 1 of 2007,(2007), the Court, while noting it is not a human rights court, affirmed human rights material jurisdiction through Articles 6(d), and 7(2) of the EAC Treaty.

¹¹⁹ Possi A, 'It's official: The East African Court of Justice can now adjudicate human rights cases' *AfricLaw.com*, 1 February 2016, citing *Democratic Party v The Secretary General of the EAC and 4 Others*, Appeal No. 1 of 2014. Possi cites a new appellate bench and sustained persuasive arguments by litigants as factors that led the development. With this case, Kenya's defeat seems almost complete.

¹²⁰ *Manneh v The Gambia*, ECW/CCJ/JUD/03/08, 5 June 2008; *Saidykhan v The Gambia*, ECW/CCJ/RUL/05/09, 30 June 2009.

¹²¹ Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (2005 Supplementary Protocol) (2005).

¹²² Alter, Gathii and Helfer, 297-300.

The SADC T has probably faced the most severe example. Zimbabwe, having not taken lightly the Court's decision in favour of white farmers after their farms were compulsorily acquired without compensation in *Mike Campbell*,¹²³ moved the SADC Summit, first, to suspend the Court's operations, then to shut it down entirely,¹²⁴ only to reconstitute it with limited jurisdiction, including eliminating *locus standi* for individuals.¹²⁵ Land reform being politically sensitive in southern Africa, the reaction of SADC states in this example is typical of the extreme reactionary backlash from states facing the prospect of an international court limiting their political discretion.¹²⁶ While there is no evidence that the suppression of the SADC T was influenced by the earlier unsuccessful attacks against ECOWAS CCJ and EACJ, the earlier attempts indicate the difficulty states face in securing the subservience of international courts.¹²⁷

The above review demonstrates that African states follow a long held trend of states defying international courts for adverse findings against them. One obvious difference here is that given their greater control over sub-regional courts' treaties, African states have reacted far more harshly, with reactions ranging from failed attempts to amend the ECOWAS Court Protocol to the nullification of the SADC Tribunal. It is also noteworthy that none of the sub-regional African courts' treaties provide for optional acceptance of jurisdiction. This review seems to indicate that states, when so politically empowered by limited diversity of interests, are prepared to suppress any independent thinking international jurisdiction. This state diversity factor may also explain the AU's reaction to ICC related conduct and the UNSC.

¹²³ *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) (5 June 2009).

¹²⁴ Final communiqué of the 32nd summit of SADC Heads of State and Government, Maputo, Mozambique, 18 August 2012.

¹²⁵ Killander M, 'On constitutional values, Marikana and the demise of the SADC Tribunal' *AfricLaw.com*, 23 August 2012; Mwanyisa P, 'The SADC Tribunal: Concerted efforts for waves of change we want to see' *AfricLaw.com*, 19 June 2015. See also, Alter, Gathii and Helfer, 'Backlash against international courts in West, East and Southern Africa', 293-328.

¹²⁶ Tanzanian President Jakaya Kikwete is reported to have described the SADC T thus: 'We have created a monster that will devour us all.' See Quan M, 'Rising against the silencing of the SADC Tribunal: Tanzania' *AfricLaw.com*, 5 June 2015. This view by Tanzania is also another example of *dissonance* in African state practice on acceptance of international jurisdictions as compared with its continued support for the ICC.

¹²⁷ For a discussion on factors that may affect independence of judges in relation to the EACJ, see Gathii JT, 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy', 24 *Duke Journal of Comparative and International Law*, 2014. See also, on the ICJ's practice in relation to 'political considerations', Sipalla H, 'The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa' in Stormes J *et al* (eds), *Transitional justice in post-conflict societies in Africa*, 251-253.

Therefore, limited state diversity and lack of optional acceptance of jurisdiction seems to lead the defiant state to seek severe treaty amendments to an international court's competence, as opposed to simply withdrawing. This finding allows us to contrast with one other example of state defiance of an international jurisdiction where states lack both optional acceptance and political uniformity.

2015-6 witnessed a spectacular defiance of an international jurisdiction related to a long running feud over maritime delimitation and sovereign rights. China, having long asserted its claim to the Spratlies in the South China Sea,¹²⁸ rejected the controversial assertion of jurisdiction by the Arbitral Tribunal in *South China Sea Arbitration*.¹²⁹ After the decision, China boycotted the merits phase of the case and increased military activity in the disputed zone. China had, like Sudan in the case of the Rome Conference, raised concerns over the then proposed compulsory dispute settlement provisions of the UN Convention on the Law of the Sea at the 1970s Third UN Conference on the Law of the Sea. By way of compromise, certain matters, particularly maritime delimitation, were excluded from compulsory adjudication.¹³⁰ As such, China's rejection of the Arbitral Tribunal's jurisdiction and admissibility ruling draws parallels with *some* of the AU's arguments on the understanding of Articles 27 and 98 of the Rome Statute, and Rule 68 of the Rules of Procedure and Evidence.

3.3 Defiance or backlash?

The Inter-American Court is considered far more stringent than other regional human rights courts; in fact, in many ways the most stringent court on its state parties, especially as regards margin of appreciation and victim-centred remedies that are less concerned on balancing interests in international relations.¹³¹ The CCPR's

¹²⁸ Kwiatkowska B, 'A regional approach towards the management of marine activities: Some reflections on the African perspective' 55 *Heidelberg Journal of International Law*, 1995, 479. Kwiatkowska notes 'tension caused by unresolved Spratlies dispute and [the] potentially unpredictable position of China claiming the entire South China Sea.'

¹²⁹ Talmon S, 'The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility' 15 *Chinese Journal of International Law*, 2016, relating to *Arbitration between the Republic of the Philippines and the People's Republic of China*, UNCLOS Annex VII Arbitral Tribunal, Award on Jurisdiction and Admissibility, 29 October 2015.

¹³⁰ Talmon S, 'Denouncing UNCLOS remains option for China after tribunal ruling' *Global Times*, 3 March 2016.

¹³¹ Killander M, 'Interpreting regional human rights treaties' 7(13) *Sur International Journal on Human Rights*, December 2010, 145-154; Lixinski L, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law' 21(3) *The European Journal of International Law*, 2010, 585-604; For a critique of the Court's practice, see Neuman GL, 'Import,

‘all or nothing’ approach to Trinidad’s attempts to exclude mandatory death penalty matters has also been criticised along similar lines.¹³² Yet, it would seem that no court, no matter how pliant to state rights to accept international jurisdiction, as is the case of the ICJ, is immune to state defiance in the shape of competence withdrawal. The examples cited above lend credence to the view that the AU-ICC-UNSC clash is precisely consistent with the historical phenomenon of backlash against international jurisdictions.¹³³ In this sense, while backlash may be the action (which can range from treaty amendment to withdrawal), defiance of international obligations is the intention.

Our discussion thus far has allowed us to ascertain that states displeased with international jurisdictions will: withdraw optional competence if so permitted by treaty; will amend the jurisdiction’s founding treaty even to the point of suppressing the jurisdiction if so allowed by treaty and lack of diversity; and in the exceptional case of China, will not denounce but use military and other expressions of state power to defeat the adverse findings.

In their objections to international criminal justice, the AU and its member states are clearly more displeased with the UNSC and European exercise of universal jurisdiction than with the ICC *per se*. Having failed to move the UNSC and European states appropriately, and UN Charter withdrawal seems unthinkable, the two tools of withdrawal threat and treaty amendment were redirected to the ICC and its Rome Statute and Rules of Procedure and Evidence, as we have demonstrated earlier. As international criminal justice is inextricably linked to the maintenance of international peace and security, and in light of the seldom discussed but formally manifest AU feud with the UNSC, we will now interrogate state practice on defiance of international organisations created precisely to ensure international peace and security.

export, and regional consent in the Inter-American Court of Human Rights’ 19(1) *The European Journal of International Law*, 2008.

¹³² Buergenthal T, ‘The UN Human Rights Committee’ 5 *Max Planck Yearbook of United Nations* 2001, L385 and McGrory G, ‘Reservations of virtue? Lessons from Trinidad and Tobago’s reservation to the First Optional Protocol’ 23 *Human Rights Quarterly*, 2001, 815, cited in Viljoen, *International human rights law in Africa*, 28.

¹³³ See generally, Caron D and Shirlow E, ‘Dissecting backlash: The unarticulated causes of backlash and its unintended consequences’ in Ulfstein G and Føllesdal A (eds), *The judicialization of international law - A mixed blessing?* Available at SSRN: <<https://ssrn.com/abstract=2834000>>; Alter, Gathii and Helfer, ‘Backlash against international courts in West, East and Southern Africa’, 293-328; Huneeus A, ‘Rejecting the Inter-American Court: Judicialization, national courts, and regional human rights’.

3.4 Withdrawals from international organisations

The preceding discussion has covered instances of defiant states employing their right to withdraw competence from an international jurisdiction to defeat adverse findings. This section reviews the history of withdrawal from treaties that create international organisations primarily to maintain international peace and security like the UN and the AU.

3.4.1 League of Nations to United Nations

The victor's justice charge, discussed earlier in relation to post-1945 war criminal tribunals, in some respects dates back to the Treaty of Versailles and its Covenant of the League of Nations. John Maynard Keynes called the 1919 agreements, a 'Carthaginian peace',¹³⁴ as 'the Covenant was tainted through its textual associations with the policy of massive reparations and the war guilt clause'.¹³⁵ In particular, the aggressor states were precluded from joining the League. However, following the Locarno Conference reconciliation, Germany was admitted to the League on 10 September 1926.¹³⁶ The optimism of Locarno was however crushed in 1933 when Germany, resisting challenges to their human rights record against Jews and Communists after the Nazis took over, denounced the Covenant of the League of Nations and withdrew from the League.¹³⁷ Similarly, Japan left the League in 1933 after the League condemned Japan's invasion and occupation of China in September 1931.¹³⁸ Italy in turn left in 1937 after the

¹³⁴ Keynes JM, *The economic consequences of peace*, Macmillan, London, 1920, cited by Crawford J, 'The Charter of the United Nations as a constitution' in Fox H (ed) *The changing constitution of the United Nations*, 1997, 4.

¹³⁵ Crawford, 'The Charter of the United Nations as a constitution', 4.

¹³⁶ Duroselle JB, 'The spirit of Locarno: Illusions of pactomania' *Foreign Affairs*, July 1972.

¹³⁷ Burns JJ, 'Conditions of withdrawal from the League of Nations' 29(1) *The American Journal of International Law*, January 1935, 40, 47. Even back then, Burns highlights the controversies around withdrawal provisions. For instance, she notes that the first draft of the Covenant was criticised by US senators for lack of a withdrawal provision. She also notes that the withdrawal provision in Covenant Article 1(3) was ambiguously worded, and adds Covenant Article 26 also contained language authorising withdrawal of membership by way of refusal of a state to accept amendments thus leading to cessation of membership.

¹³⁸ Burns, 'Conditions of withdrawal from the League of Nations', 45-46. In a case similar to the Eritrea Ethiopia Claims Commission, *Partial Award Jus Ad Bellum*, 19 December 2005, Ethiopia's Claims 1-8 issued 72 years later, the League Assembly adopted a report noting the disproportionate and unjustifiable Japanese response beyond legitimate self-defence after the night of 18 September 1931, adding: '...the military measures of Japan as a whole, developed in the course of the dispute, [cannot] be regarded as measures of self-defence. Moreover, the adoption of measures of self-defence does not exempt a State from complying with the provisions of Article 12 of the Covenant.' *Official Journal [of the League of Nations]*, 1933, Special Supplement No. 112, 72 (Document A [Extr.J 22, 1933, VII, p.17]), cited in Burns, 'Conditions of withdrawal from the League of Nations', 45.

League imposed economic sanctions against it for invading Abyssinia (present day Ethiopia).¹³⁹

It is also noteworthy that, beyond the aggressor states, the League of Nations was troubled by three withdrawals by other states. On 24 December 1924, Costa Rica notified the Secretary-General of the League of its withdrawal, stating disaffection with the League's Assembly financial demands on Latin American states and enclosing a cheque covering its financial obligations to the League for the years of membership.¹⁴⁰ After expiry of the two year notice period, the League's Council efforts, communicated on 9 March 1928, to secure Costa Rica's agreement to rejoin the League met official challenge by Costa Rica on the meaning of the Monroe Doctrine and reasons for its inclusion in Article 21 of the League's Covenant.¹⁴¹

In addition, Brazil and Spain had, in 1926, served notices of withdrawal to the Secretariat of the League 'because both nations felt that they should be accorded permanent seats on the Council of the League of Nations, at the time when Germany was admitted to the League and given a permanent Council seat'.¹⁴² Upon expiry of the two year notice period, the Council of the League, again on 9 March 1928, requested Brazil and Spain to reconsider their withdrawal decision. Brazil responded to reaffirm its withdrawal, while Spain rescinded its decision.¹⁴³

By 1938, a year before the outbreak of war in 1939, Brazil, Costa Rica, Germany, Italy, Japan, had withdrawn from the League for diverse reasons. Validity of the reasons for withdrawal aside, these withdrawals nonetheless constituted unambiguous and undisguised moves by the concerned states to pressure the international organisation into accepting their particular interests. They thus constitute early but vivid examples of *state defiance of international obligations through withdrawals and withdrawal threats*.

¹³⁹ 'Italy leaves League of Nations...News received calmly in London' *The Sydney Morning Herald*, 13 December 1937 (news report filed on 12 December 1937 in London). Available at Trove, National Library of Australia, -<<http://trove.nla.gov.au/newspaper/article/17441091>> on 20 February 2017.

¹⁴⁰ Burns, 'Conditions of withdrawal from the League of Nations', 44.

¹⁴¹ Burns, 'Conditions of withdrawal from the League of Nations', 44, citing, *inter alia*, the *Official Journal of the League of Nations*, 1928.

¹⁴² 'The League of Nations: Brazil out' *Time Magazine*, 21 May 1928, citing a new report featured in *Time Magazine* on 21 June 1926. In May 1928, *Time* was reporting an April 1928 note from the Brazilian government reaffirming Brazil's intention to withdraw. See -<<http://content.time.com/time/magazine/article/0,9171,731754,00.html>> on 20 February 2017; Burns, 'Conditions of withdrawal from the League of Nations', 44-45.

¹⁴³ Burns, 'Conditions of withdrawal from the League of Nations', 45.

It was in a deliberate aim to redress the weaknesses of the Covenant of the League of Nations that the drafters of the UN Charter excluded a withdrawal provision but instead included, in Article 6, an expulsion provision. The Dumbarton Oaks proposals, Hans Kelsen recalls,¹⁴⁴ had expressly left out withdrawal provisions in the hope of precluding ‘*recalcitrant states*’ from extracting concessions by using threats of withdrawals,¹⁴⁵ as witnessed with the League’s experience,¹⁴⁶ and curiously as repeated contemporaneously with the AU-ICC divide. The drafters then, had in mind a truly ‘permanent organisation’.¹⁴⁷

When brought up to Committee, nineteen states voted for inclusion of a withdrawal provision while 22 states affirmed the Dumbarton Oaks position. With 51 founding members, fifty of whom attended the United Nations Conference on International Organisation, these numbers were representative of then existent states.¹⁴⁸ Thirty-eight states decided to insert a most insightful text into the Committee Report, whose reproduction below may be instructive:

The Committee adopts the view that the Charter should not make express provision either to permit or prohibit withdrawal from the organization. The Committee deems that *the highest duty* of the nations which will become Members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization. It is obvious, particularly, that withdrawals or some form of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organisation was revealed to be unable to maintain peace ...¹⁴⁹

¹⁴⁴ Kelsen H, ‘Withdrawal from the United Nations’ 1(1) *Western Political Quarterly*, March 1948, 29-43. See also, Abi-Saab G, “Membership and voting”, in Fox H (ed) *The changing constitution of the United Nations*, British Institute of International and Comparative Law, London, 1997, note 4.

¹⁴⁵ Kelsen ‘Withdrawal from the United Nations’, 29, citing United Nations Conference on International Organisation (UNCIO), Summary Report of Sixth Meeting of Committee I/2, 14 May 1945, Doc 314, 2. (author’s emphasis)

¹⁴⁶ James Crawford has reiterated the view that the UN Charter was drafted precisely to fill the gaps in the League of Nations system. See Crawford, ‘The Charter of the United Nations as a constitution’, 3-8.

¹⁴⁷ Kelsen ‘Withdrawal from the United Nations’, 29.

¹⁴⁸ 46 states had been invited to the UNCIO. The Conference itself invited four more states. See ‘1945: The San Francisco Conference’-<http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>> on 10 September 2016.

¹⁴⁹ UNCIO, Report of the Rapporteur of Committee I/2 on Chapter III, Membership, 24 June 1945, Doc 1178, 4, cited in Kelsen ‘Withdrawal from the United Nations’, 29. (author’s emphasis)

In practice, only one state has ever purported to withdraw from the UN Charter. On 20 January 1965, Indonesia notified the UN of its ‘withdrawal’.¹⁵⁰ In effect, the Security Council and General Assembly ‘reacted as if it were a withdrawal into mere temporarily “inactive” membership, under the standing invitation of the UN to reactivate the membership proper at any given time.’¹⁵¹ On 19 September 1966, when Indonesia notified the UN of its ‘re-entry’, ‘the General Assembly accepted without objection the interpretation of Indonesia and the Security Council that Indonesia had only ended its cooperation, not membership,’¹⁵² and full cooperation was thus resumed without a formal process of readmission. In effect, this event can be understood to have been a claim of withdrawal that was not so, and thus no effective UN practice exists of membership withdrawal.

The latest threat of withdrawal from the UN has come from Filipino President Rodrigo Duterte, who, on 21 August 2016, threatened to withdraw the Philippines, a founding member of the UN,¹⁵³ once its UN contributions were returned.¹⁵⁴ While it is quite impossible to state with any certainty whether Duterte would act on this threat and whether the municipal legal order would oblige him,¹⁵⁵ it is fairly certain

¹⁵⁰ Nizard L, ‘Le retrait de l’Indonesie des Nations unies’ 11 *Annuaire français de droit international*, 1965, 498-528. Nizard reports appeals by fellow Third World states to Indonesia to reconsider its decision, terming it as regrettable and dangerous, quite similarly to current views on the ICC withdrawals. Nizard disputes Kelsen and asserts the view, probably valid at the time, that Indonesia’s capacity to withdraw was ‘incontestable.’

¹⁵¹ Ginther K, ‘Chapter II: Membership’ in *The Charter of the United Nations: A commentary*, Simma B (ed), 2 ed, Oxford University Press, Oxford, 186, para.40.

¹⁵² Ginther, ‘Chapter II: Membership’, 186, para.40.

¹⁵³ India and the Philippines, which gained independence in 1947 and 1946, respectively, participated in UNCIO. The Philippines gained independence from the US in 1935 but was occupied by Japan between 1942 and 1945, and signed the Declaration of the United Nations of 1942, thus being the basis for invitation to the UNCIO.

¹⁵⁴ So LA, ‘Can Duterte withdraw Philippine membership to UN?’ *Philstar.com*, 22 August 2016.

¹⁵⁵ Dr Juan Carlos Sainz-Borgo has suggested that, for states whose municipal regime vest treaty ratification authority in the legislature, treaty denunciation by executive action can be attacked at the competent municipal court as *ultra vires*, being that if the executive is incompetent to ratify a treaty it cannot possibly then be competent to denounce it, unless so empowered by municipal law. Personal communication with Dr Sainz-Borgo, March 2013. In this vein, the Philippine Constitution vests ratification authority with the Senate (see Article VII, Section 21, which provides that ‘No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all members of the Senate’). The Philippine Supreme Court in *Commissioner of Customs v Eastern Sea Trading* has, 31 October 1961, G.R. No. L-14279, had distinguished between treaties and executive agreements. The latter are now ratified by presidential decree, as provided for by Executive Order No 459, series of 1997. See Malaya JE and Mendoza-Oblena MA, ‘Philippine treaty law and practice’ 35(1) *Integrated Bar of the Philippines Journal*, August 2010, 1-17, 2. See also, in relation to South Africa’s ICC withdrawal, Woolaver H, ‘International and domestic implications of South Africa’s withdrawal from the ICC’ *European Journal of International Law*, October 2016; ‘South Africa opposition party challenges ICC withdrawal in court’ *Reuters Africa*, 24 October 2016.

that if Duterte were to act on the threat of withdrawal, the General Assembly and Security Council are likely to react in a manner similar to their response to the Indonesian withdrawal in 1966.

3.4.2 Organisation of African Unity to African Union

The Charter of the Organisation of African Unity provided for withdrawal under Article XXXI on cessation of membership. Morocco, displeased with OAU's decision against its claim over Western Sahara and the admission of the Saharawi Republic as a full Member-State of OAU, exercised its right of withdrawal under Article XXXI in 1981.¹⁵⁶

On transition from the OAU into the AU, the question of membership withdrawal at first seemed to have been overlooked. Article 31 of the Constitutive Act of the African Union, which is drafted similarly to OAU Charter Article XXXI, provided a procedure for the cessation of membership. Only a year after the AU's inauguration, in February 2003, and then again in July 2003, the AU Assembly adopted the Protocol on Amendments to the Constitutive Act of the African Union, whose Article 12 simply deleted Article 31 on cessation of membership. Girmachew Aneme and Ufuoma Lamikanra, citing the relevant Explanatory Notes, explain that the deletion aimed to reinforce continental unity, not to eliminate legal capacity.¹⁵⁷ However, the same Notes suggest that a state would have 'no grounds', presumably from a policy perspective, to withdraw and renounce membership and applicability of the Act.¹⁵⁸ This Protocol was, as at 2013, ratified by 28 states and requires at least 36 ratifications to come into force.¹⁵⁹

Withdrawals from treaties, as a corollary of consent to be bound may be permissible and examples have been discussed above. While explicit withdrawal provisions provide clarity, those treaties that lack such provisions occasion the added burden on the disgruntled state to prove that the negotiating parties envisioned trea-

¹⁵⁶ Aneme GA, Lamikanra U, 'Update: Introduction to the norms and institutions of the African Union' *GlobaLex*, August 2015, note 22.

¹⁵⁷ Aneme, Lamikanra, 'Update: Introduction to the norms and institutions of the African Union' *GlobaLex*, August 2015, Section 2, citing AU 'Explanatory Notes on the Libyan Proposals for amendment of the Constitutive Act of the African Union', Proposed Amendments to Articles of the Constitutive Act of the African Union, AHG/238(XXXVIII).

¹⁵⁸ Aneme, Lamikanra, 'Update: Introduction to the norms and institutions of the African Union', Section 2, citing AU 'Explanatory Notes on the Libyan Proposals for Amendment of the Constitutive Act of the African Union', AHG/238(XXXVIII).

¹⁵⁹ Viljoen F and Kuwali D, *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act*, Routledge, 2013, 65.

ty withdrawals. With treaties creating international organisations, such as the UN and AU that are primarily aimed at maintaining peaceful, secure and harmonious international life, legal capacity to withdraw is not straightforward. As evidenced in the League's example, such withdrawals, if permitted, could be seriously detrimental to the maintenance of international peace and security, hence the contest over the validity of such withdrawals.

In the first part of this chapter, analysis of AU Assembly decisions between 2008 and 2016 gave strong indications that UNSC and European state disregard for African state sovereign immunities and not ICC conduct *per se*, has been the key driver of AU Assembly objections to international criminal justice. In Part Two of our discussion, review of state practice in defiance of politically objectionable international findings shows withdrawal or treaty amendment to be the norm of state practice since 1920s. Since we have ascertained the not unusual nature of AU Assembly reactions to the international criminal justice, we now return to the politically charged underpinnings of AU Assembly behaviour towards the ICC, especially in light of the dissonance between individual African state practice and AU Assembly policy.

4 Resurgence of African sovereign equality claims and international rule of law

In the immediate aftermath of the January 2016 Assembly's official mention of collective withdrawal, it was opined that a mass withdrawal was unlikely to occur, given that any such withdrawal would not relieve the then key accused persons of their legal problems.¹⁶⁰

However, the analysis of the relevant Assembly decisions above, and along the lines of Nyawo (on *dissonance* in state practice and Gramscian understanding of hegemony) and Moravcsik (on why formerly repressive states adhere to restrictive international obligations), urges us to ponder as to why, six years into the controversy, African states would be so bothered as to even contemplate official language on collective withdrawal.

The 12th AU Assembly (February 2009) simultaneously pronounced itself on the abuse of the principle of universal jurisdiction and the objectionable actions of the ICC.¹⁶¹ The similarity of these two pronouncements, criminal proceedings

¹⁶⁰ '6 facts about the African Union Summit and the ICC' #*globalJUSTICE*, 4 February 2016.

¹⁶¹ 12AUA, Assembly/AU/Dec.221(XII); and 12AUA, Assembly/AU/Dec.213(XII).

against high ranking state officials,¹⁶² seems to point to the Assembly's *core concern*: the perceived challenge to the sanctity of African sovereign immunities and the dismissal of official African objections to said challenges.¹⁶³ Seen in this light, the AU protests go to the heart of a fundamental principle of harmonious international life,¹⁶⁴ namely, sovereign equality.¹⁶⁵ The question of sovereign immunity continued to characterise the AU-ICC-UNSC clash until South Africa's announcement in 2016 of its intention to withdraw from the Rome Statute.¹⁶⁶ The clash also highlights the AU view that criminal prosecutions may threaten delicate peace processes.¹⁶⁷

The language of the AU Assembly decisions increasingly becomes forthright, especially as the Libya and Kenyan situations are added to the situation in Sudan and the UNSC continues to ignore AU calls for deferral. Apart from the direct language betraying the AU's frustration at the dismissal of assertions of sovereign immunity and the dismissal thereof by the UNSC, the statements of African states solidly committed to the Rome Statute are worthy of some reflection.

¹⁶² By contrast, the other relevant Decision adopted by the AU Assembly in this session was on the Hissène Habré case. See 12AUA, Assembly/AU/Dec.240(XII).

¹⁶³ 'UNDERScores that the African Union speaking with one voice, is the appropriate collective response to counter the exercise of power by strong states over weak states', 12AUA, *Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.213(XII), para.5 (see also paras.4 and 6).

¹⁶⁴ 11AUA, *Decision on the report of the Commission on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.199(XI), para.5(i, ii).

¹⁶⁵ Article 2(1), *UN Charter*; Article III(1), *Charter of the Organisation of African Unity*, adopted 25 May 1963, 479 UNTS 39; 'All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: a) States are judicially equal; b) Each State enjoys the rights inherent in full sovereignty; c) Each State has the duty to respect the personality of other States...' Also, *Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations*, UNGA Res. A/RES/25/2625, 24 October 1970 (It may be noteworthy that Preamble 3 of the 1970 Declaration bears some similarity, *mutatis mutandis* to Preamble 3, *OAU Charter*); Article 3(a), *Treaty Establishing the African Economic Community*, adopted 3 June 1991; *AU Constitutive Act*; ICJ, *Arrest warrant* case, paras. 1, 12(1), 17 (submissions by DRC), 53-60 (*ratio* of the Court). The ICJ makes it clear in *Arrest warrant* that sovereign immunities enjoyed by duly designated officials are not personal but are those of the state, that these entail jurisdictional immunities and are not aimed at impunity but rather at preserving harmonious international life (para. 53). To be clear, the ICJ affirmations and findings (paras. 70-71) only refer to the lack of legal capacity of municipal courts to vitiate the sovereign rights (immunities) of other states (para. 61).

¹⁶⁶ Asin, 'The "great escape"', 165-180.

¹⁶⁷ 12AUA, *Decision on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of The Sudan*, Assembly/AU/Dec.221XII, para.3. See also, Mbeki T and Mamdani M, 'Courts can't end civil wars' *New York Times*, 5 February 2014; Murithi T, 'Sequencing the administration of justice to enable the pursuit of peace: Can the ICC play a role in complementing restorative justice?' *Institute for Justice and Reconciliation Policy Brief*, No 1, June 2010; Nyawo, 'Through Antonio Gramsci's lens', 216-233.

At the height of the AU-ICC-UNSC clash in 2013, coming on the back of the controversial regime change pursued by NATO under the guise of Resolution 1973¹⁶⁸ in Libya and the imminent start of the trial of Uhuru Kenyatta, Tanzanian President, Jakaya Kikwete, speaking at the 68th session of the UN General Assembly, urged the ICC to be “responsive to the legitimate concerns of the African people” if it is to enjoy support and cooperation on the continent’.¹⁶⁹ While lauding the ICC as a milestone in the international criminal justice system, he added that ‘Africa will not relent in demanding reforms in the Security Council’, thereby noting the irony in the fact that the continent with the largest base of UN membership lacked a permanent seat on the UNSC. Kikwete argues further that ‘[o]ur collective failure to respond to this reality creates scepticism [...]’.¹⁷⁰ It is noteworthy that between 2008 and 2016 the AU Assembly has adopted a decision reiterating its common position on UNSC reform at every session, except the 13th AU Assembly. Kikwete’s statement indicates the strong official African view that ICC conduct cannot be divorced from UNSC disregard of African sovereign equality.

The Ethiopian Foreign Minister echoed this view in November 2015:

We firmly believe that, Africa’s commitment to solve its problems by itself should be appreciated, and the trend of lack of trust must come to its end.¹⁷¹

At the October 2016 UN General Assembly session, Tanzanian Ambassador Tuvako Manongi affirmed Tanzania’s view: ‘All too often, avoidable misunderstandings, when left unattended or dismissed as inconsequential, grow into regrettable outcomes. ... *Lectures and claims of high moral ground from outside the continent are unhelpful.*’¹⁷²

In its statement reacting to the South African withdrawal, Botswana expressed its conviction that the ASP remained the ‘most appropriate platform for state parties

¹⁶⁸ Staff Reporter ‘Zuma lashes Nato for ‘abusing’ UN resolutions on Libya’ *Mail and Guardian*, 14 June 2011.

¹⁶⁹ ‘Heed African concerns, JK tells ICC’ *The Citizen (Tanzania)*, 30 September 2013.

¹⁷⁰ ‘Heed African concerns, JK tells ICC.’ See also, Presidential Strategic Communications Unit, ‘Respect Africa’s decisions on any matter, Uhuru tells international community’ *The Star (Kenya)*, 20 November 2016.

¹⁷¹ ‘Statement of HE Dr Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia “on behalf of the African Union” at the 14th Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC)’, The Hague, Netherlands, 18 November 2015, 5.

¹⁷² ‘Kenya criticises ICC as other African countries defend it’ *Daily Nation*. Statements from Senegal and Nigeria lauding ICC victim reparations and fight against impunity, respectively, are also here reported. (author’s emphasis)

to address concerns.¹⁷³ This view is supported *inter alia* by ASP President Sidiki Kaba and former ICTR Prosecutor Hassan Jallow.¹⁷⁴

In light of the foregoing analysis, it would seem that the underlying dispute concerns a perception among African states of being dismissed in international relations on matters of particular concern to them. Against this background, the ICC has been the weakest link in the chain that is this particular international legal-political landscape, and therefore also the first to break.

4.1 *Africa's rejection of the International Court of Justice and the creation of ITLOS*

This present clash is not the first time African states' mass rejection of an international tribunal has caused significant upheaval in international law. African states, 'widely disenchanted with the International Court of Justice because of its dismissal of the [first] *Southwest Africa* Case'¹⁷⁵ exerted considerable pressure during the Third United Nations Conference on the Law of the Sea for a new standing tribunal to be created to adjudicate disputes under the law of the sea regime that was under negotiation at the time. They thus wanted this new tribunal to reflect their interests and secure their full participation, a fact that 'explains, for example, the size of the International Tribunal for the Law of the Sea.'¹⁷⁶

5 Conclusion

If all law is dependent upon self-restraint in some measure to achieve its objectives, international law is especially dependent upon the restraint of states in fashioning their claims and positions, which in turn *depends upon the restraint of various actors in various internal political systems*.¹⁷⁷

The foregoing three part discussion has attempted to understand the historical context of state defiance of international obligations deemed politically inexpedient

¹⁷³ Botswana, 'Statement on the withdrawal of South Africa...' 25 October 2016.

¹⁷⁴ Mwagiru, 'ICC meeting turns out to be doleful affair'; 'Justice Jallow urges Government to reconsider decision on ICC withdrawal' *Foroyaa Newspaper (Gambia)* 28 October 2016. See also, Owiso, 'South Africa's intention to withdraw...' *AfricLaw.com*, 28 October 2016.

¹⁷⁵ Oxman H, 'The rule of law and UNCLOS', 7 *European Journal of International Law*, 1996, 369, note 28.

¹⁷⁶ Oxman, 'The rule of law and UNCLOS', 369, note 29.

¹⁷⁷ Oxman, 'The rule of law and UNCLOS', 359.

with a view to better understanding the AU's threat of collective withdrawal from the Rome Statute.

Our discussion has shown, in Part One and Three, that individual African states, in their bilateral relations with the ICC, tend to behave at dissonance with their collective views at the AU Assembly. Individually, they continue to seek ICC exercise of jurisdiction in their territories while denouncing it at the Assembly. Part One and Three discussions have also shown that the collective African concern is disregard for African views and its implications in sovereign equality particularly at the UNSC.

Part Two has demonstrated that withdrawal and treaty amendment are the preferred tools of defiant states. In our discussions, we have distinguished state defiance from the non-implementation of decisions of international jurisdictions, which is far broader and conceptually distinct subject beyond our scope.

Precluding 'recalcitrant states' from extracting concessions by using threats of withdrawals,¹⁷⁸ has been an international concern since Dumbarton Oaks. Withdrawal practice has led international organisations such as UN and AU to seek to exempt explicit withdrawal provisions. International jurisdictions in turn have issued decisions limiting the parameters of valid withdrawal from optional competence in the interests of juridical security. Where state membership was sufficiently low in number and uniform in political outlook, as in the case of SADC and EAC, the relevant treaties have been amended to suit the political views of the respective defiant states.

Bringing these three parts together may help explain a few points. First, our three part discussion may further explain dissonance in African state practice. African states' primary collective concern is disregard for African sovereign equality as expressed in UNSC dismissal of African views, European exercise of universal jurisdiction and conduct of the ICC OTP and bench. UN Charter amendment or withdrawal is impractical as a response to these concerns, hence the redirected attacks on the Rome Statute and organising for concerted African effort at ASP for treaty and procedural rules amendment. This explains the late entry, six years into the clash, of overt Rome system withdrawal threats and actions. However, the internal political interests of several African states continue to promote bilateral ICC relations, hence the dissonance.

¹⁷⁸ Kelsen 'Withdrawal from the United Nations', 29, citing UNCIO, Summary Report of Sixth Meeting of Committee I/2, 14 May 1945, Doc 314, 2. (author's emphasis)

Second, from the limited historical survey, it is clear that no international jurisdiction worth its salt has not suffered some defiance in the form of withdrawal, including by major powers in international relations. This however has not diminished such jurisdictions' integrity, but rather affirmed their value.

It would seem that anything other than a mass withdrawal would simply place the ICC and the Rome Statute firmly within the ranks of the international jurisdictions that have earned their stripes. It is of great import that a mass withdrawal from a multilateral treaty of such significance as the Rome Statute has never been attempted by states, let alone by states acting under the aegis of a 'regional arrangement.' As such, the effects of any such mass withdrawal on the structure and integrity of international law ought not be gainsaid. However, anything short of mass withdrawal would simply place such defiant acts as part of the general incoherent development of international law.¹⁷⁹

Third, as mentioned above, state withdrawal, even individually, from an international 'juridical organisation,'¹⁸⁰ created to preserve peace and security, and therefore occupying a certain legal-political centrality, is a far more troubling matter.

Fourth, flowing from the example of African sub-regional courts, states are willing to exercise their full legislative powers to suppress adverse findings by international jurisdictions, provided they have sufficiently low numbers and political uniformity in treaty membership. In other words, numerical and political diversity protects international courts. Elsewhere, we have suggested that the proposed Malabo Protocol court is likely to suffer the same accusations of bias as the ICC.¹⁸¹ This present reflection suggests that this view is not peculiar to Africa.

Lastly, and probably most importantly, is the question of balancing the AU's core concern and preserving the accountability mechanisms of atrocity crimes. Costa Rica, back in late 1926, became the first state to withdraw from the League of Nations, superficially over financial obligations to the League but more fundamentally in opposition to a critical concern: the inclusion of the Monroe Doctrine,

¹⁷⁹ '... complete unity has never existed in international law; and its development has always been uneven.' Schwebel S, 'The proliferation of international tribunals: Threat or promise?' in Andemas M and Fairgrieve D (eds) *Judicial review in international perspective: Liber amicorum Lord Slynn of Hadley*, Kluwer Law, 2000, 5.

¹⁸⁰ 'Convinced that *juridical organisation is a necessary condition for security and peace* founded on moral order and on justice,' Preamble 6, *Charter of the Organisation of American States*, 30 April 1948, 119 UNTS 3. (author's emphasis)

¹⁸¹ Sipalla, 'The historical irreconcilability of international law and politics...', 257-263.

offensive to Latin states, in the League's Covenant. African states as well, offended by European exercise of universal jurisdiction and UNSC disregard, have set out to attack the Rome Statute system. This has led to dissonance in state practice and created the false perception of a mutually exclusive two camp attitude; either for or against. While Africans and their states firmly support African efforts to cement our sovereign equality in international life, many are unwilling to support attempts to defy structures of accountability.

Issa Shivji captures a researcher's attempt to clarify their critique of a system they identify with: 'I must make clear that I do not doubt the noble motivations and good intentions But we do not judge the outcome of a process by the intentions of its authors. We aim to analyse the objective effect of actions regardless of their intentions.'¹⁸² If this statement holds true, the African states acting in AU collegiality must urgently consider better ways of articulating their intentions as regards the AU-ICC-UNSC clash. As noted by Shivji above, one is rationally drawn to considering the objective effect of actions, not simply of intentions. This is all the more compelling when intentions are *not* articulated.

One would dare say that the concern for Africa's rightful place in international life appeals to a broad base of Africans, and that any African dissention on the official actions of their states relate rather to the dissonance described earlier.¹⁸³ The fact that none of the withdrawing African states has made equal efforts to ratify the Merged Court Treaty and its Malabo Protocol cannot but lend credence to such fears. Other matters of equal, if not greater import for African progress, such as the Doha Development Agenda¹⁸⁴ and other structures of unbalanced economic relations,¹⁸⁵ may also fall under this purview.

¹⁸² Shivji G, *Silences in NGO discourse: The role and future of NGOs in Africa*, Fahamu, Nairobi, 2007, 2.

¹⁸³ Nyawo, 'Through Antonio Gramsci's lens', 231, referring to the public comments of support for the ICC by Archbishop Desmond Tutu and Kofi Annan. Rasna Warah, for instance asks, 'With all the chest-thumping at the African Union about African nations being sovereign, and why they must exit en masse from the "colonial" International Criminal Court, I wonder why African heads of state have not demanded that France "liberate" these 14 African countries from what essentially amounts to economic slavery.' Warah R, 'What is AU doing to liberate the former French colonies?' *Daily Nation*, 8 February 2016. See also, the response of the then French Ambassador in Kenya, Maréchaux R, 'France has no hold over its former colonies,' *Daily Nation*, 23 February 2016; and a sur-rebuttal, Omanga D, 'CFA zone no saviour of African states' *Daily Nation*, 29 February 2016.

¹⁸⁴ Kanade M, 'Chronicles of the Doha wars: The battle of Nairobi – Appraisal of the Tenth WTO Ministerial' 2(1) *Strathmore Law Journal*, August 2016, 155-164; Campbell H, 'How Kenya confirmed the deathbed of WTO: Reflections on the 10th Ministerial Conference in December 2015' *Pambazuka*, 8 January 2016.

¹⁸⁵ Nyawo reports the suggestion that the European Union coerced African states to ratify the Rome Statute by amending the Cotonou Agreement to include an obligation to so ratify, which, given its resistance,

It would serve the AU and overall African interests well if, along with clear efforts towards strengthening the African human rights system¹⁸⁶ and African accountability for international crimes under African universal or international jurisdiction, the AU were to employ AU Assembly language adopting a broad and consistent view of its well-intentioned concern for African progress that places its concerns over sovereign equality into context. Without these, one can only view the current wave of Rome Statute withdrawals as state defiance, which neither strengthens the withdrawing state's position within the international community,¹⁸⁷ nor absolves that state from its obligations towards the prosecution of international crimes.

may have led to Sudan withdrawing from Cotonou. Nyawo, 'Through Antonio Gramsci's lens', 224. Nyawo however dismisses this view, given that a majority of African states had already ratified the Rome Statute before the Cotonou Agreement amendment, and that six African states resisted US pressure to sign bilateral immunity agreements. Nyawo, 'Through Antonio Gramsci's lens', 231-2.

¹⁸⁶ Sipalla H, 'African agency in contested contests: A reflection on TrustAfrica's work in international criminal justice' in Mahomed H and Coleman E (eds) *Claiming agency: Reflecting on TrustAfrica's first decade*, Weaver Press, Harare, 2016, 46-47.

¹⁸⁷ Sipalla, 'The historical irreconcilability of international law and politics...', 249-250, giving the example of the Soviet Union and its attempts to deny the UNSC its 'concurring vote' during the 1950 Korean Crisis.

CHAPTER 4

A CRITIQUE OF THE SUBJECT MATTER JURISDICTION OF THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

EVELYNE OWIYE ASAALA

Abstract

The suggested incorporation of international and transnational crimes within the jurisdiction of the proposed African Court of Justice and Human and Peoples' Rights (the African Court) has divided opinion among scholars. Some perceive it as addressing a long-standing jurisdictional gap regarding the prosecution of international and transnational crimes in Africa. Others are sceptical as to whether the African Court will be able to achieve the very ambitious objectives of the Protocol on the African Court of Justice and Human Rights (the Malabo Protocol).

This chapter analyses the proposed substantive criminal jurisdiction of the African Court as provided for in the Malabo Protocol with specific emphasis on innovations and unique contributions to substantive international criminal law contained therein as well as exposing definitional weaknesses that require attention. The chapter argues that the innovations in the Malabo Protocol are likely to make a valuable contribution to justice in Africa and also to international criminal law in general.

LA COUR AFRICAINE DE JUSTICE ET DE DROITS DE L'HOMME ET DES PEUPLES: UNE CRITIQUE DU PROJET POUR LA MISE EN PLACE D'UNE COMPETENCE MATERIELLE SUR LES CRIMES INTERNATIONAUX

Résumé

La proposition d'incorporer une division de crimes internationaux et transfrontaliers au sein de la compétence de la Cour africaine de justice et de droits de l'homme et des peuples (la Cour africaine) a suscité des opinions partagées entre des spécialistes. D'une part, il y en a qui pensent que l'on pourra combler le vide juridictionnel qui existe depuis longtemps en ce qui concerne la poursuite des crimes internationaux et transfrontaliers en Afrique. D'autre part, il y en a ceux qui sont sceptiques quant à la capacité de la Cour africaine de réaliser ses objectifs très ambitieux qui accompagneraient l'entrée en vigueur des dispositions du protocole sur la Cour africaine de justice et de droits de l'homme (le Protocole de Malabo).

Le présent chapitre analyse la proposition de mettre en place une juridiction pénale substantielle au sein de la Cour africaine comme il est prévu par le protocole de Malabo avec un accent particulier sur les innovations et contributions exceptionnelles au droit pénal international substantiel qui y figurent ainsi que souligner les faiblesses de définition qui nécessitent que l'on y porte attention. On soutient que les innovations dans le protocole de Malabo sont susceptibles de contribuer de façon productive non seulement à la justice en Afrique mais aussi au droit pénal international dans son ensemble.

1 Introduction

It is arguable that the bad relationship between Africa and the International Criminal Court (ICC) has driven the African Union (AU) to incorporate international and transnational crimes within the jurisdiction of the African Court of Justice and Human and Peoples' Rights (the African Court) in search of an African solution to the continent's problem of impunity. Thus, apart from its traditional human rights mandate, the African Court may in future also have jurisdiction over international and transnational crimes.¹ This initiative has elicited mixed reactions. Some critics view the proposed incorporation of international crimes within the African Court as expanding the mandate of an already overstretched Court.² The inclusion of crimes such as terrorism, money laundering, corruption, illicit exploitation of natural resources and unconstitutional change of government has, nonetheless, generally been perceived as addressing a long-standing jurisdictional gap regarding the prosecution of international and transnational crimes in Africa.³ This notwithstanding, some scholars are sceptical of the elevation of these crimes into the category of international crimes contrary to existing customary international law.⁴ Others appear convinced that an African court with international criminal jurisdiction is likely to succumb to several challenges without achieving its intended objective of eradicating impunity.⁵

¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) [hereinafter 'Malabo Protocol'] Article 14.

² Du Plessis M, 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (2012) ISS Paper No. 235; Lamony S, 'African court not ready for international crimes' *African arguments* <http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes---by-steven-lamony/on> 8 February 2016.

³ Abass A, 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects' 60 *Netherlands International Law Review* (2013), 33.

⁴ Abass, 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects', 27-50; Du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes'.

⁵ Abass, 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects', 37- 45; Du Plessis M and Stone L, 'A court not found' 7 *African Human Rights Law Journal*, (2007), 530-535 (enumerating several challenges that have curtailed the effective performance of the African Court on Human and Peoples' Rights as well as the African Commission on Human and Peoples' Rights); Lamony, 'African court not ready for international crimes'; Du Plessis M, 'Implications of the AU decision to give the African Court jurisdiction over international crimes'. Key challenges facing the Court include: the question of independence of the office of the prosecutor, over reliance on donor funding, the possibility of the draft protocol failing to come into force due to lack of the required ratification threshold and the admissibility criteria.

This chapter argues that the adequacy of the subject matter jurisdiction provided for in the Protocol on the African Court of Justice and Human Rights (the Malabo Protocol) must be determined with reference to Africa's socio-political landscape. The latter aspect is perhaps the most significant factor to consider in determining whether or not this AU initiative is realistically capable of achieving its stated objective to eradicate impunity on the continent.

The corpus of current international crimes has evolved over time. The Nuremberg Principles listed crimes against peace, war crimes and crimes against humanity as international crimes.⁶ The Genocide Convention (1948) elaborately proscribed the crime of genocide.⁷ The Rome Statute of the International Criminal Court (Rome Statute) has expanded the Nuremberg list of crimes to include genocide.⁸ It also includes the crime of aggression, which, although not yet in force, is the modern equivalent of crimes against peace. The Malabo Protocol has further expanded this list to include piracy, mercenarism, corruption, unconstitutional change of government and terrorism.⁹

In light of the above, the contribution of the Malabo Protocol to international criminal justice can be assessed at two levels: firstly, at the definitional level and, secondly, in relation to the choice of crimes over which the African Court will have jurisdiction. The crimes of piracy, terrorism, money laundering, trafficking in persons, trafficking in drugs and hazardous waste, unconstitutional change of government, mercenarism and corruption are new innovations at an international or even regional level. With the adoption of the Malabo Protocol, the African Court stands to become the first supranational criminal tribunal to be expressly bestowed with jurisdiction over these crimes. Additionally, while the conception of international crimes may not be too different, Africa has introduced some noticeable variations in the manner in which some of the ICC crimes are defined. For example, the definitions of war crimes, aggression, and genocide embody innovations that make unique contributions to substantive international criminal law. Since there is abundant literature on international crimes and their elements,¹⁰ this chapter only

⁶ Principle VI, *Principles of the Nuremberg Tribunal*, 1950.

⁷ Article 2, UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, [*Genocide Convention*].

⁸ Article 5, *Rome Statute of the International Criminal Court*, 17 July 1998.

⁹ Article 14, inserting Article 28A, *African Protocol*.

¹⁰ For further reading see Brownlie I, *Principles of public international law*, 7th ed, Oxford University Press, 2008, 587-593; Cassese A, *International law*, 2nd ed, Oxford University Press, 2005, 436-450; Werle G and Jessberger F, *Principles of International Criminal Law*, 3rd ed, Oxford University Press, 2014, 289-546; Cryer R, Friman H, Robinson D and Wilmshurst E, *An introduction to international criminal law and procedure*, 2nd ed, Cambridge University Press, 2010, 201-352; Cassese A, *Acqua-*

addresses itself to Africa's unique contribution to substantive international criminal law through the Malabo Protocol. The chapter also highlights certain definitional weaknesses that require to be addressed. The following sections deal with the crimes under the Malabo Protocol in turn.

2 The crime of aggression

The Charters of the Nuremberg¹¹ and Tokyo¹² tribunals were the first to introduce the crime of aggression, referred to at the time as crimes against peace. Sergey Sayapin correctly notes that the highly politicised nature of this crime not only made the prosecution of aggression nearly impossible for decades, but also delayed efforts to find a definition for the crime under the Rome Statute, which was not possible until the 2010 Kampala Conference.¹³

Like the Rome Statute, the Malabo Protocol refers to the crime of aggression. Both frameworks build on the definition of crimes against peace in the Charter of the International Military Tribunals or the Charter of the Nuremberg (Nuremberg Charter). The latter defines crimes against peace as 'planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.'¹⁴

While under the Nuremberg Charter it appears as though anyone could be prosecuted for crimes against peace, the Rome Statute and the Malabo Protocol specify that the accused person must be 'a person in a position to effectively exer-

viva G, Fan F and Whiting A, *International criminal law: Cases and commentary*, Oxford University Press, 2013; Mettraux G, 'Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda' 43, 1 *Harvard International Law Journal* (2002), 244; Badar ME, 'From the Nuremberg Charter to the Rome Statute: defining the elements of crimes against humanity' 5 *San Diego International Law Journal* (2004), 109; Chesterman S, 'An all together different order: defining the elements of crimes against humanity' 10 *Duke Journal of Comparative & International Law* (2000), 214-315; Day A, 'Crimes against humanity as a nexus of individual and state responsibility: Why the ICJ got *Belgium v. Congo* wrong' 22 *Berkeley Journal of International Law*, 3 (2004), 506 citing Robinson D, 'Defining crimes against humanity at the Rome conference' 93 *American Journal of International Law* (1999), 43.

¹¹ Article 6(a), *Charter of the International Military Tribunal*, London, 8 August 1945 (Nuremberg Charter).

¹² Article 5(a), *Charter of the International Military Tribunal for the Far East*, Tokyo, 19 January 1946 (amended charter dated 26 April 1946) (Tokyo Charter).

¹³ Sayapin S, 'The crime of aggression in the African Court of Justice and Human and Peoples' Rights' https://www.academia.edu/25874281/The_Crime_of_Aggression_in_the_African_Court_of_Justice_and_Human_and_Peoples_Rights on 18 November 2016.

¹⁴ Article 6(a), *Nuremberg Charter*.

cise control over or direct the political or military action of a State, of an act of aggression [...].¹⁵ The Rome Statute requires that an act of aggression must be the act of a state. Accordingly, under the Rome Statute, the crime of aggression is the use of ‘armed force by a State against the sovereignty, territorial integrity or political independence of another State [...].’¹⁶ The Malabo Protocol, however, introduces a small variation – an act of aggression can either be an action of a state or an ‘organisation, whether connected to the State or not.’¹⁷ Thus, while the Rome Statute restricts the crime of aggression to states as both the aggressor and the victim, the Malabo Protocol does not limit this crime to states but also applies it to organisations including those independent of any state. The Malabo Protocol therefore moves away from the traditional conceptualisation of aggression as a leadership crime, targeting high-ranking state officers and introduces non-state actors as possible perpetrators of the crime.

The reference to non-state actors under the crime of aggression would include acts of aggression by rebel groups whose intention is neither to access power nor maintain it.¹⁸ Yet, one is likely to raise two critical points of concern. First, the difficulty and necessity involved in changing the customary law position that traditionally limits the crime of aggression to state actors. In that regard, Sayapin has asked an important question whether Africa’s extension of this crime to non-state actors is necessary.¹⁹ If Africa were concerned with addressing the menace of rebel groups, can this not be adequately prosecuted under the crimes of genocide, crimes against humanity or war crimes? Yet, the notion of non-state actors brings into perspective the controversial debate on ‘organisational element,’ which has traditionally been linked to state-oriented crimes. In this regard, it is useful to draw from the ICC’s experience in the Kenyan cases, where Judge Hans-Peter Kaul dismissed the Prosecutor’s interpretation of the notion ‘organisation’ as insufficient to fulfil the threshold of Article 7(2)(a) of the Rome Statute. The relevant part of this judgment reads as follows:

I read the provision such that the juxtaposition of the notions ‘State’ and ‘organisation’ in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those ‘organisations’ should partake of some characteristics of a State. Those characteristics eventually turn the private ‘organisation’

¹⁵ Article 8 *bis*, *Rome Statute*; Article 28M, *Malabo Protocol*.

¹⁶ Article 8 *bis*, *Rome Statute*; Article 28M, *Malabo Protocol*.

¹⁷ Article 28M, *Malabo Protocol*.

¹⁸ See definition of unconstitutional change of government in Section 5 below.

¹⁹ Sayapin, ‘The crime of aggression in the African Court of Justice and Human and Peoples’ Rights’.

into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of people; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.

In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of article 7(2)(a) of the Statute.²⁰

Some scholars, however, disagree with this line of thought. According to Gerhard Werle and Florian Jessberger, for example, the crucial factor ought not to be the internal structure of a group but its potential – in terms of personnel and physical capacity – to commit a widespread or systematic attack.²¹ Arguably, restricting the meaning of an organisation to a state or state-like entity is very limiting and is likely to undermine the deterrent effect of the ICC, especially with respect to those private organisations that have the ability to commit grave international crimes, yet do not by themselves have state-like characteristics. It is therefore important that the African Court adopts guidelines on how to interpret this already controversial aspect. It may be true that including non-state actors as possible perpetrators of the crime of aggression targets entities like rebel groups or Al Shabaab. However, if the set ICC threshold is followed, it implies that the definition of non-state actors in the context of the crime of aggression in Africa is likely to leave out the targeted entities thus posing a challenge to Africa's enforcement of this crime in relation to non-state actors.

Another noteworthy aspect of the definition of the crime of aggression and the implication of non-state actors is the requirement that the character, gravity and scale of an act of aggression 'constitutes a manifest violation of the Charter of the United Nations (UN Charter) or the Constitutive Act of the African Union.'²² Firstly, the Malabo Protocol does not define what constitutes 'manifest violation.' The only existing definition of this concept relates to states' 'responsibility to protect.'²³

²⁰ Paras 51-52.

²¹ Werle G and Jessberger F, *Principles of International Criminal Law*, 3rd ed, Oxford University Press, 2014.

²² Article 28M(a), *Malabo Protocol*.

²³ 2005 World Summit Outcome, United Nations General Assembly Resolution A/RES/60/1, 24 October 2005.

The ‘responsibility to protect’ is founded on the idea of sovereignty of states²⁴ and it ‘places the primary responsibility of protection on the territorial state, but allows for collective external intervention, in the last resort, in the event of a failure on the part of the territorial state.’²⁵ In order to fulfil the requirement of ‘a manifest violation,’ it should be demonstrated that the state (on its own or as part of a collective effort) failed to protect its citizens from heinous crimes.²⁶ Manifest violation thus refers to the failure by a state to fulfil certain obligations within the domain of ‘responsibility to protect.’ Understandably, the UN system has traditionally perceived international crimes as state-oriented crimes as opposed to the Malabo Protocol, which introduces the phenomenon of non-state actors. This definition therefore implies that non-state actors are incapable of ‘manifest violation’ as they do not have the international responsibility to protect. Secondly, the UN Charter does not apply to non-state actors, but to member states only.²⁷ For its part, the Constitutive Act of the AU (Constitutive Act) does not envisage non-state actors. While some may argue that it is a matter of interpretation and that the principles under the Constitutive Act could be interpreted as applying to non-state actors, the reality is that principles concerning the use or threat of force and resolution of conflicts are limited to member states of the AU.²⁸ Nowhere does the Constitutive Act mention non-state actors. This calls for an appropriate amendment to the definition of aggression in the Malabo Protocol.

Another problematic issue is: who makes the determination of an act of aggression? Under the Rome Statute, a state referral or the Prosecutor’s exercise of *proprio motu* powers in relation to crimes of aggression is allowed²⁹ but subject to the United Nation’s Security Council (UNSC) making such a determination.³⁰ The UNSC’s powers to make this determination emanates from Article 39 of the UN Charter, which authorises it to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and to ‘make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42

²⁴ Omorogbe EY, ‘The African Union, responsibility to protect and the Libyan crisis’ 59 *Netherlands International Law Review*, 2 (2012), 143 citing Bellamy AJ, *Responsibility to protect*, Polity Press, Cambridge, 2009, 21-28; Stahn C, ‘Responsibility to protect: Political rhetoric or emerging legal norm?’ *The American Journal of International Law* (2007), 111; Thukur R, *The United Nations, peace and security: From collective security to the responsibility to protect*, Cambridge University Press, 2006, 255.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Article 3, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

²⁸ Article 4(e), (f) and (g), *Constitutive Act of AU*.

²⁹ Articles 13 and 15bis, *Rome Statute*.

³⁰ Article 15bis (6) and (7), *Rome Statute*.

to maintain or restore international peace and security.’ Since the UNSC enjoys primary responsibility over matters of peace and security, one could correctly question whether such a UNSC determination will be required for cases before the African Court or whether it will be the AU through the Peace and Security Council (PSC) that makes such a determination.

The Malabo Protocol does not, however, contain any express provisions on who should make a determination regarding the existence of an act of aggression. In defining the crime of aggression, the Malabo Protocol acknowledges the primary role of the UN Charter and that of the Constitutive Act. Seemingly, it can be argued that in the African context, both the UNSC and the AU would have the same powers in relation to the determination of an act of aggression. If the AU were to make such a determination in relation to cases before the African Court, would that conflict with Article 39 of the UN Charter and the UNSC’s primary responsibility in this regard?

Clearly, there is an overlap of responsibility between the PSC and the UNSC with respect to acts of aggression.³¹ The PSC has the mandate to ‘examine and take such appropriate action within its mandate in situations where the national independence and sovereignty of a Member State is threatened by acts of aggression [...]’.³² The UNSC has a similar mandate under Article 39 of the UN Charter as already quoted above. It is, however, argued that Article 52 of the UN Charter allows ‘the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.’ There is, therefore, no inherent contradiction between the powers of the UNSC and PSC in determining crimes of aggression. Though the two are independent institutions with independent normative frameworks, the objectives for their activities are within the principles of the UN Charter. It is thus expected that the two organs will work in close collaboration towards adopting appropriate measures to restore international peace and security. In fact, the AU has made it mandatory for the PSC to ‘cooperate and work closely with the UNSC, which has the primary responsibility for the maintenance of international peace and security.’³³ The AU has further

³¹ Article 2, *Protocol Relating to the establishment of the Peace and Security Council of the African Union (PSC Protocol)* provides that the PSC is established pursuant to Article 5(2) of the *Constitutive Act of the African Union*.

³² Article 7(o), *PSC Protocol*.

³³ Article 17(1), *PSC Protocol*.

acknowledged the necessity ‘to maintain sustained interaction between the UN and the Regional Organisations in order to build particularly the operational capacities of the organisations.’³⁴

Nonetheless, let us consider an extreme theoretical and hypothetical case where the UNSC, while acting under Chapter VII of the UN Charter, determines an act of aggression over which the African Court has jurisdiction. It then proceeds to adopt a resolution to the effect that no member states to the UN Charter can undertake any kind of prosecution. By virtue of Articles 25 and 103 of the UN Charter, such a resolution will be binding on all UN member states and any international agreement to the contrary is void. This will in effect oust the powers of the PSC over determining that act as an act of aggression. This hypothetical case is not only too intrusive but also it requires a high threshold – a vote by majority members and also no veto from the permanent members of the UNSC. Besides, it is unlikely that such a scenario can happen although it is important for this kind of discourse. The possibility of such an eventuality can, however, be overcome when the UNSC and the PSC work closely together within the spirit of the UN Charter and the Protocol Relating to the establishment of the Peace and Security Council of the African Union (PSC Protocol) in undertaking appropriate measures to restore international peace and security.

It may also be validly questioned whether the UNSC determination in this regard would affect the independence of either the ICC or the African Court? With respect to the ICC, it is my opinion that such a determination does not amount to a violation of its independence. If anything, the Rome Statute recognises the importance of the ICC working hand in hand with the UNSC on international security matters. Not only does the Rome Statute allow referrals by the UNSC,³⁵ it also allows the UNSC to undertake its primary role of determining acts of aggression before the ICC exercises jurisdiction over crimes of aggression where either states or the Prosecutor makes a referral.³⁶ Similarly, African states are members to the UN Charter. The Malabo Protocol also defines crimes of aggression as a violation of the UN Charter. Thus, it recognises the need for the African Court to work together with the UN in restoring international peace and security through the prosecution of crimes of aggression.

³⁴ AU Executive Council ‘The common African position on the proposed reform of the United Nations’ *the Ezulwini consensus*, Ext/EX.CL/2 (VII) (2005), 7, para. 1.

³⁵ Article 13(b), *Rome Statute*.

³⁶ Article 15bis(7), *Rome Statute*.

3 War crimes

The Nuremberg Charter defines war crimes as 'violations of the laws or customs of war'³⁷ and lists several acts as comprising these violations.³⁸ International criminal law has adopted this definition, albeit with detailed elaboration. In contrast to the Geneva Conventions and the Statute of the International Criminal Tribunal for the former Yugoslavia, which, in addition to the elements of the crime, adopted the Nuremberg Charter's list of acts that amount to violations of the laws and customs of war, the Rome Statute introduces a gravity threshold. Under the Rome Statute, the listed acts amount to war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'³⁹ It also makes it clear that war crimes can be committed in armed conflicts both of an international and of a non-international character.⁴⁰ The acts that amount to war crimes are not exhaustive. The ICTY has previously held that such a list is inclusive of all laws and customs of war whether listed or not.⁴¹

The Malabo Protocol adopts the Rome Statute's definition with minimal adjustments.⁴² Informed by Africa's history, it lists the following acts as war crimes if committed in an armed conflict of an international character: unjustified delayed repatriation of prisoners of war; apartheid and other inhuman and degrading practices based on racial discrimination; making non-defended localities and demilitarised zones the objects of attack; slavery; collective punishment and despoliation of the wounded, sick, shipwrecked or dead.⁴³ In relation to armed conflict not of an international character, it also proscribes starvation of civilians and using civilians or other protected persons to render certain areas immune from military operations.⁴⁴ Another significant addition under the Malabo Protocol is the proscription of the use of nuclear weapons or other weapons of mass destruction.⁴⁵ Apart from these differences, the description of war crimes under the Malabo Protocol is the same as in the Rome Statute.

³⁷ Article 6(b), *Nuremberg Charter*.

³⁸ Article 6(b), *Nuremberg Charter*.

³⁹ Article 8(1), *Rome Statute*.

⁴⁰ Article 8(2), *Rome Statute*.

⁴¹ *Delalić case*, ICTY, Appeals Chamber, interpreting Article 3 of the ICTY Statute, which lists acts that amount to violation of laws and customs of war.

⁴² Article 28D, *African Protocol*.

⁴³ Article 28D(b) xxviii-xxxiii, *Malabo Protocol*.

⁴⁴ Article 28D(e) xvi-xxii, *Malabo Protocol*.

⁴⁵ Article 28D(g), *Malabo Protocol*.

4 Genocide

The crime of genocide was not included in the Nuremberg Charter. It is the Genocide Convention (1948) that later on defined the crime of genocide to mean:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁴⁶

Like the *ad hoc* international criminal tribunals and the ICC,⁴⁷ the Malabo Protocol has adopted this definition, with one addition, namely, the inclusion of specific ‘acts of rape or any other form of sexual violence.’⁴⁸ This new addition may have been inspired by the judgment in the *Akayesu* case, which held that torture could include rape, thus confirming that rape may constitute a war crime or a crime against humanity under certain circumstances.⁴⁹ The African Court is thus likely to follow the interpretation of genocide developed in other international criminal justice tribunals, but with an emphasis on rape and sexual violence as ingredients of the crime of genocide.

While Malabo Protocol’s inclusion of ‘acts of rape or any other form of sexual violence’ must be applauded, the interpretation of the *mens rea* of this element is likely to be problematic. Experts have lamented the challenges of prosecuting sexual violence in a conflict situation⁵⁰ because, in genocide contexts, some offences

⁴⁶ Article 2, *Genocide Convention*.

⁴⁷ Article 2(2), *ICTR Statute*; Article 4(2), *ICTY Statute*; Article 6, *Rome Statute*. This is the same definition adopted by earlier *ad hoc* tribunals as well as Article 2 of the United Nations International Convention on the Prevention and Punishment of the Crime of Genocide of 1948. In fact, in *Prosecutor v. Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T, para. 495, the court held that the Genocide Convention has coalesced into customary international law.

⁴⁸ Article 28B(f), *Malabo Protocol*.

⁴⁹ *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4 T, 2 September 1998, para. 597. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is also a violation of personal dignity and constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁵⁰ Kapur A, ‘Complementarity as the mechanism to catalyze national prosecutions of international crimes

related to acts of rape and other sexual violence are committed in the aftermath of an armed conflict by peacekeeping troops. This essentially refers to rape by soldiers after an armed conflict in which case the laws governing war crimes or genocide no longer apply. It is therefore almost impossible to prosecute all sexual offences as part of genocide due to the requirement of proving the *chapeau* elements of the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.⁵¹ Yet, these troops are usually not part of the conflict at that point. Although it may be argued that such rape could be prosecuted as a crime against humanity, the difficulty lies in proving the 'widespread or systematic' nature of the rape. Presumably, when rape is committed by soldiers in peacekeeping missions, it will not satisfy the varied elements of international crimes. The only option left for accountability for these crimes is prosecution through domestic avenues, which are normally either unstable or complicit in the crimes. Nevertheless, the attempt by the Malabo Protocol to close the impunity gap in so far as sexual offences are concerned cannot be underestimated.

5 Unconstitutional change of government

Unconstitutional change of government through military coups and dictatorship has been a common phenomenon in post-independence Africa.⁵² Mxolisi Nkosi provides data to the effect that all countries in the West of Africa '... with the exception of Senegal and Cape Verde have experienced from one to six successful coups (Benin, Ghana, Togo, Niger, Burkina Faso, Guinea Bissau, Guinea Conakry, Mauritania and Nigeria). East Africa and the Horn of Africa, with 10 states, have experienced coups ... in the Sudan, Uganda, Burundi and Ethiopia.'⁵³ Central Africa is no exception (Congo-Brazzaville, the Central African Republic, São Tomé and Príncipe). This region has experienced a total of 14 successful coups between 1956 and 1984.⁵⁴ African Islands too (Comoros and Madagascar) have undergone

of sexual violence,' Annual Forum of the International Nuremberg Principles Academy, Nuremberg, 21 November 2015.

⁵¹ See the *chapeaux*, (n 47 above).

⁵² Wachira GM, 'The Role of the African Union in strengthening the rule of law and constitutional order in Africa' in Cordenillo, R and Sample, K (eds), *Rule of law and constitution building: The role of regional organisations*, International IDEA, Stockholm, 2014, 21.

⁵³ Nkosi N, 'Analysis of OAU/AU responses to unconstitutional changes of government in Africa' (2010) Unpublished LLM thesis, University of Pretoria, 23; see further, Omorogbe EY, 'A club of incumbents? The African Union and *coups d'état* 44 *Vanderbilt Journal of Transitional Law* (2011), 1233.

⁵⁴ Nkosi, 'Analysis of OAU/AU responses to unconstitutional changes of government in Africa'.

4 successful coups.⁵⁵ In 2009, Madagascar experienced a successful coup. Michael Vunyingah estimates that between 1961 and 1997, there were a total of 78 coups in Africa.⁵⁶ The states of Mali and Guinea Bissau experienced successful coups as recently as 2012.⁵⁷

Unconstitutional change of government through *coups d'état* has therefore been a concern of both the Organisation of the African Union (OAU) and the AU.⁵⁸ The inclusion of the crime of unconstitutional change of government in the Malabo Protocol has been accounted for as follows: 'most African leaders – some of whom had come to power through the barrel of a gun – thought that coups were a bigger threat to their regimes and thus merited greater attention.'⁵⁹ Indeed, the fact that several African heads of state have circumvented the law in order to ensure retention of power further supports this kind of thinking. Uganda and Cameroon, for instance, have heads of state that previously came to power through coups. In these countries, it should be noted that the heads of state have been in power for 30 and 34 years respectively. If elections are held at all, they are often either compromised, or undemocratic in the sense of lacking any true pluralism of political parties, thus bringing into question the effectiveness of the AU Charter on Democracy, Elections and Governance.⁶⁰

Nonetheless, the OAU Declaration on the Framework on a Response to Unconstitutional Change of Government (the OAU Declaration) proffers the first definition of a situation that could be considered to amount to an unconstitutional change of government.

- i) military *coup d'état* against a democratically elected government;
- ii) intervention by mercenaries to replace a democratically elected government;

⁵⁵ Nkosi, 'Analysis of OAU/AU responses to unconstitutional changes of government in Africa'.

⁵⁶ Vunyingah M, 'Unconstitutional changes of government in Africa: An assessment of the relevance of the Constitutive Act of the African Union' *Policy Brief*, Africa Institute of South Africa, No. 44, (March 2011), 2.

⁵⁷ PSC/MIN/3 Report of the Chairperson of the Commission on the situation in Guinea Bissau, Mali and between the Sudan and South Sudan adopted at the 319th PSC Meeting at the level of Ministers in Abuja, Nigeria on 24 April 2012, 1.

⁵⁸ Article 13(1) of the African Charter on Human and Peoples' Rights provides for the right for every citizen to participate in their government either directly or through chosen representatives, this document was adopted by the OAU on 27 June 1981; Decision on unconstitutional change of government, AHG/Dec. 142 (XXXV) 1999; Declaration on the framework for an OAU response to unconstitutional changes of government, AHG/Decl.5 (XXXVI) 2000; Article 4(p) of the Constitutive Act condemns and rejects unconstitutional change of government as one of the key principles guiding the AU.

⁵⁹ Souare IK, 'The AU and the challenge of unconstitutional changes of government in Africa' ISS Paper 179 (2009), 3.

⁶⁰ AU Charter on Democracy Elections and Governance, January 2007.

- iii) replacement of democratically elected governments by armed dissident groups and rebel movements; and
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁶¹

Article 23(5) of the African Charter on Democracy, Elections and Government (ACDEG) introduces an additional criterion to this list, namely, 'amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of Governments.' This was a response to an emerging practice where African presidents alter their respective national constitutions or laws to either extend their presidential term or declare themselves presidents for life.⁶² Recently, after failing to secure a constitutional change extending his term limit, President Pierre Nkurunziza of Burundi decided nevertheless to vie for presidency and won amidst great opposition and violence that led to over 70 deaths and the displacement of more than 170,000 people.⁶³ Rwanda recently extended the term limit for the President and the Republic of Congo Brazzaville intends to do the same.⁶⁴

Initially, the AU responded to the problem of unconstitutional change of government through condemnation, suspension and the imposition of sanctions on relevant member states.⁶⁵ Given the magnitude of the problem – or perhaps in re-

⁶¹ Declaration on the framework for an OAU response to unconstitutional changes of government, AHG/Decl.5 (XXXVI) 2000, adopted at the 36th Ordinary Session of the Assembly of Heads of States and Governments of the OAU held in the Togolese capital, Lomé, in the period from 10 to 12 July 2000.

⁶² In 1982, the Kenyan National Assembly declared the country a one party state and amended the constitution to reflect this declaration. This was the status until the government succumbed to pressure in 2002 and restored the multi-party regime by way of a constitutional amendment. Uganda, in contrast, has moved from a 'no party' regime to a multi-party regime. However, though 'officially' a multi-party State, Uganda is effectively still a one party state. This is also true for Rwanda. For the Union Islands of Comoros, in 2007, the then president of the Autonomous Island of Anjouan, Colonel Mohamed Bacar, refused to relinquish power after finishing his term and declared himself president for yet an additional term.

⁶³ 'Burundi, Rwanda and now Congo: Another African president set to change term limit rules' *Mail & Guardian Africa* 18 July 2015 <http://mgafrica.com/article/2015-07-18-burundi-rwanda-and-now-congo-another-african-president-set-to-get-a-third-term-and-more> on 8 June 2016.

⁶⁴ 'Update: 99% of Rwandan Law makers vote for changes to allow Kagame extend his 15 years in power' *Mail & Guardian Africa* 14 July 2015 <http://mgafrica.com/article/2015-07-14-rwandan-lawmakers-set-to-vote-changes-that-would-allow-kagame-extend-his-15-years-in-power/> on 8 June 2016; With Rwanda's general elections scheduled for 2017, the Rwandan Parliament voted with an overwhelming majority to hold a referendum on the proposed changes to the Constitution, which have the effect of extending the term of the current president to a third term. Similarly, lawmakers in Congo are seeking to amend the country's constitution through a referendum. Such amendment would remove the presidential age limit and also extend the term limit of the president.

⁶⁵ Article 23, *Constitutive Act*; Article 7(1)(g), *Protocol establishing the AU Peace and Security Council*;

sponse to criticisms by some scholars who describe AU interventions as impotent and paralysed,⁶⁶ the AU has taken a firmer position against unconstitutional changes of government by establishing it as an international crime under the Malabo Protocol. This raises the question whether this crime, which occurs elsewhere but is especially problematic in Africa, should be elevated to the level of an international crime? Unconstitutional change of governments is a crime of regional concern. It has largely contributed to compromised leadership that eventually leads to mass violation of rights. Therefore, elevating it to the level of international crimes may boost the efforts aimed at ending impunity in the region if it is properly enforced.

The Malabo Protocol adopts a definition that seeks to combine the definitions under the OAU Declaration, the ACDEG and that of the PSC Protocol. It further expands these definitions by including political assassinations and alterations of electoral laws as follows:

‘unconstitutional change of government’ means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a) A putsch or coup d’état against a democratically elected government;
- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;

Charter on Democracy, Elections and Governance; Rule 37.4, *Rules of Procedure of the Assembly*; Communique PSC/PR/Comm(CLXIV) adopted at the 164th PSC Meeting in Addis Ababa, Ethiopia on 24 December 2008, paras. 4 and 5; Communique PSC/PR/Comm(CLXV) adopted at the 165th PSC Meeting in Addis Ababa, Ethiopia on 29 December 2008. Following the coups that had occurred in Guinea Bissau on 5 August 2008 and in Mauritania on 6 August 2008, the PSC condemned the coup and suspended Guinea from all AU activities pending the restitution of constitutional order. Communique PSC/PR/Comm(XCV) adopted at the 95th PSC Meeting in Addis Ababa, Ethiopia on 10 October 2007, para. 5. In the case of the Comoros, where President Bacar had refused to relinquish power after his term came to an end, the PSC imposed sanctions. In some cases, where the AU has been inactive, some sub-regional bodies have imposed sanctions, as was the case in Niger. ECOWAS Communique adopted at the Extraordinary ECOWAS HoSG Summit in Abuja, Nigeria on 17 October 2009, paras. 14(a), 15 and 17. The AU later endorsed the decision by ECOWAS. Communique PSC/AHG/Comm.3(CCVII) adopted at the 207th PSC Meeting at the level of the HoSG in Abuja, Nigeria on 29 October 2009, paras. 2 and 5. The AU further condemned the 2010 uprising in Tunisia, Egypt and Libya. PSC/PR/Comm.2(CCLVII) Press statement at the 257th PSC Meeting in Addis Ababa, Ethiopia on 15 January 2011; Communique PSC/PR/Comm.(CCLX) adopted at the 260th PSC Meeting in Addis Ababa, Ethiopia on 16 February 2011, paras. 3 and 4; Communique PSC/PR/Comm(CCLXI) adopted at the 261st PSC Meeting in Addis Ababa, Ethiopia on 23 February 2011, paras. 2 and 5. In Madagascar, the Peace and Security Council condemned the unconstitutional change of government and suspended Madagascar from the AU on 20 March 2009, 3 days after the coup. Similarly, in the PSC Meeting of 2008-08-07, the AU condemned the acts of Mauritania and suspended it from the AU.

⁶⁶ Eriksson M and Zetterlund K, *Dealing with change: EU and AU responses to the uprisings in Tunisia, Egypt and Libya*, Report for the Swedish Ministry of Defence, FOI, 2013, 38.

- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.⁶⁷

In order to prove the offence of unconstitutional change of government, one has to prove any of the listed acts. Unlike its predecessor instruments, the Malabo Protocol does not use permissive qualifiers like 'could be'. This can be interpreted to imply that in some instances, though the listed act has occurred, it may not amount to unconstitutional change of government. The Malabo Protocol further places emphasis on 'democratically elected government.' This risks excluding individuals who order or organise military coups against 'undemocratically elected governments.' That the current governments of Burkina Faso and Uganda initially came to power through the power of the gun⁶⁸ raises the question of what would happen to governments that first came to power through military coups and subsequently organised 'democratic elections.' Do the subsequent elections legitimise the previous coup? If not, does this mean that the organisers of a subsequent coup by a different group cannot be punished under this provision?

As pointed out by Francis Ikome and Kathryn Sturman, an affirmative answer to the latter suggests the existence of 'good coups.'⁶⁹ Their identification as 'good coups' seems to be closely aligned with the legal-philosophical foundations of the French Declaration on the Rights of Man and Citizens and the American Declaration of Independence. These documents assert the right of citizens to resist tyrannical governments.

The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are ... Resistance to Oppression.⁷⁰

⁶⁷ Art 28E(1), *African Protocol*.

⁶⁸ www.globalsecurity.org/military/library/report/1985/WJ.htm on 9 December 2015.

⁶⁹ Sturman K, 'Unconstitutional change of government: The democrat's dilemma in Africa' Policy briefing 30, South African Institute of International Affairs (2011) citing Ikome F, *Good coups and bad coups: The limits of the AU's injunction on unconstitutional changes of government*, Occasional Paper, Johannesburg: Institute for Global Dialogue, 2007, 55. They refer to good coups as those engineered against bad governance that has shut down peaceful and democratic methods of changing governments.

⁷⁰ Article 2, *Declaration of Human and Civic Rights* of 26 June 1789, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf on 2 December 2015.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.⁷¹

However, adherents of the principles of democratic governance will readily argue, and rightly so, that the right to resist tyrannical government does not include the right to engage in a *coup d'état*. Rather, resistance should be pursued using democratic means. The silence of international human rights discourse on any right to engage in *coups d'état* seems to confirm the obligation to resist tyrannical governments only through peaceful means. The challenge, however, is that elections under such regimes are usually neither free nor fair resulting in the re-election of the same tyrannical governments.⁷² Kenya and Sudan are examples of countries which heads of state are facing, or have faced ICC prosecution yet their populations have elected those same leaders even amidst allegations of voting irregularities.⁷³ It would have made more sense if the crime of unconstitutional change of government included provisions regarding fraudulent elections, as that is the means by which most African leaders come to power.⁷⁴ This element should be treated as equivalent to a *coup d'état*. The ACDEG provides for the criteria of a democratically elected

⁷¹ *American Declaration of Independence*, 4 July 1776, para. 2, <http://www.ushistory.org/declaration/document/index.htm> on 2 December 2015.

⁷² More so, under the discussion on unconstitutional change of governments above, this chapter has pointed out the way oppressive governments in Burundi, Uganda, the Comoros Island have sought to get deliberately re-elected despite exhausting their constitutional term. In Zimbabwe, the presidential elections took place on 29th March 2008. The results were only announced on 2 May 2008. This delay was declared by the Zimbabwean High Court to be legitimate even as Morgan Tsvangirai, the leader of the Movement for Democratic Change (MDC), was announced to have garnered 47.9% of the votes while the incumbent Robert Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) received 43.2%. None of them garnered the required 50% necessitating a run off according to Zimbabwean law. Although the date for a run off was set for 27 June 2008, the opposition leader pulled out of the race a day before the election, leaving Mugabe to garner 85% of the vote in an unopposed election. It should be mentioned that these events played out amidst intensified violence and killing of opposition supporters. For further reading see Förander K, 'Dealing with unconstitutional changes of government – the African Union way' Unpublished LLM thesis, Faculty of Law, University of Lund (2010), 52-54.

⁷³ Report by the Supreme Court on its *suo moto* motion to re-tally certain polling stations; ICC-02/05-01/09, Pre-Trial Chamber 1, Situation in Darfur Sudan, In the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March 2009); *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, (*Notice of withdrawal of the charges against Uhuru Muigai Kenyatta*) 5 December 2014. The case against Uhuru has however since been withdrawn, <https://www.icc-cpi.int/pages/cases.aspx#Default=%7B%22k%22%3A%22%22%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D> (accessed 27 March 2017).

⁷⁴ For example, the elections in Kenya in 2007 and Zimbabwe in 2008.

government as requiring regular, transparent, free and fair elections that uphold the principles of human rights, gender equality, the rule of law, constitutionalism and political pluralism.⁷⁵ Despite this Charter having come to force in 2007, its effectiveness remains questionable since several incidences of irregular elections have been reported even after its operationalisation.

Another interesting aspect of the definition of unconstitutional change of government is the crime of 'refusal by an incumbent government to relinquish power to the winning party.' This creates an inherent contradiction between the offence of unconstitutional change of government and the Malabo Protocol's immunity clause, which provides as follows:

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office⁷⁶

While an incumbent leader may refuse to relinquish power, the immunity clause bestows upon them absolute protection from any prosecution 'while still serving.' How then will the court enforce this particular aspect of the crime of unconstitutional change of government in respect of an incumbent who refuses to relinquish power and yet is provided with absolute protection under the immunity clause? If this is not rectified, it could easily create a misconception that the crime of unconstitutional change of government was created to protect incumbent leaders and not necessarily to hold leaders accountable.

Further, the mental element of this crime has a bearing on its definition. The prosecution has to prove that the person being accused of this crime either committed or ordered the commission of the said acts 'with the aim of illegally accessing or maintaining power.'⁷⁷ The mental element of the crime is, therefore the intention to either access or maintain power.

6 Piracy

Piracy is recognised in customary international law as a violation of norms of *jus cogens*.⁷⁸ Antonio Cassese, however, argues that although customary

⁷⁵ Articles 1 and 17, *African Charter on Democracy, Elections and Governance*.

⁷⁶ Article 46 *bis* of the Malabo Protocol.

⁷⁷ Article 28E(1), *Malabo Protocol*.

⁷⁸ Bassiouni MC, 'International Crimes: *Jus Cogens* and *Obligatio Ergo Omnes*' 59 *Law & Contemporary Problems*, 4 (1996), 63; Bassiouni MC, 'Universal jurisdiction for international crimes: Historical

international law authorises any state to ‘seize and capture pirates on the high seas and bring them to trial,’ customary international law does not create piracy as an *international crime*.⁷⁹ It can however be argued that because international custom allows every state that captures pirates to prosecute them, then even though international custom may not expressly criminalise it, piracy is nonetheless shunned by the international community. Moreover, the fact that all states are encouraged to criminalise piracy clearly makes it a crime of international concern. The Nuremberg Charter and the *ad hoc* tribunals did not list piracy as one of the international crimes within their jurisdiction. The nature and timing of these tribunals did not necessitate such jurisdiction. The Rome Statute also fails to acknowledge this crime within its jurisdiction. This could be informed by the fact that when the Rome Statute was negotiated, the crime seemed archaic only to resurrect itself at the coast surrounding the horn of Africa a few years later.

The Malabo Protocol therefore becomes particularly important, especially given the fact that piracy is still rampant in Africa. Although international tribunals may not have expressly provided jurisdiction over piracy, this crime has largely been prosecuted under the doctrine of universal jurisdiction. In fact, it has been argued that the crime of piracy was the catalyst for the development of the doctrine of universal jurisdiction.

An issue that cuts across all non-core international crimes included in the Malabo Protocol is the non-existence of gravity test that can be used in order to determine which cases should be admissible before the African Court. For example, given the fact that piracy is a non-state related crime, does this imply that the African Court will take on board all piracy cases? This calls for the need to create practical criteria regarding the admissibility of non-core international crimes.

perspectives and contemporary practice’ 42 *Virginia Journal of International Law* (2001), 81; Cassese A, ‘Is the bell tolling for universality? A plea for a sensible notion of universal jurisdiction’ 1 *Journal of International Criminal Justice* (2003), 591; *AU-EU expert report on the Principle of Universal Jurisdiction*, para. 9; *Prosecutor v. Furundzija*, ICTY Trial Chamber, decision of 10 December 1998, para. 156; *Pinochet, Decision of the House of Lords of 24 March 1999* in [1999] 2 All England Reports, speeches by Lord Browne Wilkinson, paras. 837-838; Article 105, *United Nations Convention on the Law of the Sea*; Articles 8, 9, 17, 18 and 20, *1996 Draft Code of Crimes Against the Peace and Security of Mankind*. Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc.A/51/10, para. 50.

⁷⁹ Cassese A, *International criminal law*, 3rd ed, Revised by Cassese A, Gaeta P, Baig L, Fan M, Gosnell C and Whiting A, Oxford University Press, 2013, 19.

7 Mercenarism

International law prohibits the use of mercenaries.⁸⁰ According to the International Committee of the Red Cross, the prohibition of mercenarism is a norm of customary international law.⁸¹ Mercenarism is not a new offence to Africa. Africa first outlawed mercenarism at a regional level in 1977.⁸² In this regard, Africa was reacting to international developments. The OAU adopted the Convention for the Elimination of Mercenarism in Africa (OAU Convention against Mercenarism) barely a month after the adoption of the 1977 Additional Protocols to the Geneva Convention. Both the Additional Protocol (I) to the Geneva Conventions (AP I) and the 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention against Mercenaries)⁸³ prohibit mercenarism. Additional Protocol (I) to the Geneva Conventions defines a mercenary as a person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict; and
- f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁸⁴

Because all six of the abovementioned factors must be present, the definition of a mercenary is elaborate and therefore quite narrowly defined. Although the UN Convention against Mercenaries adopts a definition similar to that in AP I, it

⁸⁰ Article 47(1), *Additional Protocol (I) to the Geneva Conventions*; Article 3, *OAU Convention for the Elimination of Mercenarism in Africa (OAU Convention against Mercenarism)*, OAU Doc. CM/433/Rev.L (1972); Articles 3 and 16, *UN Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention against Mercenaries)* 1989.

⁸¹ Fallah K, 'Corporate actors: The legal status of mercenaries in armed conflict' 88, No. 863 *International Review of the Red Cross* (2006), 604 citing Henckaerts JM and Doswald-Beck L, *Customary international humanitarian law, Vol. 1: Rules*, ICRC and Cambridge University Press, Geneva, 2005, 391-395.

⁸² On 3 July 1988, the OAU adopted the *Convention for the Elimination of Mercenarism in Africa*.

⁸³ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted on 4 December 1989.

⁸⁴ Article 47(2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

excludes the second condition, namely, that a mercenary is someone who ‘does, in fact, take a direct part in the hostilities.’⁸⁵ This makes the definition of a mercenary in AP I more restrictive than under the UN Convention against Mercenaries. Under AP I a person must take direct part in the hostilities to qualify as a mercenary, while under the UN Convention against Mercenaries proof of other factors suffice for one to be a mercenary regardless of whether or not such person played any direct part in hostilities.

The OAU sought to address this crime, albeit in a more diplomatic manner,⁸⁶ by defining the crime of mercenarism as follows:

A mercenary is a person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does in fact take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
- d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- e) is not a member of the armed forces of a party to the conflict; and
- f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

[...]

Any person... who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an offence considered as a crime against peace and security in Africa and shall be punished as such.⁸⁷

The Malabo Protocol seems to have been largely inspired by these earlier documents. Under the Protocol, a person commits the offence of mercenarism if s/he:

Article 28H(a)

- (i) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (ii) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
- (iii) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

⁸⁵ Article 1, *UN Convention against Mercenaries*.

⁸⁶ See generally, *OAU Convention against Mercenaries*.

⁸⁷ Articles 1(1) and (3), *OAU Convention against Mercenarism*.

- (iv) Is not a member of the armed forces of a party to the conflict; and
- (v) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 28H(b)

A mercenary is also any person who, in any other situation:

- i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 - 2. Assisting a government to maintain power;
 - 3. Assisting a group of persons to obtain power; or
 - 4. Undermining the territorial integrity of a State.
- ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
- iii. Is neither a national nor a resident of the State against which such an act is directed;
- iv. Has not been sent by a State on official duty; and
- v. Is not a member of the armed forces of the State on whose territory the act is undertaken.⁸⁸

The OAU Convention posits a more restrictive definition of a mercenary than the Malabo Protocol, which adopts the more elaborate definition under the UN Convention against Mercenaries. The Malabo Protocol also adds additional purposes to the definition, namely, 'participating in concerted acts of violence aimed at assisting a government to maintain power' and 'assisting a group of persons to obtain power.'⁸⁹ Thus, in order to determine whether a person would qualify as a mercenary under the Malabo Protocol, it is not necessarily a requirement to prove that such person took part directly in hostilities since any level of engagement or participation in acts of violence calculated towards assisting a government to either obtain or maintain power would suffice to hold them accountable.

The Malabo Protocol's approach to mercenarism is therefore a great improvement over the OAU Convention against Mercenarism. It not only elaborately defines a mercenary, but also clarifies contentious areas under the OAU Convention. For example, unlike its predecessor, the Malabo Protocol clarifies the meaning of

⁸⁸ Articles 28H(a) and (b), *Malabo Protocol*.

⁸⁹ Articles 28H(b) i, *Malabo Protocol*.

being motivated by the ‘desire for private gain’ by also requiring proof of ‘the promise or payment of material compensation.’ Because of the conjunctive ‘and’ in Article 28H(b)(ii), the prosecution would need to prove two things: First, a personal motivation for private gain on the part of the mercenary and, secondly, that some compensation was at least promised by someone to the mercenary (if not paid). Notably, the Malabo Protocol does away with the UN Convention against Mercenaries’ criterion of material gain being ‘substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces.’⁹⁰ Most likely, this was informed by the difficulty inherent in proving the exact compensation paid to a mercenary.⁹¹

The Malabo Protocol further clarifies the nationality and residence status of a mercenary, the status of the mercenary as a member of an armed force and the status of the mercenary in relation to the sending state.⁹² Like the UN Convention against Mercenaries, the Malabo Protocol further offers two alternative definitions of a mercenary as stated above. In either case, the relevant factors have to be proved cumulatively.

8 Corruption

The problem of corruption is not confined to Africa. However, Transparency International’s (TI) Corruption Index Ratings (CIR) as well as African literature depicts corruption as being especially prevalent in African countries.⁹³ Referring to Nigeria, for instance, Chinua Achebe observed:

Nigeria has passed the alarming and entered the fatal stage; and Nigeria will die if we keep pretending that she is only slightly indisposed...corruption has grown enormously in variety, magnitude and brazenness...because it has been extravagantly fuelled by budgetary abuse and political patronage on an unprecedented scale...⁹⁴

⁹⁰ Article 1(1)b, *UN Convention against Mercenaries*.

⁹¹ ICRC ‘Rule 108. Mercenaries’ https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule108#Fn_81_2 on 11 November 2015.

⁹² Article 28H (b) iii, iv and v.

⁹³ See generally Corruption Perception Index from 1995-2015, <http://www.transparency.org/research/cpi/overview> on 23 June 2016; Mbaku J (ed), *Corruption and the crisis of institutional reforms in Africa* (1998); Etuk U, ‘Problems of responsible governance in Africa’ in Oguejiofor JO (ed), *Philosophy, democracy and responsible governance in Africa*, Lit, Münster: New Brunswick, 2003; Chweya L, Tuta JK and Akivaga SK (eds), *Control of corruption in Kenya: Legal political dimensions*, Claripress, Nairobi, 2005.

⁹⁴ Nnoruka SI, ‘Responsible leadership in governance’ in Oguejiofor JO (ed), *Philosophy, democracy and responsible governance in Africa*, Münster, Lit, New Brunswick, 2003, 175.

This statement could apply to many other African states.⁹⁵ Attempts to fight corruption at the international level saw the UN adopt the UN Convention against Corruption.⁹⁶ This Convention criminalises the following acts: bribery of national public officials; bribery of foreign public officials of public international organisations; embezzlement, misappropriation or other diversion of property by a public official; trading in influence, abuse of functions, illicit enrichment, and bribery in the private sector; embezzlement of property in the private sector; laundering of proceeds of crime; concealment of proceeds of any of these acts; and obstruction of justice with respect to any of these acts.⁹⁷ The AU Convention on Preventing and Combating Corruption includes a similar list of acts that constitute corruption.⁹⁸

The Malabo Protocol has adopted a similar approach.⁹⁹ One notable feature of the Malabo Protocol definition of corruption is that it grants the court discretion to determine the seriousness of any act.¹⁰⁰ While this is a positive step towards establishing the gravity test for admissibility of this crime, it is too ambiguous and therefore creates the risk not only of prosecutorial abuse but also for contradictory jurisprudence between different chambers of the African Court. This would likely lead to calls for further amendment to the Malabo Protocol to provide clear criteria that should provide for greater legal certainty regarding the admissibility of cases involving corruption.

9 Terrorism

Underlying the crime of terrorism is the 'wilful killing' of civilians with a particular motive to cause terror. Although the Nuremberg Principles do not expressly provide for the crime of terrorism, it can, if committed in the context of a widespread and systematic attack against a civilian population, be found as a component of crimes against humanity, for example, as an underlying act of 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.'¹⁰¹ Crimes

⁹⁵ Chweya, Tuta and Akivaga, *Control of corruption in Kenya: Legal political dimensions*.

⁹⁶ Adopted by the General Assembly of the UN on 31 October 2003 and entered into force on 14 December 2005.

⁹⁷ Articles 15-25, *UN Convention against Corruption*.

⁹⁸ Adopted on 11 July 2003 and entered into force on 5 August 2006; Article 4, *AU Convention on Preventing and Combating Corruption*.

⁹⁹ Articles 28I and 28I Bis, *Malabo Protocol*.

¹⁰⁰ Art 28I Bis (2), *Malabo Protocol*.

¹⁰¹ Article 6(c), *Nuremberg Charter*.

against humanity at Nuremberg required the existence of an armed conflict.¹⁰² Thus, acts of terrorism could not be prosecuted for acts committed either before or after the war. The Rome Statute also broadly includes terrorism within its definition of crimes against humanity.¹⁰³ The advantage of the Rome Statute definition is that it does not require the existence of an armed conflict. It thus provides an increased likelihood of apportioning criminal responsibility for terrorism at the international level, if committed in the context of a widespread and systematic attack against a civilian population. Similarly, several other international treaties include this crime under their respective definitions of either war crimes or crimes against humanity.¹⁰⁴

The problem, however, arises for terrorist acts committed outside armed conflict or where there is no widespread or systematic attack against a civilian population. Does this imply that terrorist acts committed within this context cannot be prosecuted as an international crime?

The UN was the first to articulate the offence of terrorist bombing in an international legal instrument. Under the International Convention for the Suppression of Terrorist Bombings (UN Terrorism Convention):

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

- a) With the intent to cause death or serious bodily injury; or
- b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.¹⁰⁵

Significantly, the UN Terrorism Convention includes incomplete acts of terrorism or attempted terrorism,¹⁰⁶ as well as the acts committed by accessories before and after the fact in its definition of terrorism.¹⁰⁷

¹⁰² Principle vi(c), *Nuremberg Principles*.

¹⁰³ Article 7, *Rome Statute*.

¹⁰⁴ For instance, Article 52, *Protocol Additional (I) Geneva Convention 1949*; Article 51, *Protocol Additional (I) Geneva Convention 1949*; Article 20, *Draft Code of Crimes Against the Peace and Security of Mankind*, 1996. These treaties make provision for protection of the civilian population, and prohibits wilful killing or wilfully causing great suffering or serious injury to body or health, making civilians the objects of attack or indiscriminate attack that affects civilians which acts embody the elements of the crime of terrorism.

¹⁰⁵ Article 2(1), *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on 15 December 1997, which came into force on 23 May 2001.

¹⁰⁶ Article 2(2), *International Convention for the Suppression of Terrorist Bombings*.

¹⁰⁷ Article 2(3), *International Convention for the Suppression of Terrorist Bombings*.

The Malabo Protocol adopts an extremely flexible and wide definition of the crime of terrorism taking into account earlier definitions. According to the Malabo Protocol, terrorism could mean any of the following acts:

- A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - (iii) create general insurrection in a State.
- B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a)(1) to (3).
- C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
- D. The acts covered by international humanitarian law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.

Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defense against a terrorist act.¹⁰⁸

Though elaborate, this definition is not without criticism. Firstly, the definition does not stipulate a threshold requirement. Will the African Court have jurisdiction over every act falling within categories A and B? Is this practically possible? This concern necessitates an amendment establishing threshold criteria for determining the acts over which the African Court can exercise its jurisdiction. It is almost impossible that the African Court will be able to deal with every act of terror falling within categories A and B above. Secondly, it is not clear who determines that an act is not a terrorist act because it falls within category C, which concerns liberation

¹⁰⁸ Article 14 (inserting Article 28G), *Malabo Protocol*.

struggles, struggles against colonialism, foreign occupation and aggression. Should this be the prosecution's responsibility or should the Court have the final say? Furthermore, what criteria should be applied in determining the acts that will fall under category C? In other words, does any level of aggression and domination by foreign forces justify terrorism in that context?

Finally, while international legal instruments focus mostly on protecting the civilian population by prohibiting attacks against civilians and their property and the wilful killing or causing serious bodily harm to civilians, the broader definition of terrorism under the Malabo Protocol also makes it possible to hold to account acts of terror targeting the military. The Malabo Protocol does not distinguish between the military and civilians. It uses the terms 'any person' and 'any number or groups of persons.' This protects everyone including the military so long as the acts committed are prohibited under domestic, regional or international law.

10 Conclusion

This chapter set out to establish Africa's contribution towards the development of international and transnational crimes. It focused on those crimes under the Malabo Protocol that most clearly illustrate Africa's innovative and unique contribution to substantive international criminal law. These crimes are tailored for Africa and can, in theory, make a valuable contribution to justice on the continent. An overview of the nature of these crimes and their significance to Africa confirms that Africa has made some noticeable contributions to substantive international criminal law, particularly in relation to the definition of international crimes. Although the Malabo Protocol largely adopts the Rome Statute's definitions of international crimes, it makes some innovative additions to war crimes, the crime of aggression, crimes against humanity and genocide. The Malabo Protocol can further be lauded for its incorporation of the crime of unconstitutional change of government and the transnational crimes of terrorism, piracy and corruption over which no other international tribunal has previously exercised jurisdiction. However, the potential destructive nature of the immunity clause as it relates to the crimes under the Malabo Protocol and particularly, the crime of unconstitutional change of government is of great concern and must be addressed accordingly. More so, one also needs to look at how the proposed expanded jurisdiction of the African Court will *in practice* fit into the bigger project of international criminal justice. It remains to be seen whether Africa's suggested contribution will fully address the impending question of impunity on the continent.

CHAPTER 5

LA NOUVELLE SECTION PÉNALE DE LA COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES: UN MIROIR AUX ALOUETTES?

EUGENE BAKAMA BOPE

Résumé

L'Afrique vient de décider de se doter d'une cour pénale qui aura compétence sur les crimes internationaux sur le continent. Cela intervient dans un contexte où la Cour pénale internationale (CPI) et l'Union africaine (UA) entretiennent des relations conflictuelles dues à l'action de la CPI en Afrique.

Plusieurs incriminations transnationales figurent sur la liste comme le changement anti-constitutionnel de gouvernement, le trafic illicite de stupéfiants, l'exploitation illicite des ressources naturelles, etc. Ces crimes ont plus une connotation des réalités africaines (le parfum africain) ; De même le Protocole de Malabo étend la notion d'agression telle que définie dans la Résolution 3314 (XXIX) de l'Assemblée Générale des Nations Unies (AGNU) et dans la définition insérée dans le Statut de Rome lors de la conférence de révision de Kampala. Ainsi, des faits commis par les États et des acteurs non étatiques (Shebab, Boko Haram, Daesh, etc.) peuvent être constitutifs de crimes d'agression.

Ce commentaire se focalise sur les points les plus importants du Protocole, c'est à dire les ressemblances et les différences avec le Statut de Rome (compétences matérielles, complémentarité, procédure, immunités) et l'incidence des différences sur la compétence de la CPI en termes de complémentarité. Il s'agit donc d'une présentation générale du Protocole de Malabo en comparaison avec le Statut de Rome (les avancées et reculs).

Une chose est de prévoir des crimes et une autre sera de rendre les poursuites effectives et efficaces. Est-ce un dispositif trompeur?

THE NEW CRIMINAL DIVISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: IS IT JUST A SMOKESCREEN?

Abstract

Africa has just decided to establish an international crimes court, which will have jurisdiction over international crimes on the continent. This comes at a time when the African Union (AU) is embroiled in a conflict with the International Criminal Court (ICC) due to the latter's intervention in Africa.

The substantive jurisdiction of this court will include several cross-border crimes such as unconstitutional change of government, illegal trafficking in narcotic drugs and illegal exploitation of natural resources. These crimes also mirror the realities on the African continent (African flavour). Similarly, the Malabo Protocol expands the notion of aggression as defined in the Resolution 3314 (XXIX) of the United Nations General Assembly (UNGA) and in the definition inserted in the Rome Statute during the Kampala Review Conference. Thus, acts committed by States and non-state actors (Al-Shaabab, Boko Haram, ISIS, etc.) can constitute crimes of aggression.

This article is focused on the most important points of the Protocol, that is, the similarities and differences with the Rome Statute (substantive jurisdictions, complementarity, procedure, immunities) and the impact of the differences on the jurisdiction of the ICC in terms of complementarity. It is therefore a general presentation of the Malabo Protocol in comparison with the Rome Statute (progress and setbacks).

It is one thing to anticipate crimes and another to make the prosecution for the same efficient and effective. Is this a deceptive mechanism?

1 Cour africaine de justice, des droits de l'homme et des peuples (CAJDHP) et Cour pénale internationale (CPI) : points de ressemblance et de divergences

1.1 La complémentarité avec les juridictions nationales

Le principe de complémentarité présente un double aspect :

1. le juge du lieu des crimes est, en principe, le mieux placé pour en connaître, et
2. une justice rendue par un juge autre que celui du lieu des crimes doit avoir pour finalité de suppléer au manque de volonté ou à l'incapacité matérielle du lieu avant que le juge national redevienne à nouveau capable d'assurer des poursuites pour crimes internationaux.

Dans cet chapitre, le principe de complémentarité est présenté dans le cadre de la CAJDHP et de la CPI.

1.1.1 Complémentarité dans le cadre de la CAJDHP

Il faut distinguer deux types de complémentarité : Commission-Cour africaine, d'une part et CAJDHP-juridictions nationales de l'autre. La première concerne la mission de 'protection' des droits de l'homme tandis que la deuxième, qui nous occupe ici, concerne la compétence pénale (spécialement la poursuite de crimes de droit international).

L'article 4 du Protocole de Malabo indique que la CAJDHP complète le mandat de protection de la Commission africaine des droits de l'homme et des peuples.

En outre, en vertu de l'article 46 H, la complémentarité de la Cour peut également s'appliquer à ses relations avec les juridictions des communautés économiques régionales quand l'acte constitutif de ces dernières confère à ces juridictions des compétences pénales en matière de crimes de droit international.

A l'instar du Statut de Rome, le Protocole de Malabo¹ énonce les critères permettant de déterminer le manque de volonté ou l'incapacité d'un État à enquêter ou à poursuivre une affaire donnée² :

¹ La première décision d'étendre la compétence de la Cour africaine des droits de l'homme aux crimes internationaux a été prise par l'Union africaine au Sommet de février 2009 et le Protocole de Malabo a été adopté en juillet 2014. Les raisons premières de l'établissement d'une chambre pénale au sein de la Cour africaine sont fondées par des motivations politiques en réaction aux poursuites qualifiées de « discriminatoire » à l'endroit de certains dirigeants africains sur base du principe de la compétence universelle. Et des poursuites de la Cour visant les « africains ».

² Article 46 H 3 (a) (b) (c) du *Protocole portant amendements au Protocole portant Statut de la Cour africaine de justice et des droits de l'homme* (ci-après *Protocole de Malabo*).

- un procès est en cours, mais la juridiction nationale vise à protéger l'accusé contre sa responsabilité pénale internationale ;
- le retard injustifié du procès ne traduit pas la volonté de traduire le suspect en justice ;
- le procès n'est pas conduit de manière indépendante et impartiale ou il est conduit d'une manière telle qu'il ne traduit pas la volonté de faire comparaître le suspect devant la justice³ ;
- l'État est incapable d'arrêter le suspect ou d'obtenir les preuves et témoignages nécessaires en raison de l'effondrement total ou substantiel de son système judiciaire national ou en raison de son inexistence.⁴

1.1.2 La complémentarité dans le cadre de la CPI

Le principe de complémentarité suppose la primauté de la compétence nationale⁵ en matière de crimes internationaux, la CPI ne s'y substituant que lorsque l'État concerné n'a pas la volonté ou la capacité de mener véritablement à bien les enquêtes ou les poursuites.⁶

La jurisprudence de la CPI interprète de manière large les notions d'incapacité et de manque de volonté à poursuivre de la part d'un État, en faisant remarquer qu'elle peut engager des poursuites même si l'État a déjà engagé la procédure de droit interne, ou lorsque les faits pour lesquels le prévenu est poursuivi par devant elle n'ont pas fait l'objet de poursuites spécifiques.⁷ Dans cette optique, on serait tenté de dire que la CPI est censée parfois se livrer à une analyse approfondie de l'appareil judiciaire en général, et de la qualité du système pénal de l'État concerné en particulier, notamment de sa conformité aux standards internationaux reconnus en matière des droits de l'homme. Un argument que ne partage pas la Chambre d'appel de la CPI dans *l'affaire Al Senussi* qui rappelle qu'elle n'est pas une cour des droits de l'homme : *'The Court was not established to be an international court*

³ Article 46 H 3 (a) (b) (c) du *Protocole de Malabo*.

⁴ Article 46 H (4) du *Protocole de Malabo*.

⁵ Holmes T, *The principle of complementarity* in Roy SL (éd), *The International Criminal Court: The making of the Rome Statute: Issues, negotiations, results*, 1999, 41-78; Williams SA, Schabas WA, 'Article 17 Issues of admissibility' in Triffterer O (éd), 2 édition, *The commentary of the Rome Statute of the International Criminal Court: Observers' notes, article by article*, 2008, 383-394.

⁶ Articles 1 et 17 du *Statut de Rome de la Cour pénale internationale*.

⁷ Megret F, 'Qu'est-ce qu'une juridiction "incapable" ou manquant de volonté au sens de l'article 17 du Traité de Rome ? Quelques enseignements tirés des théories du déni de justice en droit international', *17 Revue québécoise de droit international (RQDI)*, 2 (2004), 185-186.

of human rights, sitting in judgement over domestic legal system to ensure that they are compliant with international standards'.⁸

Avec ce principe, la CPI apparaît comme un 'mécanisme de soutien aux États en difficulté',⁹ une 'réponse aux immunités internes' ; et un 'organe de contrôle sur les juridictions nationales'.¹⁰ En vertu donc de ce principe, les États sont appelés à adapter leurs législations aux exigences internationales. Ainsi le non-respect des standards internationaux sert mieux la complémentarité.¹¹

Enfin, comme le souligne Jacques Mbokani, le principe de complémentarité n'implique pas une obligation de poursuivre les crimes prévus dans le Statut de Rome puisque l'objet de ce dernier se limite à l'institution d'une CPI et à l'organisation des rapports que cette Cour est appelée à entretenir avec les systèmes de justice pénale nationaux.¹² Cette obligation découle toutefois des autres traités de droit international humanitaire et ceux des droits de l'homme.¹³

Bien que les deux cours affirment leur caractère complémentaire vis à vis des juridictions nationales, la CPI reste moins claire vis à vis de sa relation avec des tribunaux sous régionaux tandis que la section pénale précise son caractère complémentaire vis à vis des tribunaux sous régionaux et nationaux.

Mais le Protocole reste muet sur les rapports à la CPI.

Les États africains parties au Statut de Rome se retrouvent donc devant un système de 'double complémentarité ou de conflits de juridictions'.¹⁴

⁸ CPI, *Décision de la Chambre d'appel dans l'Affaire Al Senussi*, ICC-01 /11-01/11 OA6, para. 219.

⁹ Weckel P, 'La Cour pénale internationale, présentation générale,' 4 *Revue générale de droit international public (RGDIP)*, (1998), 984.

¹⁰ Ondo T, 'Réflexions sur la responsabilité pénale internationale du Chef d'État africain,' 69 *Revue trimestrielle des droits de l'homme* (2007), 177.

¹¹ Kambale P, 'Quelques considérations sur la compatibilité du Statut de la Cour pénale internationale avec certains principes constitutionnels en Afrique francophone,' 21 *Revue de droit africain*, (janvier 2002), 41-42.

¹² Mbokani J, 'L'amnistie et la répression des crimes de droit international au regard de l'avènement de la Cour pénale internationale,' Thèse, inédit, Université catholique de Louvain, 7 septembre 2015, 33.

¹³ Deschutter O, *International human rights law*, Cambridge University Press (CUP) cité par Mbokani J, 'La jurisprudence congolaise en matière des crimes de droit international,' Étude Osisa, à paraître, 24. Ceci est peut-être correct mais un débat est possible. Que penser notamment du septième paragraphe du Statut de Rome selon lequel 'il est du devoir de chaque État de soumettre à sa juridiction criminelle les responsables de crimes internationaux' ?.

¹⁴ Mubiala M, 'L'Afrique et la justice pénale internationale,' 85 *Revue internationale de droit pénal* (janvier 2014), 4.

Quant aux juridictions hybrides, on serait tenté de reconnaître la primauté des poursuites sur base de l'Article 17 du Statut de Rome compte tenue de l'objectif de lutte contre l'impunité.

1.2 Saisine de la CAJDHP et de la CPI

La saisine de la Section pénale de la CAJDHP est l'œuvre des États parties, du Conseil de paix et de sécurité de l'Union africaine et du Bureau du Procureur (Article 15, 16 (f) et 29 du Protocole de Malabo) tandis que la CPI ne peut être saisie que par :

- L'État partie ou faisant une déclaration de compétence de la Cour ;
- Le Procureur (*proprio motu*) ;
- Le Conseil de sécurité des Nations unies ;

Le protocole adopte donc des dispositions similaires au Statut de Rome dans la mesure où les mécanismes de déclenchement de la procédure sont les mêmes.

Il semble cependant paradoxal comme le fait remarquer Evelyne Asaala que l'Afrique adopte un mode de saisine similaire à celui qu'il a critiqué pour la CPI notamment le rôle du Conseil de paix et de sécurité ainsi que les pouvoirs '*proprio motu*' du Procureur.¹⁵ Peut être que la configuration du Conseil de paix et de sécurité de l'UA n'est de nature à les inquiéter, à la différence de celle du Conseil de sécurité des Nations unies.

1.3 Compétence pénale internationale matérielle

Il sied de préciser les crimes relevant de la compétence de la Section pénale de la Cour africaine. Il s'agit de :

- 1) génocide ;
- 2) crimes contre l'humanité ;
- 3) crimes de guerre ;
- 4) crime relatif au changement anti constitutionnel de gouvernement ;
- 5) piraterie ;
- 6) terrorisme ;

¹⁵ Asaala EO, 'The African Court of Justice and Human and Peoples' Rights: An opportunity for international criminal justice?' in Van der Merwe HJ (ed) *International criminal justice in Africa: Challenges and opportunities*, 2014, 49.

- 7) mercenariat ;
- 8) corruption ;
- 9) blanchiment d'argent ;
- 10) traite des personnes ;
- 11) trafic illicite de stupéfiants ;
- 12) trafic illicite de déchets dangereux ;
- 13) exploitation illicite des ressources naturelles ;
- 14) le crime d'agression.

Le Protocole dispose que 'la Conférence peut étendre sur consensus des États parties, la compétence de la CAJDHP à d'autres crimes afin de refléter le développement du droit international'.¹⁶ De même, ces crimes relevant de la compétence de la Cour ne doivent pas souffrir d'aucune limitation.¹⁷ On pourrait se demander est ce que le Protocole veut-il interdire que, dans la pratique, la liste des crimes effectivement poursuivis ne soit rétrécie ou veut-il proscrire une interprétation qui réduirait la portée de chacune des incriminations ? Le flou vient peut-être de la manière est rédigé l'Article 28, A, 3.

Comme on peut le constater la Cour prévue aura une compétence très étendue, plus large même que celle de la CPI. Cette situation entrainera sans doute des difficultés de fonctionnement de la Cour notamment : Le fait qu'il y ait plusieurs chambres dans une seule et même juridiction; la double compétence (contentieuse et interprétative) des textes applicables pour trois compétences différentes.

Quand on prend, le nombre élevé de crimes retenus et qui sont souvent *sui generis* dans le catalogue pénal international, se posera sans doute une question d'efficacité pour la Cour quand on sait que même la CPI qui a plus de moyens et supposée couvrir le monde entier, n'a retenu que quatre crimes.

Si certains de ces crimes existent déjà dans des traités spécifiques au niveau universel et régional africain (terrorisme, corruption, blanchiment d'argent, par exemple), certains d'entre eux sont nouveaux et spécifiques à l'Afrique. C'est le cas du changement anti-constitutionnel de gouvernement, du mercenariat, du trafic des déchets dangereux et de l'exploitation illégale des ressources naturelles.¹⁸

¹⁶ Article 28A(2) du *Protocole de Malabo*.

¹⁷ Article 28A(3) du *Protocole de Malabo*.

¹⁸ Mubiala M, 'L'Afrique et la justice pénale internationale,' 3.

L'analyse des définitions des quatre crimes communs entre la CPI et la Cour africaine à savoir, le crime contre l'humanité, le génocide, le crime de guerre et le crime d'agression montre plusieurs ressemblances mis à part la définition du crime d'agression dans le Protocole et les éléments contextuels du crime de guerre. Nous y reviendrons plus loin dans la partie 2.4 de ce chapitre.

Pour exercer sa compétence sur les crimes précités, la Cour devra vérifier les conditions ci-dessous :

- l'État sur le territoire duquel le comportement en cause a eu lieu ou, si le crime a été commis à bord d'un navire ou d'un aéronef, l'État du pavillon ou l'État d'immatriculation ;
- l'État dont la personne accusée du crime est un ressortissant quand la victime du crime est citoyenne de cet État ;
- la commission des actes extraterritoriaux par des non nationaux menace un intérêt vital d'un État.

La compétence de la CAJDHP est uniquement prospective, comme celle d'ailleurs de la CPI.¹⁹ Si l'acceptation de la compétence de la CAJDHP par un État qui n'est pas Partie au Protocole de la CAJDHP est requise conformément au paragraphe 2, cet État peut, par une requête déposée auprès du Greffier, consentir à ce que la CAJDHP exerce sa compétence à l'égard du crime.

Le protocole de Malabo donne aussi compétence à la Cour sur les personnes morales à l'exception de l'État²⁰ contrairement à la CPI où seules les personnes physiques peuvent être traduites devant elle.

Ce développement reflète l'évolution du droit international africain.

1.4 Procédure devant la CAJDHP et la CPI

Quelques éléments communs aux deux juridictions méritent d'être soulignés : il s'agit notamment :

- de la participation des victimes à la procédure²¹ ;
- du droit à la réparation ;

¹⁹ Williams A, 'Article 11: Jurisdiction *ratione temporis*' in Triffterer O (éd), 2éd, *The commentary of Rome Statute of the International Criminal Court: Observers' notes, article by article*, 2008, 323-328.

²⁰ Article 46C(1) du Protocole de Malabo.

²¹ Le Protocole de Malabo prévoit la création d'une unité des victimes et des témoins au sein du Greffe pour prendre des mesures de protection (Article 22B).

- du Fonds au profit des victimes
- de l'existence d'un Bureau de la défense²² ;
- de l'incompétence de la Cour pour les personnes âgées de moins de 18 ans au moment des faits ;
- de l'imprescriptibilité des crimes internationaux .

En ce qui concerne le déroulement du procès, Mutoy Mubiala rappelle que le Protocole contient des dispositions détaillées s'inspirant largement du Statut de Rome. Celles-ci sont relatives ²³:

- aux droits des accusés (Article 46 A) ;
- aux conditions d'exercices de ses compétences par la Cour (Article 46 E bis et 46 F) ;
- à l'application du principe *non bis in idem* (Article 46 I) ;
- à l'exécution des amendes et des mesures de saisie (Article 46 J bis) ;
- à la grâce ou à la commutation de peine (Article 46 K) ;
- à la coopération et à l'assistance judiciaire (Article 48 L) ;
- au fonds d'affectation spéciale y relative (Article 46 M).

1.5 Régime des peines

Le Protocole de Malabo présente quelques spécificités par rapport au régime prévu par le Statut de Rome.

L'article 43A du Protocole de Malabo relatif aux peines et amendes infligées conformément à la compétence pénale internationale de la Cour indique que 'sans préjudice des dispositions de l'article 43, la CAJDHP rend le jugement et prend à l'encontre des personnes reconnues coupables de crimes de portée internationale des peines et/ou amendes, autres que la peine de mort, conformément au Statut de Malabo. Il s'ensuit que les peines y prononcées ne doivent pas être limitées à l'emprisonnement et/ou à des amendes financières'.

²² L'un des aspects positifs du Protocole de Malabo est la création d'un Bureau de la défense comme un organe indépendant et séparé de la Cour (Article 22 C). La CPI vient de se doter d'une association du Barreau de la Cour, un bureau de la défense indépendant des autres organes de la CPI.

²³ Mubiala M, ' L'Afrique et la justice pénale internationale', 4.

En plus de l'emprisonnement et/ou des amendes, la CAJDHP peut ordonner 'la saisie des biens et ressources acquis illégalement ou par un comportement criminel, et leur restitution à leur propriétaire légitime ou à un État membre approprié'. Il s'agit de l'application du principe *ex ignore jus non oritur* qui donne compétence à la section pénale de confisquer les biens ou ressources acquis illégalement mais non de manière délictueuse.

Il importe de souligner également la possibilité de bénéficier d'une grâce ou d'une commutation de peine. À ce titre, l'article 46K dispose : '(...) il ne peut y avoir grâce ou commutation de peine que si la Cour en décide ainsi sur la base de l'intérêt de la justice et des principes généraux du droit'.

1.6 Immunités et défaut de pertinence de la qualité officielle

1.6.1 Dans le cadre de la CAJDHP

1.6.1.1 Responsabilité pénale individuelle

Le principe sacro-saint de responsabilité pénale individuelle est consacré dans le Protocole de Malabo. Il y est souligné :

1. Toute personne qui commet un crime prévu par le présent Statut en sera tenue personnellement responsable.
2. Sous réserve des dispositions de l'Article 46A *bis* du présent Statut, la qualité officielle de toute personne accusée, n'exonère pas cette personne de responsabilité pénale ni n'allège la peine.
3. Le fait que tous actes prévus à l'article 28A(1) du présent Statut aient été commis par un subalterne, ne dispense pas son supérieur de responsabilité pénale s'il savait que le subalterne était sur le point de commettre de tels actes ou les avait commis et que le supérieur n'a pas pris les mesures nécessaires et raisonnables pour empêcher de tels actes ou pour punir ses auteurs.
4. Le fait qu'un accusé agissait conformément aux ordres d'un État ou d'un supérieur ne le dispense pas de responsabilité pénale, mais peut conduire à l'allègement de sa peine si la Cour établit que cela est conforme à l'esprit de justice.'

Au-delà de la simple responsabilité pénale individuelle, le droit international africain des crimes internationaux intègre la responsabilité pénale des personnes morales. L'article 46C alinéa 1 du Statut de la CAJDHP affirme le principe. Il y est souligné : '*Aux fins du présent Statut, la Cour a compétence sur les personnes morales, à l'exception des États*'.

Cette particularité illustre la situation du continent africain où des entreprises souvent occidentales pillent les ressources naturelles de ces pays. La République démocratique du Congo (RDC) demeure un des cas parfaits : plus de cinq millions des personnes tuées, dont femmes et enfants.²⁴ Y compris l'exploitation illégale des ressources naturelles du pays.²⁵

Le droit pénal contemporain des États connaît le principe de la responsabilité des personnes morales indépendamment de celle des dirigeants, ce que rappelle l'article 46 du Protocole, para. 6.

Dans cette logique, l'intention d'une entreprise de commettre une infraction pourra être établie sur la preuve que c'était la politique de l'entreprise de commettre des actes constitutifs de crime international ou l'information pertinente réelle ou présumée était connue dans l'entreprise.

1.6.1.2 Privilège des poursuites ou immunités?

La coexistence des immunités de juridictions pénales des gouvernants en exercice avec la lutte contre l'impunité des crimes graves a pendant longtemps été tumultueuse en droit international avant l'arrêt de principe de la Cour internationale de justice (CIJ) relatif à un mandat d'arrêt international lancé par la Belgique contre un ministre des affaires étrangères en exercice en RDC.²⁶ La question centrale est celle de savoir si un gouvernant en exercice reste protégé contre les poursuites pour ses actes de fonction, quand bien même ceux-ci seraient constitutifs de crimes internationaux ? La réponse de la CIJ sur cette question est à deux volets : d'une part, les gouvernants demeurent exempts de poursuites devant les tribunaux pénaux étrangers ; d'autre part, ils ne peuvent voir leur responsabilité engagées, lorsqu'ils sont en fonction, que devant une juridiction pénale internationale compétente.²⁷

Alors que l'article 27 du Statut de Rome consolide l'irrecevabilité de l'invo- cation de la qualité officielle en cas d'inculpation pour crimes internationaux, l'ar-

²⁴ On parle de plus de cinq millions de personnes qui sont tombées victimes directes ou indirectes de la guerre en RDC. Mais selon l'enquête d'IRC, plus de trois millions des morts. Voir International Rescue Committee, 'Mortality in the Democratic Republic of Congo: Results from a nationwide survey conducted September-November 2002,' disponible sur le site www.reliefweb.int/library/documents/irc-drc-8apr.pdf.

²⁵ Voir Rapport final du Groupe d'experts sur l'exploitation des ressources naturelles et autres formes de richesse de la RDC (coltan, cobalt, cuivre etc.) S/2002/1146 du 22 mai 2002.

²⁶ Tachou-Sipowo AG, 'L'immunité de l'acte de fonction et la responsabilité pénale pour crimes internationaux des gouvernants en exercice,' 56 *McGill Law Journal/ Revue de droit de McGill*, 3 (2011), 629-672.

²⁷ *L'affaire relative au mandat d'arrêt du 11 avril 2000 (RDC c. Belgique)*, 2002, CIJ, Rec. 3, para. 59.

article 46A *bis* du Statut de la CAJDHP (Protocole de Malabo) souligne qu'aucune procédure pénale ne peut être engagée ni poursuivie contre un chef d'État ou de gouvernement de l'UA en fonction, ou toute personne agissant ou habilitée à agir en cette qualité ou tout autre haut responsable public en raison de ses fonctions.

Un Chef d'État ou de Gouvernement en fonction est protégé des poursuites tant qu'il occupe constitutionnellement ses fonctions.²⁸ Il s'agit là d'une différence de traitement entre les justiciables potentiels de la Section pénale de la CAJDHP.

Si l'on regarde ce qui est dit à propos des 'hauts responsables publics'. Lorsqu'il est écrit 'en raison de ses fonctions', l'on pourrait penser que l'on est en présence d'une 'functional immunity'. Or, celle-ci, à la différence de la 'personal immunity', subsiste, même à la fin des fonctions parce qu'elle est justifiée par l'imputabilité du fait à l'État plutôt qu'à l'individu. Une chose est cependant certaine. L'illégalité de la 'functional immunity' en ce qui concerne les crimes de droit international est établie depuis Nuremberg. L'immunité fonctionnelle signifie en effet que les actes commis par l'agent de l'État au titre de l'accomplissement de sa fonction ne sont pas susceptibles de poursuites devant un tribunal pénal étranger.²⁹ La CIJ a décidé cependant que la distinction entre actes privés et publics d'un ministre des affaires étrangères en exercice était 'sans conséquence et sans importance'.³⁰

L'article 46A*bis* du Protocole est incontestablement l'une des grandes différences entre le Statut de Rome et le Protocole. Selon cet article, les Chefs d'États et de gouvernement en fonction et les hautes personnalités publiques 'agissant comme tel', bénéficient de l'immunité. On peut comprendre les différentes réactions négatives aussi bien sur le continent qu'en dehors du continent, quand on connaît l'importance de la question des droits de l'Homme et les graves violations dont sont victimes les populations africaines. Est-ce raisonnable de consacrer l'immunité de telles personnalités ? Quid des États africains parties à la CPI et au protocole qui auront à faire face à deux engagements contradictoires ? Ces immunités ne vont-elles pas encourager certains dirigeants à demeurer au pouvoir par peur d'être poursuivi ? Autant des questions difficiles à résoudre.

Mais il faut aborder ce sujet sans passion, avec objectivité et réalisme.

²⁸ Il est d'ailleurs possible que les poursuites soient impossibles, même après la fin des fonctions, du moins en ce qui concerne les crimes commis pendant l'exercice des fonctions.

²⁹ Tachou-Sipwo, 'L'immunité de l'acte de fonction et la responsabilité pénale pour crimes internationaux des gouvernants en exercice', 643. La 'functional immunity' est notamment celle qu'exclut l'article 27 du *Statut de Rome* tandis que dans l'affaire du mandat d'arrêt, il s'agissait plutôt de 'personal immunity' celle qui couvre chefs d'États et diplomates etc.

³⁰ *Affaire du mandat d'arrêt du 11 avril 2000*, para.55.

Ceux qui estiment que cette immunité est négative ont des arguments solides qui portent sur les souffrances des populations africaines face à des dictatures, les guerres civiles, les tortures, les assassinats politiques, les exécutions extra judiciaires, crimes de guerres, crimes contre l'humanité, le manque de libertés individuelles etc. Bref une situation de non-droit qui consacre l'impunité. À ce jour, il y a de nombreux États africains qui sont dans cette situation. Les exemples de la Gambie, de l'Erythrée, du Burundi sont patents.

On peut se demander qu'est-ce qui a bien pu amener ceux qui ont écrit le texte à proposer une telle immunité? Il semble qu'ils ont pris en compte le fait que les États africains sont encore très fragiles, qu'ils ne sont pas des états nations. La plupart des États africains sont encore confrontés à des questions ethniques, régionales, tribales, et religieuses, etc... Ces questions font que la démocratie à l'occidentale n'est pas encore une réalité.

Les hommes politiques sont souvent élus en raison du poids, de leur appartenance régionale. Ils ne sont pas élus sur la base d'un programme. On a encore en mémoire ce qui s'est passé au Kenya en 2008 après les élections contestées (plus de 1000 morts). Des massacres inter-ethniques, chaque communauté, chaque ethnie s'alignant derrière son leader politique. Pour ramener la paix, il a fallu mettre en place un gouvernement fondé non pas sur les résultats des urnes mais sur l'union des leaders politiques selon leur appartenance politique voire ethnique. Dans un tel contexte, la poursuite pénale de ces leaders ne risque-t-elle pas de faire perdurer les troubles ?

L'exemple du Kenya n'est pas isolé. La plupart des États africains sont dans cette situation. Au Burkina-Faso, lors des dernières élections, le Président Kaboré a été démocratiquement élu dès le premier tour. Une élection qui a été saluée par la communauté internationale. Mais les Burkinabès savent que cela ne pouvait pas être autrement, pour la simple raison que le Président Kaboré appartient à l'ethnie majoritaire, les mossis qui font 40% de la population. Et comme la majorité de la population est analphabète, elle vote par appartenance ethnique tout comme au Kenya, au Congo, etc. Il n'y avait aucune chance pour que le candidat venu en seconde position, Zéphirin Diabré puisse battre Kaboré, parce qu'il est d'une ethnie minoritaire.

Avec tout cela, le principe de complémentarité ne sera pas réalisable au niveau de la Cour africaine parce que la Section pénale sera incapable de poursuivre une catégorie de personnes. La CPI trouve ainsi sa puissance sauf si les États africains se retirent, ce qui ne sera pas facile étant donné la pression de la société civile. Si le but du Protocole était de faire échapper certaines personnes des poursuites, c'est

raté car la CPI pourra jouer son rôle à moins d'un retrait et sans préjudice d'un renvoi du Conseil de sécurité des Nations unies.

Sur cette question du fond sur les immunités, Eric David rappelle³¹ que dans *l'affaire du mandat d'arrêt du 11 avril 2000*, la CIJ a dit :

'En quatrième lieu, un ministre des affaires étrangères ou un ancien ministre des affaires étrangères peut faire l'objet de poursuites pénales devant certaines juridictions pénales internationales dès lors que celles-ci sont compétentes. Le Tribunal pénal international pour l'ex-Yougoslavie et le Tribunal pénal international pour le Rwanda, établis par des résolutions du Conseil de sécurité adoptées en application du chapitre VII de la Charte des Nations unies, ainsi que la future Cour pénale internationale instituée par la convention de Rome de 1998, en sont des exemples. Le statut de cette dernière prévoit expressément, au paragraphe 2 de son article 27, que « les immunités ou règles de procédure spéciales qui peuvent s'attacher à la qualité officielle d'une personne, en vertu du droit interne ou du droit international, n'empêchent pas la Cour d'exercer sa compétence à l'égard de cette personne ».'

La CPI, référant à la décision de la CIJ dans *l'affaire du mandat d'arrêt du 11 avril 2000*, note dans l'affaire *Al Bashir*, que même si la CIJ rappelle que dans les relations entre États, les Chefs d'État, de gouvernement et les ministres des affaires étrangères en exercice bénéficient d'une immunité de juridiction pénale et civile totale comme un principe reconnu de droit coutumier, elle a, par ailleurs, précisé que des poursuites sont possibles devant des juridictions internationales.³²

L'article 27 du Statut de Rome consacre le principe d'égalité d'application du Statut, en vertu duquel la responsabilité pénale individuelle ne peut être évitée sur le fondement de la qualité officielle de l'auteur du crime ou encore d'une erreur de droit, sauf si celle-ci fait disparaître l'élément psychologique du crime.³³

³¹ David E, 'La CPI : avancées, défis des premiers cas' Cours dans le cadre de la 5^{ème} édition des cours intensifs sur les droits de l'homme et le droit international pénal, Bukavu, le 22 août 2016, inédit, 5.

³² *Affaire du mandat d'arrêt du 11 avril 2000*, para.61 ; CPI, *Le Procureur c Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 13 décembre 2011, Rectificatif à la décision rendue en application de l'article 87-7 du Statut de Rome relativement au manquement par la République du Malawi à l'obligation d'accéder aux demandes que lui a adressées la Cour aux fins de l'arrestation et de la remise d'Omar Hassan Ahmad Al Bashir, para.33. Aussi pour écarter l'exception d'immunité d'un Président de la République, le Tribunal spécial pour la Sierra Leone note: 'the Special Court for Sierra Leone was an international – not a national – court, and that the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international tribunal or court.' (TSSL, *Affaire Le Procureur c Charles Ghankay Taylor*, Decision on immunity from jurisdiction, SCSL-03-01-I-059, 31 mai 2004, §52 in TSSL, *Affaire Le Procureur c Charles Ghankay Taylor*, Trial chamber II, Case No.: SCSL-03-01-T, 18 May 2012, Annex B : Procedural history, p. 2583, 7).

³³ Triffterer O, 'Article 27: Irrelevance of official capacity,' in TRIFFTERER O (éd), *Commentary on Rome Statute of the International Criminal Court: Observer's notes, article by article*, 1999.

L'on mentionne de manière particulière la qualité officielle de chef d'État ou de gouvernement, ou d'un parlement, de représentant élu ou d'agent d'un État, qui n'exonère en aucun cas de la responsabilité pénale, pas plus qu'elle ne constitue en tant que tel un motif de réduction de la peine. Il appert clairement, que nul n'échappe à la compétence de la Cour quels que soient des privilèges ou immunités dont on jouirait en vertu du droit interne ou même international conventionnel ou coutumier. Maintenir une telle exception reviendrait à renier à cette juridiction toute effectivité, en protégeant les plus hauts responsables des crimes de droit international.³⁴

Et donc, il n'est plus besoin dès lors, dans les poursuites des crimes graves, de distinguer celui qui n'agit pas pour le compte de l'État ou qui agit en qualité purement privée de celui qui peut légalement représenter l'autorité publique dont le corollaire serait l'imputation des actes officiels de cet individu à l'État dont il est l'organe et à l'État seul.³⁵ On s'accorde ainsi avec le Tribunal militaire international de Nuremberg sur le fait 'ce sont des hommes et non des entités abstraites qui commettent les crimes dont la répression s'impose, comme sanction du droit international'.³⁶

Le second paragraphe de l'article 27 du Statut de Rome ajoute : 'les immunités ou règles de procédure spéciales qui peuvent s'attacher à la qualité officielle d'une personne (...) n'empêchent pas la Cour d'exercer sa *compétence* à l'égard de cette personne'.³⁷

1.7 *Obligation générale de coopérer et limites : articles 86 et 98 du Statut de Rome*

Dans le chapitre relatif à la coopération internationale et l'assistance judiciaire, sans organisme quelconque de sécurité (police, armée), le Statut de Rome

³⁴ Aurey X, 'Article 27,' in Fernandez J, Pacreau X (dir.), *Statut de Rome de la Cour Pénale Internationale. Commentaire article par article*, A. Pédone, 2012, 843-861.

³⁵ Verhoeven J, *Les immunités propres aux organes ou autres agents des sujets de droit international. Le droit international des immunités : contestation ou consolidation ?* Larquier, Bruxelles, 2004, 62.

³⁶ Tribunal militaire international, *Procès des grands criminels de guerre devant le tribunal militaire international*, Nuremberg, 14 nov. 1945-1^{er} oct. 1946, Washington (DC), Government Printing Office, 1949, 235.

³⁷ Voir aussi Aurey X, 'Cachez cette immunité que je ne saurais voir : La CPI et les Chefs d'État en exercice' consulté en ligne le 14 septembre 2016.

<http://www.fondamentaux.org/2013/10/15/cachez-cette-immunite-que-je-ne-saurais-voir-la-cpi-et-les-chefs-dÉtat-en-exercice/>.

pose l'obligation générale de coopérer³⁸ à travers laquelle les États coopèrent pleinement avec la Cour dans les enquêtes et poursuites qu'elle mène pour les crimes relevant de sa compétence. Le Protocole de Malabo prévoit aussi à l'article 46L des règles de coopération qui invitent les États parties à coopérer avec la Cour dans l'enquête et la poursuite des personnes accusées d'avoir commis les crimes définis par son Statut. De même, il envisage une collaboration avec les autres cours internationales et régionales à travers des accords dans le but de faciliter sa mission. Il est possible de voir demain un accord entre la CPI et la CAJDHP sur base de cette disposition.

S'agissant du Statut de Rome, l'article 98 en rapport avec la coopération en relation avec la renonciation à l'immunité et le consentement à la remise, vient relancer le débat sur l'impunité de certaines personnes bénéficiant des immunités d'État ou diplomatiques. Il est ainsi libellé :

- '1. La Cour ne peut poursuivre l'exécution d'une demande de remise ou d'assistance qui contraindrait l'État requis à agir de façon incompatible avec les obligations qui lui incombent en droit international en matière d'immunité des États ou d'immunité diplomatique d'une personne ou de biens d'un État tiers, à moins d'obtenir au préalable la coopération de cet État tiers en vue de la levée de l'immunité.
2. La Cour ne peut poursuivre l'exécution d'une demande de remise qui contraindrait l'État requis à agir de façon incompatible avec les obligations qui lui incombent en vertu d'accords internationaux selon lesquels le consentement de l'État d'envoi est nécessaire pour que soit remise à la Cour une personne relevant de cet État, à moins que la Cour ne puisse au préalable obtenir la coopération de l'État d'envoi pour qu'il consente à la remise.'

Il y a lieu de reconnaître une ambiguïté entre les dispositions de l'article 27 et 98 du Statut de Rome.

En effet, on serait tenté de penser que l'article 98 consacre une impunité – momentanée³⁹ – même si la CPI signale l'existence d'une exception à l'immunité lorsqu'un Tribunal international sollicite l'arrestation d'un accusé pour crimes internationaux ; et que sur cette base, l'article 98.1 ne s'applique pas.

C'est ce paragraphe de l'alinéa 1 de l'article 98 du Statut de Rome que les États-Unis ont mis à contribution pour contraindre certains États, ceux d'Amérique du Sud et d'Afrique notamment, à accepter des accords bilatéraux afin de soustraire leurs ressortissants des girones de la CPI.

³⁸ Article 86 du *Statut de Rome de la Cour pénale internationale*.

³⁹ Sauf pour ceux qui détiendraient le pouvoir à vie.

Cet arsenal juridique a été complété au plan interne par l'American Service-Member's Protection Act (ASPA, HR4775), le 2 août 2002.⁴⁰

Il semble admis que l'article 27 est relatif à la compétence de la CPI et consacre ainsi le principe absolu de poursuites pour fait des crimes graves ; alors que l'article 98 est quant à lui relatif à la coopération avec la CPI. Cela dit, ce dernier article n'est pas une exception à l'article 27, mais à l'article 86 relatif à l'obligation générale de coopérer, et devrait, sans désenparer, être adapté au but et à la mission de la CPI.

2 Les incidences diverses

2.1 Crimes du passé au passé?

La CAJDHP reprend, à tort ou à raison, le même reproche fait précédemment à la CPI. Alors que d'innombrables victimes réclament justice à la suite des crimes graves commis sur le continent pendant les cinq dernières décennies, le Protocole de Malabo ne dispose que pour l'avenir. Seuls les tribunaux spéciaux (ou mixtes) ont déjà répondu à cette critique.

Le bilan de justice contre les crimes internationaux est très mitigé sur le continent africain comparativement aux situations nécessitant que justice soit rendue en faveur des victimes. Le Rwanda et la Sierra Leone sont les rares pays qui ont vu les crimes graves commis sur leurs territoires être poursuivis.⁴¹ D'abord, le Tribunal pénal international pour le Rwanda (TPIR) a soulagé autant d'âmes nécessiteuses de justice face au 'carnage' génocidaire dont les populations ont été victimes. Ensuite, le Tribunal spécial pour la Sierra Leone (TSSL) a joué ce même rôle à l'endroit des crimes de guerre dont les enfants ont gonflé le nombre de victimes sierra-léonaises.

Dans d'autres États africains où guerres et conflits armés se sont succédés et continuent de faire rage, la justice n'est pas venue à la rescousse des solutions politiques proposées. C'est par exemple le cas en RDC. Malgré la publication Rap-

⁴⁰ FIDH (Fédération internationale des droits de l'Homme), 'Rapport de position. Cour Pénale Internationale, Non à l'exception américaine. Sous couvert de lutte contre le terrorisme, l'offensive américaine contre la Cour pénale internationale,' n° 345, novembre 2002 ; HRW, 'Accords d'immunité bilatéraux,' voir <http://www.hrw.org/campaigns/icc/docs/bilateralagreemer> cité par Ondo T, 'Réflexions sur la responsabilité pénale internationale du Chef d'État africain,' 69 *Revue trimestrielle des droits de l'homme* (2007), 196.

⁴¹ Notons que malgré ses moyens énormes, pendant 20 ans le TPIR n'a pu juger qu'une trentaine de suspects.

port Mapping⁴² qui fait une énumération claire des crimes graves et responsables présumés ; les propositions de justice sont, jusque-là, restées lettre morte. Plus de trois à 5 millions des morts dont des femmes enceintes éventrées, mutilées et des enfants pillés dans des mortiers seulement entre 1993 et 2003. La suite des conflits armés qui continuent à décimer d'autres têtes a fait augmenter ce nombre ; mais curieusement cela ne semble gêner que ceux qui demandent justice.

2.2 La CAJDHP, complémentaire à la CPI ?

La CAJDHP, de sa part, à une compétence *ratione materiae* plus étendue et susceptible d'être davantage rallongée. Celle-ci couvre aussi bien des crimes internationaux que certaines infractions 'transnationales'. Cela est intéressant parce qu'elle apporte des nouvelles incriminations pour lutter contre certains crimes dont fait face le continent.

Les rédacteurs de Malabo ont eu raison de s'inspirer des chaos d'Afrique pour faire évoluer le droit international. En effet, les graves violations qui ont lieu sur le continent nécessitent une véritable prise en charge qui ne peut être possible sans le développement du droit international africain. Cela a été le cas avec l'intégration d'autres crimes sur la liste de la compétence pénale internationale de la CAJDHP.

Comme indiqué avant, la CPI ne poursuit que quatre des 4 crimes énumérés ci-haut : le génocide, les crimes contre l'humanité, les crimes de guerre et le crime d'agression.

En Afrique, la commission de ces crimes peut avoir pour fondement d'autres actes illicites que le Protocole a pris le soin d'incriminer. C'est le cas de l'exploitation illicite des ressources naturelles ou encore du changement anti-constitutionnel de gouvernement.

De ce fait, le Statut de Malabo est 'complémentaire' du Statut de la CPI en ce qu'au-delà des crimes classiques poursuivis par la dernière, la CAJDHP poursuit également le crime relatif au changement anticonstitutionnel de gouvernement, la piraterie, le terrorisme, le mercenariat, la corruption, le blanchiment d'argent, la traite des personnes, le trafic illicite de stupéfiants, le trafic illicite de déchets dangereux et l'exploitation illicite des ressources naturelles.

⁴² Haut-commissariat des Nations Unies aux droits de l'Homme, Rapport du projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République Démocratique du Congo, août 2010. *Rapport Mapping*, 474.

En sus, le Protocole consacre la fin de l'impunité pour les entreprises et animateurs qui plongeraient dans le financement des rébellions pour exploiter illégalement les ressources naturelles d'un État. La CAJDHP a admis la responsabilité des personnes morales indépendamment de leurs animateurs. L'article 46C alinéa 1 du Protocole de Malabo souligne, à cet effet, qu'aux fins du Protocole de Malabo, la CAJDHP a compétence sur les personnes morales, à l'exception des États. Le point 6 de l'article 46C précité insiste sur le fait que la responsabilité pénale des personnes morales n'exclut pas la responsabilité pénale des personnes physiques qui sont les auteurs ou les complices des mêmes crimes.

Des relations de collaboration et une division de travail efficace peuvent être établies sur cette base : une CPI lavée des accusations de partialité et d'injustice de l'Union africaine se chargerait des crimes de sa compétence (crime de génocide, crimes contre l'humanité, crimes de guerre et crime d'agression) et la CAJDHP se chargerait du reste. On conviendrait que l'idée d'une Section pénale empiète en grande partie au travail de la CPI et fait double emploi avec le principe de complémentarité. L'énergie devrait viser à exploiter l'opportunité présentée par le principe de complémentarité du Statut de Rome pour les États parties africains à la Cour de prendre la primauté de répression des crimes graves.⁴³ Cela implique que les systèmes nationaux arrivent à un point qu'ils assument leurs juridictions de manière adéquate pour faire face aux crimes atroces.

Cette division de travailler pourrait être bénéfique pour le continent et rendre efficace la collaboration entre les deux juridictions. Pour certains experts africains, une juridiction régionale pourrait parer à l'absence criante d'expertise locale en droit pénal international ; l'institution judiciaire africaine puiserait dans l'expertise africaine qui s'est raffinée avec le développement du système de justice pénale internationale. En effet, comme le rappelle Manirakiza, depuis une quinzaine d'années des juristes africains ont œuvré au sein des institutions judiciaires internationales à divers statuts. Il y a eu des juges, des avocats à la défense, des procureurs, des conseillers etc. Tous ces juristes constituent une pépinière importante indispensable pour développer un système africain de lutte contre l'impunité.⁴⁴ La question préalable qu'on devrait se poser au moment d'initier ce projet africain était sa nécessité compte tenu de son caractère quelque peu duplicatif vis à vis de la CPI. Mais le plus important c'est la nécessité d'évaluer s'il y avait des ressources

⁴³ Nmehielle VO, 'Saddling the new African regional human rights courts with international criminal jurisdiction: Innovative, obstructive, expedient' 7 *African Journal of Legal Studies* (2014) 7-42.

⁴⁴ Manirakiza P, 'L'Afrique et le système de justice pénale internationale' 3 *African Journal of Legal Studies*, (2009) 21-52.

suffisantes, un engagement juridique et politique crédible, et l'opportunité du tribunal compte tenu de la possibilité offerte aux États membres en vertu du principe de complémentarité.⁴⁵ Il semble que cela n'a pas été fait.

Toutefois, l'existence de deux juridictions appelées à connaître des mêmes crimes peut constituer un rétrécissement des mailles de la justice qui permettrait de capturer un plus grand nombre de criminels. Cela est certes possible. Mais à une condition : un dialogue entre l'Union africaine (la CAJDHP) et la CPI afin de créer une collaboration en faveur de la justice contre des crimes internationaux.

Ce dialogue est crucial. En effet, les États africains signataires du Statut de la CPI caressent encore l'idée d'une véritable CPI comme 'mécanisme de soutien aux États en difficulté'⁴⁶ et, de ce fait, un 'facteur de paix par la justice'.⁴⁷

En définitive, la coopération entre la CPI et l'UA est vitale pour le succès de deux institutions dans la lutte contre l'impunité en Afrique.

Le conflit entre l'Union africaine et la CPI a un impact négatif sur l'action de la CPI sur le continent africain.

Pour rétablir le climat de confiance qui n'a cessé de se dégrader entre les deux institutions voici quelques pistes de solution :

- intensifier le dialogue déjà en cours entre l'UA et la CPI en vue de raviver la coopération des États ;
- mettre pleinement en œuvre le principe de la complémentarité dans les pays africains ;
- envisager de tirer le meilleur bénéfice de l'initiative tendant à élargir le mandat de la Cour africaine des droits de l'homme et des peuples en vue d'inclure une compétence pénale pour juger les crimes internationaux ;
- aboutir à un accord de coopération entre l'Union africaine et la CPI.

2.3 *Deux juridictions complémentaires à l'État : lit de l'impunité des crimes graves ?*

La justice pénale demeure, dans l'esprit du plus grand nombre, comme le symbole même de la souveraineté de l'État, seul habilité à juger les infractions pénales commises, selon le cas, sur son territoire, par ou contre ses ressortissants. La structure moderne de l'État permet l'organisation d'un pouvoir judiciaire appelé,

⁴⁵ Nmehielle, 'Saddling the new African regional human rights courts with international criminal jurisdiction', 39.

⁴⁶ Weckel P, 'La Cour pénale internationale. Présentation générale', 984.

⁴⁷ Kilele P, 'La CPI face à la répression des crimes graves supposés commis par les responsables du M23,' 9 *Revue facultaire*, Bukavu, (2014), 54.

conformément à la loi, à réprimer les infractions commises et à en punir les auteurs, le tout sous l'autorité supérieure de l'État.⁴⁸

À ce sujet, il faut noter que malgré les avancées spectaculaires de l'organisation de la justice pénale internationale au cours de dernières décennies, la répression pénale des violations graves du droit international humanitaire et autres crimes internationaux relève toujours et avant tout de la responsabilité des États.⁴⁹

C'est seulement en cas de manque de volonté ou de capacité d'un État à assurer cette compétence vis-à-vis de crimes touchant la sensibilité universelle qu'il lui est requis de recourir à la coopération internationale dans le cadre, ici, soit de la CPI ou de la CAJDHP et même des cours sous régionales.

Avec l'avènement de la CAJDHP, il n'existe plus deux mais trois voire quatre sphères (si l'on ajoute les cours sous régionales) de répression internationale des crimes internationaux commis sur le continent africain. La sphère étatique avec une compétence originelle. En cas de manque de volonté ou de capacité, il y a le recours à la CPI ou à la CAJDHP comme deux autres sphères de répression des crimes internationaux.

D'entrée de jeu, il est crucial de relever que les crimes internationaux sont ainsi appelés car touchant la sensibilité universelle.⁵⁰ De ce fait, l'organisation de leur répression doit faire preuve de cohérence afin d'éviter que des mécanismes juridictionnels établis à cet effet ne se neutralisent au profit des criminels.

Comme il existe déjà une CPI, l'institution d'une CAJDHP devrait reposer sur des fondements devant permettre une collaboration efficace avec la première afin de permettre aux deux d'être efficaces. Autrement, la justice qui en résultera ne sera pas au profit de la justice.

Néanmoins, si les États d'Afrique, mieux leurs justices nationales, fonctionnent correctement, ce débat risque de ne demeurer que théorique. Car on n'aura besoin ni de la CPI ni de la Cour africaine mais cela risque d'être un rêve pieux.

⁴⁸ Currat P, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, Bruylant-L. G.D.J.-Schulthess, Bruxelles-Paris-Genève, 2006, 1.

⁴⁹ Maurer P, 'Préface' in La Rosa AM, 'Prévenir et réprimer les crimes internationaux : vers une approche « intégrée » fondée sur la pratique nationale,' *Rapport de la troisième réunion universelle des commissions nationales de mise en œuvre du droit international humanitaire*, Volume I, CICR, Genève, juin 2013. Voir *Ead.*, 'Prévenir et réprimer les crimes internationaux : vers une approche 'intégrée' fondée sur la pratique nationale,' *Rapport de la troisième réunion universelle des commissions nationales de mise en œuvre du droit international humanitaire*, Volume II : Règles, CICR, Genève, juin 2013.

⁵⁰ Même si les génocides et 'contre-génocide rwandais,' les crimes contre l'humanité, les crimes de guerre commis en RDC n'ont toujours pas de réponse internationale à travers soit un 'Tribunal pénal international pour la RDC' ou 'des chambres spécialisées'.

Pour revenir à la complémentarité, serait-il déraisonnable de considérer que la CAJDHP serait assimilable à une juridiction d'un 'État ayant compétence' au sens de l'article 17 du Statut de Rome ? La lecture stricte de l'article 17 ne permettra pas une telle conclusion mais si on lit l'article 17 dans son objectif qui est d'alléger la charge de la Cour, on peut admettre une complémentarité positive. Qu'advierait-il alors en cas de conflit de compétence ? Sur ce point il n'y aura pas de primauté. On ne peut pas opposer à la Cour pénale internationale une exception d'incompétence. Seuls les tribunaux nationaux des États ont primauté vis à vis de la CAJDHP et de la CPI. Mais ça sera difficile d'avoir ce genre de conflits de compétence parce que la CPI a aussi intérêt que d'autres juridictions s'occupent des affaires. Sur ce point, la CAJDHP présente l'avantage de proximité avec les lieux de commission de crimes. Cela est bénéfique pour les enquêtes, l'accès aux éléments de preuves et témoins. Plus important encore, cela donne aux victimes et les communautés affectées de s'approprier le procès et faciliterait un grand intérêt de participation et de réconciliation.⁵¹

Le principe de complémentarité évoqué ici ne donne nullement prérogative à la défense de se choisir une juridiction au détriment d'une autre régulièrement saisie. Pareille approche viderait la complémentarité de toute sa substance et ferait à coup sûr le lit de l'impunité des crimes graves.⁵²

2.4 Les crimes de la CPI à la CAJDHP

Certains de ces crimes comme le mercenariat, le terrorisme, la corruption, le blanchiment d'argent et le trafic de déchets dangereux sont définis dans le cadre du droit de l'Union africaine ; tandis que d'autres comme le génocide, les crimes contre l'humanité, les crimes de guerre ou l'agression sont déjà inscrits dans le droit pénal international. La CAJDHP ne pourra connaître que des crimes commis sur le territoire des États membres de l'Union africaine.

Le développement qui suit est consacré à ces quatre derniers crimes.

⁵¹ KPTJ, 'Seeking justice or shielding suspects? An analysis of the Malabo Protocol of the African Court', KPTJ, 14.

⁵² CPI, *Affaire Le Procureur c/ Germain Katanga et Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1189-Anx, Observations de la République Démocratique du Congo par rapport à l'exception d'irrecevabilité soulevée par la défense de Germain Katanga dans l'*Affaire Le procureur c Germain Katanga et Mathieu Ngudjolo Chui*, 1^{er} juin 2009, point II (b), para. 3.

2.4.1 Crime de génocide

Le génocide fait incontestablement partie du droit international coutumier.⁵³ La Convention du 9 décembre 1948 sur la prévention et la répression du crime de génocide, le Statut de Rome ou encore le Statut de Malabo n'en sont qu'une consécration formelle.

Au niveau du Statut de la CPI, le génocide est défini de la manière suivante :

‘Aux fins du présent Statut, on entend par crime de génocide l'un des actes ci-après commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :

- a) meurtre de membres du groupe;
- b) atteinte grave à l'intégrité physique ou mentale de membres du groupe;
- c) soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;
- d) mesures visant à entraver les naissances au sein du groupe;
- e) transfert forcé d'enfants du groupe à un autre groupe.’⁵⁴

Le Statut de Malabo reprend la même définition avec l'évolution qu'elle a requis du droit international. Il s'agit d'une définition plus progressiste et qui correspond davantage à la récente jurisprudence que la définition utilisée dans le Statut de Rome. L'ajout de l'article 28B (f) ‘viols ou autres formes de violence sexuelle’ complète l'énumération des actes commis dans l'intention de détruire, en tout ou en partie, un groupe national, racial ou religieux, en tant que tel, et donc constitutifs de génocide.⁵⁵ Une telle disposition ne semble pas apparaître clairement dans le Statut de Rome.

⁵³ Rappelé pour la première fois dans CIJ, *Application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie et Monténégro)*, Recueil 2007 (I), para.161, cité par Adjovi R et Mazon F, *Tribunal pénal international pour Le Rwanda. L'essentiel de la jurisprudence du TPIR depuis sa création jusqu'à septembre 2002*, version au format word, 3. Disponible sur le site <http://www.ridi.org/adi/dip/tpir2002.pdf> consulté le 25 nov. 2016.

Pour ces auteurs ‘dans cet avis, la CIJ s'est contentée d'affirmer que les principes qui sont à sa base [de cette Convention] sont reconnus par les nations civilisées comme engageant même en dehors de tout lien conventionnel’. Cette formule laconique, qui fonde depuis le caractère coutumier du crime de génocide, relève davantage de l'incantation morale que de la démonstration juridique. A notre sens, celle-ci aurait exigé que soit rapportée la preuve d'une pratique concordante des États et d'une *opinio juris*. La CIJ ne l'a pas fait, et le TPIR n'a pas pallié cette lacune. Pourtant, cinquante ans après l'avis sur les réserves, la démonstration aurait pu s'appuyer sur les nombreuses résolutions des Nations unies qui, à la suite de celle du 9 décembre 1948 (Rés. 260 A (III)), ont réaffirmé le caractère criminel du génocide, ainsi que sur un examen détaillé de la législation et de la jurisprudence des États.

⁵⁴ Article 6 du *Statut de Rome de la Cour pénale internationale*.

⁵⁵ Cet ajout vaut quelque chose mais seulement sur le plan symbolique parce qu'on peut faire entrer le viol dans la catégorie des ‘atteinte grave à l'intégrité physique ou mentale de membres du groupes,’ (Article 6, b du *Statut de Rome* et 28B b du *Protocole de Malabo*).

Malgré l'existence du jugement rendu dans l'affaire *Akayesu* au TPIR, l'inscription très claire du viol comme un acte de génocide est l'œuvre du Protocole de Malabo.

2.4.2 Crimes contre l'humanité

La CPI entend, aux fins de l'article 7 de son Statut, par 'crimes contre l'humanité', l'un des actes ci-après commis dans le cadre d'une attaque généralisée ou systématique lancée contre une population civile et en connaissance de cette attaque :

- a) meurtre ;
- b) extermination ;
- c) réduction en esclavage ;
- d) déportation ou transfert forcé de population ;
- e) emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international ;
- f) torture ;
- g) viol, esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée et toute autre forme de violence sexuelle de gravité comparable ;
- h) persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste au sus du paragraphe 3, ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans le présent paragraphe ou tout crime relevant de la compétence de la Cour ;
- i) disparitions forcées ;
- j) apartheid ;
- k) autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou à la santé physique ou mentale.

Le Statut de Malabo a repris la même définition admise déjà en droit international. Toutefois, alors que le Statut de la CPI ne parle que d'attaque généralisée ou systématique ; le Protocole de Malabo parle d'attaque ou activité généralisée ou systématique'. Dans cette définition, l'article 28C(b) a intégré l'élément contextuel

spécifiant formellement que ces crimes doivent avoir été commis 'conformément ou pour servir un État ou une politique organisationnelle'.

Il s'agit d'une formalisation de la jurisprudence de la CPI dans les affaires concernant la situation au Kenya. La CPI a considéré que des bandes criminelles, par exemple, pouvaient constituer des acteurs de crimes contre l'humanité.

2.4.3 Crimes de guerre

L'article 8 du Statut de Rome définit ce que l'on entend par 'crimes de guerre'. Grosso modo, il faut entendre les diverses violations graves aux lois et coutumes de guerre.

Il s'agit de :

- infractions graves telles qu'énumérées dans le présent Statut⁵⁶ commises sur des personnes ou des biens protégés par les Conventions de Genève du 12 août 1949 ;
- violations graves des lois et coutumes applicables aux conflits armés internationaux dans le cadre établi du droit international, telles qu'énumérées dans le présent Statut⁵⁷ ;
- violations graves des lois et coutumes à l'article 3 commun aux quatre Conventions de Genève du 12 août 1949⁵⁸ ;
- violations graves des lois et coutumes applicables aux conflits armés ne présentant pas de caractère international internationaux dans le cadre établi du droit international, telles qu'énumérées dans le présent Statut.⁵⁹

La définition retenue dans le Statut de Malabo présente deux traits à ce niveau⁶⁰ :

- Ajout de six crimes supplémentaires comprenant les violations des lois et des coutumes applicables aux conflits armés internationaux, à savoir :

⁵⁶ Article 8.2.a du *Statut de Rome de la Cour pénale internationale*.

⁵⁷ Article 8.2.b du *Statut de Rome de la Cour pénale internationale*.

⁵⁸ Article 8.2.c du *Statut de Rome de la Cour pénale internationale*. Il s'applique aux conflits armés qui opposent de manière prolongée sur le territoire d'un État les autorités du gouvernement de cet État et des groupes armés organisés ou des groupes armés organisés entre eux, et dont l'intensité est grande contrairement à ce qu'exige l'article 3 commun aux 4 *Conventions de Genève* applicable aussi en cas de conflit armé ne présentant pas de caractère international.

⁵⁹ Article 8.2.e du *Statut de Rome de la Cour pénale internationale*.

⁶⁰ Amnesty International, 'Le Protocole de Malabo. Incidences juridiques et institutionnelles de la Cour africaine issue d'une fusion et à compétence élargie,' janvier 2016, 19.

- le fait de retarder de manière injustifiée le rapatriement des prisonniers de guerre ou des civils ;
 - la pratique volontaire de l'apartheid ou d'autres pratiques inhumaines ou dégradantes fondées sur la discrimination raciale, qui donnent lieu à des outrages à la dignité personnelle ;
 - le fait de soumettre à une attaque des localités non défendues et des zones démilitarisées ;
 - l'esclavage et la déportation pour des travaux forcés ;
 - les peines collectives ;
 - le fait de dépouiller les blessés, les malades, les naufragés ou les morts (28D(b), § iv, xxviii, xxix, xxx, xxxi, xxxii, xxxiii).
- Alors que le Statut de Rome identifie seulement 12 actes constituant des violations dans les conflits armés ne présentant pas un caractère international, le Protocole de Malabo énumère 22 actes (article 28D(e), §i-xxi), y compris le fait d'employer des armes nucléaires et d'autres armes de destruction massive (article 28D(g)).

3 Le cas particulier du crime d'agression

3.1 La définition du crime d'agression au regard de la Résolution 3314, du Statut de Rome et de la Résolution de Kampala

Avec la création des Nations unies le 26 juin 1945, la communauté des États a essayé d'introduire des règles pour empêcher l'agression. Le préambule de la Charte des Nations unies reflète au mieux cette volonté lorsqu'il affirme la volonté des peuples de 'préserver les générations futures du fléau de la guerre' et à cette fin d' 'unir nos forces pour maintenir la paix et la sécurité internationales'.

Conformément au chapitre VII, le Conseil de sécurité ne peut agir que s'il constate 'l'existence d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression'. La Charte a évité de donner une définition de ces termes, en particulier en ce qui concerne la notion d'agression qui est la forme la plus grave de l'emploi non autorisé de la force. L'importance du concept a exigé une définition juridique, nécessaire pour le développement du droit international dans le sens de l'établissement d'une paix durable.

La Résolution de l'AGNU 3314 (XXIX) du 14 décembre 1974 définit, à son article 1^{er}, l'agression comme 'l'emploi de la force armée par un État contre la souveraineté, l'intégrité territoriale ou l'indépendance politique d'un autre État, ou de toute autre manière incompatible avec la Charte des Nations unies (...)'. L'article 2 dispose que 'l'emploi de la force armée par un État agissant le premier constitue la preuve suffisante à première vue d'un acte d'agression' mais il précise que le Conseil de sécurité peut renverser cette présomption 'compte tenu des autres circonstances pertinentes', notamment l'absence de 'gravité suffisante' du recours à la force armée. L'article 3 énumère 7 faits qui réunissent les conditions d'un acte d'agression. Toutefois, l'article 4 précise que cette énumération n'est pas exhaustive et n'empêche pas le Conseil de sécurité de qualifier d'autres faits d'actes d'agression, conformément à la Charte des Nations unies.

Cette définition, qui exprime l'*opinio juris* des États⁶¹ permet au Conseil de sécurité, dans l'exercice des pouvoirs qui lui sont conférés à l'article 39 de la Charte, de constater, ou non, l'existence d'une agression.

La définition adoptée en 1974 incriminait non l'agression mais 'la guerre d'agression' (définition, article 5, § 2) sans autre précision. Il faut se rappeler que cette définition était le résultat d'une longue controverse qui avait opposé pendant plus de 30 ans États occidentaux et États socialistes.⁶² En outre, beaucoup d'États étaient – et demeurent peut-être – hostiles à l'idée d'introduire un tel crime en droit pénal international.⁶³ Comme le dit Cherif Bassiouni, l'incrimination de l'agression est l'histoire d'une quête difficile, mais encore inachevée, qui permet néanmoins de dégager les éléments pour une définition juridiquement acceptable du crime d'agression en tant que crime commis par un individu.⁶⁴ Pourtant, dès 1946, le Tribunal militaire international (TMI) de Nuremberg constatait : 'Ce sont des hommes, et non des entités abstraites, qui commettent les crimes dont la répression s'impose, comme sanction du droit international'.⁶⁵

⁶¹ *Activités militaires au Nicaragua*, 27 juin 1986, arrêt, *Rec.* 1986, para. 195.

⁶² Salmon J et David E, *Droit international public*, Pr. Univ. de Bxl., 2015, 28^e éd., (ronéo), para. 14.5.1 ss.

⁶³ Kamto M, *L'agression en droit international*, éd. A. Pedone, Paris, mars 2010, 25.

⁶⁴ Bassiouni C, 'The time has come for an international criminal court,' 1 *Indiana International & Comparative Law Review* 1 (1991); Ntanda Nsereko DD, 'Defining the crime of aggression: An important agenda item for the Assembly of States Parties to the Rome Statute of the International Criminal Court,' *Acta Juridica* 256-286 (2003) cité par Kamto, *L'agression en droit international*, 420.

⁶⁵ Procès des grands criminels de guerre devant le Tribunal militaire international, arrêt du 1er octobre 1946, reproduit dans 41 *American Journal of International Law* (1947), 221.

L'article 8*bis*, adopté à la conférence de révision du Statut de Rome de 2010 à Kampala, a défini le crime d'agression comme suit :

- '1. Aux fins du présent Statut, on entend par « crime d'agression » la planification, la préparation, le lancement ou l'exécution par une personne effectivement en mesure de contrôler ou de diriger l'action politique ou militaire d'un État, d'un acte d'agression qui, par sa nature, sa gravité et son ampleur, constitue une violation manifeste de la Charte des Nations unies.
2. Aux fins du paragraphe 1, on entend par « acte d'agression » l'emploi par un État de la force armée contre la souveraineté, l'intégrité territoriale ou l'indépendance politique d'un autre État, ou de toute autre manière incompatible avec la Charte des Nations unies. Qu'il y ait ou non déclaration de guerre, les actes suivants sont des actes d'agression au regard de la résolution 3314 (XXIX) de l'Assemblée générale des Nations unies en date du 14 décembre 1974 :
 - a) L'invasion ou l'attaque par les forces armées d'un État du territoire d'un autre État ou l'occupation militaire, même temporaire, résultant d'une telle invasion ou d'une telle attaque, ou l'annexion par la force de la totalité ou d'une partie du territoire d'un autre État ;
 - b) Le bombardement par les forces armées d'un État du territoire d'un autre État, ou l'utilisation d'une arme quelconque par un État contre le territoire d'un autre État ;
 - c) Le blocus des ports ou des côtes d'un État par les forces armées d'un autre État ;
 - d) L'attaque par les forces armées d'un État des forces terrestres, maritimes ou aériennes, ou des flottes aériennes et maritimes d'un autre État ;
 - e) L'emploi des forces armées d'un État qui se trouvent dans le territoire d'un autre État avec l'agrément de celui-ci en contravention avec les conditions fixées dans l'accord pertinent, ou la prolongation de la présence de ces forces sur ce territoire après l'échéance de l'accord pertinent ;
 - f) Le fait pour un État de permettre que son territoire, qu'il a mis à la disposition d'un autre État, serve à la commission par cet autre État d'un acte d'agression contre un État tiers ;
 - g) L'envoi par un État ou au nom d'un État de bandes, groupes, troupes irrégulières ou mercenaires armés qui exécutent contre un autre État des actes assimilables à ceux de forces armées d'une gravité égale à celle des actes énumérés ci-dessus, ou qui apportent un concours substantiel à de tels actes.'

La définition du crime d'agression dans l'article 8*bis* du Statut de la CPI est inspirée de la Résolution 3314 (XXIX) qui garde seul l'État au centre de sa définition. Cet article limite strictement la définition en ne la sanctionnant qu'en cas de planification et de poursuite d'une guerre en violation directe et manifeste de la Charte des Nations unies. Carrie McDougall considère pour sa part que cette défini-

tion ne requiert pas seulement qu'un État commette un acte d'agression comme défini dans l'article 8bis (2) mais aussi des actes qui dépassent le seuil fixé à l'article 8bis (1). Ce seuil était censé garantir que tout usage illégal de la force ne pourrait donner lieu à une responsabilité pénale individuelle mais seulement aux cas les plus graves et sans ambiguïté juridique.⁶⁶ Le paragraphe 2 de l'article 8bis procède à la définition de l'acte d'agression et reprend *in extenso* les actes considérés comme 'des actes d'agression au regard de la résolution 3314 (XXIX)'. La définition du crime d'agression relève non des règles relatives au comportement dans la guerre (*jus in bello*) mais de celles relatives au déclenchement de la guerre (*jus contra bellum*). La qualification d'agression est donc un préalable et un élément *sine qua non* de la reconnaissance du crime d'agression.

Il importe de noter aussi que les cinq membres permanents du Conseil de sécurité (CS) ne voulaient pas, déjà en 1974 (XXIX) que les pouvoirs reconnus au Conseil par l'article 39 de la Charte des Nations unies fussent limités et circonscrits dans un cadre définitionnel. La Conférence de révision de Kampala a fait écho à ce souci aux §§ 6-7 de l'article 15bis : l'agression doit être constatée par le Conseil de sécurité pour que le Procureur puisse mener une enquête sur un crime d'agression. Toutefois, en cas de silence du CS pendant un délai de 6 mois après que le Procureur ait notifié au Secrétaire Général des Nations unies (SGNU) qu'il voulait ouvrir une enquête pour crime d'agression, le Procureur peut aller de l'avant et ouvrir son enquête (Statut CPI, article 15bis, para. 8) avec l'accord de la Chambre préliminaire de la CPI (*id.*, article 15, para. 4).

Il est important de reconnaître le régime restrictif de la Cour pénale internationale en ce qui concerne le crime d'agression.⁶⁷ En effet, la CPI ne sera pas capable d'exercer sa compétence sur les nationaux des États non parties qui ont participé dans les actes d'agression commis par un État partie. Une distinction doit être établie entre les États parties qui ont ratifié la Résolution de Kampala et ceux qui

⁶⁶ Le seuil fixé à l'article 8bis(1) en ces termes "the threshold contained in Article 8bis (1): namely that it constitute, by its "character, gravity and scale," a "manifest" violation of the UN Charter. That threshold was meant to ensure that not every illegal use of force could give rise to individual criminal responsibility, but only the most serious and legally unambiguous cases." Report Seminar for States Parties to the Rome Statute of the ICC on the Activation of the Court's jurisdiction over the crime of aggression, 17 and 18 June 2016, Princeton, New Jersey, 2. Au cours de ce séminaire, les participants ont également discuté de l'impact potentiel des modifications sur 'les interventions humanitaires' (par exemple au Kosovo, 1998). Il a été noté que la plupart des États considéraient de telles interventions sans l'autorisation du Conseil de sécurité comme étant illégal conformément à la Charte des Nations unies, alors que certains les considéraient comme justifiable ou légitime.

⁶⁷ Werle G and Jessberger F, *Principles of international criminal law* cité par Kemp G, *Individual criminal liability for the international crime of aggression*, 2 éd, Intersentia, Cambridge-Antwerpen-Portland, 2016, 242.

ne l'ont pas fait. Si tant l'État présumé 'agresseur' que l'État victime a ratifié les amendements contenus dans la Résolution de Kampala, il n'y a pas lieu de douter que la CPI ait compétence sur le cas. Si aucune des parties n'a ratifié, la CPI n'aura pas compétence.⁶⁸ Plus problématique sont les scénarios où seul l'État présumé 'agresseur' ou l'État victime a ratifié les amendements.

L'entrée en vigueur de la compétence de la Cour pour crime d'agression ne pourra avoir lieu avant 2017 et dans le respect des conditions suivantes :

- au 1^{er} janvier 2017, 30 États parties au Statut ont accepté les amendements (*id.*, article 15^{ter}, para. 2-3) ; ce chiffre a été atteint le 29 juin 2016 avec l'acceptation des amendements par la Palestine ;⁶⁹
- les amendements n'entrent en vigueur qu'à l'égard des États qui les ont acceptés et seulement un an après les avoir ratifiés ou y avoir adhéré (*id.*, article 121, para. 5) ;
- à partir du 1^{er} janvier 2017, l'Assemblée des États parties décide par consensus ou, à défaut, à la majorité des deux tiers, que les amendements sont désormais applicables (*id.*, article 15^{ter}, para. 3, et article 121, para. 3).

Il est clair que ce qui a été réalisé à Kampala est un jalon sur la route de l'évolution du projet de la justice pénale internationale ayant comme objectif de mettre fin à l'impunité pour les crimes les plus graves en vertu du droit international⁷⁰ en dépit des inquiétudes concernant tout rôle pour un organe politique comme le Conseil de sécurité à cet égard. Qu'en est-il de la définition du crime d'agression dans le Statut de Malabo ?

3.2 *Crime d'agression dans le Protocole de Malabo*

Les États membres de l'Union africaine ont choisi d'aller au-delà de la définition consacrée par le Statut de la CPI. Les États africains ont bien sûr le droit de se permettre une définition plus vaste du crime d'agression qui prendrait en compte les réalités actuelles du continent.

La Rés. 3314 de AGNU date de 1974. Depuis lors, le monde a changé. L'on assiste davantage à la présence d'acteurs non étatiques sur la scène internationale dont des organisations terroristes (Al Quaida, Aqmi, Daesh, Al Shabaab, Boko Haram, etc.).

⁶⁸ Werle and Jessberger, *Principles of international criminal law*, 243.

⁶⁹ https://asp.icc-cpi.int/fr_menus/asp/crime%20of%20aggression/Pages/default.aspx

⁷⁰ Kemp G, *Individual criminal liability for the international crime of aggression*, part IV (ICC and crime of aggression), 244.

Les définitions de l'AGNU de 1974, et du Statut de la CPI de 2010 ne reflètent plus les réalités du monde contemporain. La définition de l'article 28M du Protocole de Malabo tend à s'en rapprocher davantage en disposant :

- 'A. Aux fins du présent Statut, on entend par 'crime d'agression' la planification, la préparation, le déclenchement ou la commission par une personne qui, étant effectivement en mesure de contrôler ou de diriger l'action politique ou militaire d'un État [ou d'une organisation, qu'elle ait un lien avec l'État ou non], un acte d'agression/d'attaque armée, qui, par ses caractéristiques, sa gravité et son ampleur constitue une violation manifeste de la Charte des Nations unies ou de l'Acte constitutif de l'Union africaine.
- B. Les actes suivants constituent des actes d'agression, sans déclaration de guerre par un État, groupe d'États, organisation d'États ou acteurs non étatiques ou entité étrangère :
 - a) l'utilisation de la force armée contre la souveraineté, l'intégrité territoriale et l'indépendance politique d'un État, ou tout autre acte incompatible avec les dispositions de l'Acte constitutif de l'Union africaine et de la Charte des Nations unies ;
 - b) l'invasion ou l'attaque du territoire d'un État par les forces armées, ou toute occupation militaire, même temporaire, résultant d'une telle invasion ou d'une telle attaque, ou toute annexion par l'emploi de la force du territoire ou d'une partie du territoire d'un État ;
 - c) le bombardement par les forces armées d'un État du territoire d'un autre État, ou l'emploi de toutes armes par un État contre le territoire d'un autre État ;
 - d) le blocus des ports, des côtes ou de l'espace aérien d'un État par les forces armées d'un autre État;
 - e) l'attaque par les forces armées d'un État, contre les forces armées terrestres, navales ou aériennes d'un autre État ;
 - f) l'utilisation des forces armées d'un État qui sont stationnées sur le territoire d'un autre État avec l'accord de l'État d'accueil, contrairement aux conditions prévues dans le Pacte de non-agression et de défense commune, ou toute extension de leur présence sur ledit territoire après la fin de l'Accord;
 - g) le fait pour un État d'admettre que son territoire qu'il a mis à la disposition d'un autre État, soit utilisé par ce dernier pour perpétrer un acte d'agression contre un État tiers ;

- h) L'envoi ou le soutien par un État ou en son nom, de bandes, groupes, troupes irrégulières ou mercenaires qui exécutent contre un État des actes d'une telle gravité, assimilables à ceux énumérés ci-dessus, ou sa participation à de tels actes.'

On voit que l'article 28M suit la même structure de base que l'article 8 *bis* du Statut de Rome avec des différences sur les actes constitutifs et les acteurs concernés. Cependant, il est à noter que les éléments du crime sont vagues et l'absence des Travaux préparatoires rend la définition prévue dans l'article 28M plus difficile à comprendre en termes de ses fondements.⁷¹

Cette disposition qualifie d'agression des faits commis aussi bien par des États que par des 'acteurs non étatiques' ou une 'entité étrangère'. A l'aune de ce texte, des personnes appartenant aux Shebab, à Boko Haram, à l'AQMI, à Daesh, etc., peuvent se voir imputer un crime d'agression s'ils commettent un des faits énumérés aux lettres a) à h) de l'article 28M (B). C'est évidemment une extension de la notion d'agression définie dans la Rés. 3314 (XXIX) de l'AGNU et reprise dans une large mesure par le Statut de la CPI (article 8*bis* nouveau).

Une autre différence notable avec la définition du Statut de Rome apparaît au point B, a, de l'article 28M précité qui ajoute un fait qui ne figure pas dans la définition classique : 'l'utilisation de la force armée contre la souveraineté, l'intégrité territoriale et l'indépendance politique d'un État, ou tout autre acte incompatible avec les dispositions de l'Acte constitutif de l'Union africaine et de la Charte des Nations unies' (italiques ajoutés).

D'une part, l'État n'est donc plus le seul auteur possible d'une agression armée ; selon l'article 28M, B, tout acteur, non étatique qui utilise la force armée contre la souveraineté, l'intégrité territoriale et l'indépendance politique d'un État, commet le crime d'agression.

D'autre part, le texte laisse entendre que tout autre fait 'incompatible avec les dispositions de l'Acte constitutif de l'Union africaine et de la Charte des Nations unies' pourrait être constitutif du crime d'agression. Faut-il, alors, assimiler un changement anti-constitutionnel de gouvernement – un fait incompatible avec l'article 4, p, de l'Acte constitutif de l'UA – à un crime d'agression ? Ce serait un résultat étrange puisque le 'changement anti-constitutionnel de gouvernement' est déjà, en soi, un crime prévu à l'article 28E du Protocole ! Cela montre, en tout cas, que la formulation de l'article 28M ne semble pas avoir été très réfléchie et qu'un commentaire officiel de celui-ci s'impose.

⁷¹ Kemp, *Individual criminal liability for the international crime of aggression*, 255.

Par ailleurs, on peut se demander pourquoi on ajoute ces acteurs non étatiques qui ne figurent ni sur la liste de la Charte des Nations unies ni la Charte de l'Union africaine. Est-ce que ces acteurs peuvent violer la Charte des Nations unies ou de l'Union africaine ?⁷² Il y a lieu de modifier ces définitions soit en intégrant ces acteurs non étatiques dans l'Acte constitutif de l'Union africaine, soit dans la Charte des Nations unies.

De même, il n'est pas facile de savoir qui est responsable pour déterminer le crime d'agression. Un rôle reconnu normalement au Conseil de sécurité des Nations unies. Est-ce le Conseil de paix et de sécurité de l'UA en ce qui concerne la violation de l'acte constitutif de l'UA ? Comment définir le rôle du Conseil de sécurité ? Il semble illogique de confier un rôle au Conseil de sécurité des Nations unies dans la détermination du crime d'agression commis par des acteurs non étatiques au niveau africain alors que la Charte des Nations unies n'inclut pas les acteurs non étatiques dans la définition du crime d'agression. S'agissant de la détermination de l'acte d'agression, au regard du Protocole de Malabo, il convient de noter qu'il n'y a pas de disposition comparable à l'article 15 *ter* du Statut de Rome.

L'article 46F du Protocole de Malabo prévoit évidemment la possibilité de renvoi par le Conseil de paix et de sécurité de l'UA, mais, ce n'est pas comparable au rôle juridictionnel du Conseil de sécurité dans le contexte du crime d'agression et comme énoncé à l'article 15 *ter* du Statut de Rome. Donc, en résumé, le Conseil de paix et de Sécurité de l'UA ne détermine pas que le crime d'agression a été commis. Le Conseil peut déterminer qu'un acte d'agression s'est produit ou qu'une situation dans laquelle une agression a pu se produire doit être renvoyée devant la Cour africaine pour déterminer la responsabilité pénale.⁷³

Concernant les acteurs non-étatiques, les conséquences apparemment incongrues de l'absence des acteurs non étatiques dans la Charte des Nations unies et l'Acte constitutif de l'UA sont à l'origine d'un débat politique intéressant mais il faut supposer que les rédacteurs du Protocole de Malabo veulent créer un régime de *lex specialis* pour la justice pénale régionale.⁷⁴ Gerhard Kemp indique que la création du crime d'agression dans l'article 28M semble être une solution africaine pour des problèmes africains. De même, les intérêts sous-jacents protégés semblent toujours s'aligner sur ceux qui sont protégés dans la définition de l'agres-

⁷² Gerhard Kemp souligne que l'utilisation l'interprétation de l'article 28 (A) nous ramène à la question de savoir si un acte d'agression pourrait-il constituer une violation manifeste de l'Acte constitutif de l'Union africaine sans être une violation manifeste de la Charte des Nations unies ?

⁷³ Personal communication with Kemp G on 17 November 2016.

⁷⁴ Personal communication with Kemp G on 17 November 2016.

sion prévue par l'Assemblée générale des Nations unies en 1974 et qui constituent explicitement la base de la deuxième partie de l'article 8*bis* du Statut de Rome et implicitement, l'article 28M(B) du Protocole de Malabo.⁷⁵

Une autre difficulté apparaît au sujet des immunités prévues dans le Protocole de Malabo contrairement au Statut de Rome qui consacre le défaut de pertinence de la qualité officielle. Alors que le crime d'agression est considéré comme un crime de 'leadership'.⁷⁶ Il est donc contradictoire d'un coter de vouloir réprimer le crime d'agression (qui est souvent commis par des leaders) et de l'autre maintenir l'immunité des chefs d'États et officiels dans l'article 46A.

En définitive, la pénalisation de l'agression sous l'article 28M du Protocole semble visé uniquement les acteurs non étatiques et des entités 'étrangères' mais pas beaucoup les leaders des États.⁷⁷

4 Conclusion

Le nombre énorme de crimes retenus et qui sont souvent *sui generis* dans le catalogue pénal international, posera sans doute une question d'efficacité pour la Cour quand on sait que même la CPI qui a plus de moyens et qui est supposée couvrir le monde entier, n'a retenu que quatre crimes.

On peut se dire que rien que la mise en œuvre du Protocole représentera une charge pénale immense avec les enquêtes du Procureur, le travail des équipes de la défense, la protection des témoins etc. L'exemple du TPIR qui n'avait qu'une compétence criminelle, avec des moyens énormes mais qui, pendant 20 ans, n'a pu juger qu'une trentaine de suspects est éloquent.

Cependant, la plupart des crimes du Protocole ont plus une connotation des réalités africaines donc inconnus dans les textes de la CPI : le pillage des ressources naturelles, le blanchiment d'argent sale, les fraudes électorales, la modification des Constitutions, le détournement des biens publics, la corruption etc... Quand on connaît les difficultés de certains États à joindre les deux bouts et les maux qui les

⁷⁵ Kemp, *Individual criminal liability for the international crime of aggression*, 255.

⁷⁶ See Kemp, *Individual criminal liability for the international crime of aggression*, 256. L'article 46*Abis* n'est pas une clause d'impunité parce que les personnes bénéficiant des immunités peuvent être poursuivis à la fin de leur mandats mais en Afrique cela peut prendre un temps considérable, c'est la triste réalité dans plusieurs pays africains. Ainsi l'immunité est problématique en termes de poursuite effective du crime d'agression devant la CAJDHP.

⁷⁷ Kemp, *Individual criminal liability for the international crime of aggression*, 256.

minent, on peut saluer cette initiative d'incriminer ces pratiques, c'est ce que nous qualifions de parfum africain.

Pour ce qui est de la ratification, le Protocole de Malabo vient de la fusion de deux Protocoles, qui ne sont toujours pas entrés en vigueur. Il faudra ici souligner que c'est un constat général : Les États africains membres de l'UA ont la facilité de mettre en place des organes, des instruments nouveaux mais peinent toujours à les faire fonctionner faute de ratification ou des moyens. On constate un manque de volonté politique et ce n'est pas particulier au Protocole de Malabo. Tous les instruments juridiques africains ont cette difficulté. Faute de ratification, l'instrument peut prendre facilement 10 à 15 ans avant l'entrée en vigueur. C'est le cas du Protocole portant création de la Cour africaine actuelle dont l'acte fondateur a été signé en 1998, mais n'est entré en vigueur qu'en janvier 2004 après la 15^{ème} signature. A ce jour, soit 18 ans après, seuls 30 pays ont ratifié et seulement 8 pays ont fait la déclaration reconnaissant la compétence de la Cour pour recevoir les plaintes directes des individus et ONG. Le Rwanda vient d'ailleurs de retirer sa déclaration laissant donc 7 pays.

Le manque de volonté politique est flagrant. Le Protocole de Malabo a été adopté en juin 2014 à Malabo mais à ce jour aucun pays n'a ratifié le texte.

Ce texte est victime, comme les autres textes, du manque de volonté politique qui découle de la peur des actuels leaders africains. La culture de l'impunité est un mode de gouvernance en Afrique et il est difficile pour ceux qui règnent par la force et veulent s'y maintenir, d'y renoncer!

Le Protocole de Malabo ne fait pas mention du Statut de Rome alors que 34 États africains y sont partis. Cela se comprend parce qu'au moment de l'adoption du Protocole, certains États africains avaient déjà engagé une offensive contre la CPI et tentaient de convaincre les autres pays sur le fait que selon eux la CPI œuvrait contre l'Afrique. Il faut regretter cette situation, parce que la coopération et la complémentarité de ces deux juridictions devraient s'imposer pour une simple raison d'efficacité. La complémentarité est un principe du droit international pénal. Le Protocole de Malabo le prévoit d'ailleurs pour les juridictions nationales mais ne dit rien pour la CPI. Mais on peut espérer une solution dans les années à venir⁷⁸

⁷⁸ Il y a deux dossiers qui posaient problèmes: le Kenya et le Soudan. Pour le Kenya, comme le Procureur de la CPI a abandonné les poursuites, la question est résolue. Le Président soudanais ne restera pas éternellement au pouvoir et il semble qu'après lui, les choses iront mieux avec la CPI. Quoique d'autres leaders africains peuvent, entretemps, être tombés dans le collimateur de la Cour, l'exemple des dirigeants Burundais. Avec ce que ces deux pays ont vécu, les autres dirigeants actuels encore au pouvoir hésiteront de commettre ce genre de crimes! C'est peut-être le cas Blaise Compaoré au Burkina Faso qui

même si les retraits de certains pays africains (Afrique du Sud, Burundi, Gambie) du Statut de Rome ne facilitent pas les choses.

S'agissant des immunités, l'article 46C du Protocole est incontestablement l'une des grandes différences entre le Statut de Rome et le Protocole. Un sujet qui fait le plus couler d'encre et qui pourrait même hypothéquer l'avenir du Protocole.

Du fait de l'absence de poursuites à l'endroit d'une catégorie de personnes bénéficiant des immunités, la complémentarité n'est pas réalisable et la CPI trouve sa puissance sauf si les États africains se retirent du Statut de Rome sans préjudice d'un renvoi du Conseil de sécurité. Cela renforce l'idée d'un dispositif trompeur (un miroir aux alouettes).

Enfin, pour le crime d'agression, les États africains ont, bien sûr, le droit de se permettre une définition plus vaste du crime d'agression qui prendrait en compte les réalités actuelles du continent. Mais là aussi, il paraît contradictoire de vouloir lutter contre l'impunité d'un côté et admettre que ceux qui ont la grande responsabilité dans la commission du crime d'agression, les chefs d'États restent dans l'impunité tant qu'ils sont en fonction. Raison de plus pour eux de rester longtemps au pouvoir. Dans le même ordre d'idées, certains crimes prévus dans le Protocole pourront être prescrits alors son auteur bénéficie encore des immunités liées à ses fonctions d'officiels d'États.

Les États parties ont encore la possibilité d'introduire des amendements au Protocole avant son entrée en vigueur pour son renforcement, son efficacité et sa légitimité notamment en supprimant 46A sur les immunités ; en corrigeant la définition du crime de changement anti constitutionnel du régime qui porte atteinte au droit des peuples d'exercer de manière pacifique leurs revendications (Article 28E) ; en renforçant la complémentarité avec la CPI.⁷⁹

En définitive, l'avenir de la justice pénale internationale passe entre autre par une collaboration entre les institutions judiciaires internationales, régionales et nationales. On ne peut encore bien loin de cet idéal et le retrait de certains pays africains au Statut de Rome complique davantage les choses et ouvre un champ à l'impunité surtout dans les pays où la justice nationale ne fonctionne pas correctement.

a préféré fuir au lieu de faire tirer sur les civils. Il devait avoir la CPI en tête. Ce qui est intéressant, c'est qu'il semble que durant le dernier sommet de l'UA, certains États se sont opposés à l'idée d'une sortie collective du Statut de Rome, estimant que c'est une question individuelle propre à chaque État. C'est ce qui a été fait récemment avec les retraits individuels de l'Afrique du Sud, du Burundi et de la Gambie.

⁷⁹ KPTJ, 'Seeking justice or shielding suspects?' 2.

CHAPTER 6

LÉGISLATION CONGOLAISE DE MISE EN ŒUVRE DU STATUT DE ROME : UN PAS EN AVANT, UN PAS EN ARRIÈRE

PACIFIQUE MUHINDO MAGADJU

Résumé

Dans un élan de recherche des voies et moyens pour lutter contre l'impunité de crimes commis sur son territoire, la République Démocratique du Congo avait ratifié le Statut de la Cour pénale internationale le 11 avril 2002. Ceci fut suivi par la promulgation de la loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire et de la loi n°023/2002 du 18 novembre 2002 portant Code judiciaire militaire. Ces lois consacraient respectivement l'incrimination des crimes de guerre, des crimes contre l'humanité et du génocide et accordaient la compétence exclusive aux juridictions militaires pour les réprimer. Cependant, les définitions que donnait le Code pénal militaire de ces crimes soulevaient des difficultés par rapport au principe de la légalité et aux critères de prévisibilité, de précision et de clarté des lois pénales.

Des critiques ont été alors émisées contre ces lois pénales militaires. Les autorités congolaises ont alors promulgué les lois n° 15/022, 15/023 et 15/024 toutes du 31 décembre 2015 modifiant et complétant respectivement le Code pénal ordinaire, le Code pénal militaire et le Code de procédure pénale en vue de la mise en œuvre du Statut de Rome. Le Code pénal contient dès lors des définitions claires des crimes et ses prévisions sont conformes au droit international pénal.

Cependant, la législation de mise en œuvre du Statut de Rome soulève quelques difficultés à trois points de vue : d'abord, elle est en régression en ce qui concerne la peine par rapport à la législation militaire abrogée; ensuite, les mécanismes de répartition des compétences entre juridictions civiles et juridictions militaires semblent conférer une sorte de compétence subsidiaire aux font tribunaux civils; enfin, elle consacre une redondance législative relativement aux modalités de responsabilité pénale.

CONGOLESE LEGISLATION FOR THE IMPLEMENTATION OF THE ROME STATUTE: A STEP FORWARD, A STEP BACKWARD

Abstract

In an effort to fight against impunity for the gravest crimes committed on its territory, the Democratic Republic of the Congo ratified the Rome Statute of the International Criminal Court on 11 April 2002. This was quickly followed by the promulgation of the law N° 024-2002 of 18 November 2002 on the Military Penal Code and law No. 023/2002 of 18 November 2002 on the Code of Military Justice, which not only provided definitions for war crimes, crimes against humanity and genocide but also granted exclusive jurisdiction of the aforementioned crimes to the military courts. However, the definitions that were included in the Military Penal Code presented difficulties in relation to the principle of legality but also lacked the foreseeability, precision, and clarity expected of criminal law.

Faced with such criticisms, Congolese authorities enacted laws No. 15/022, 15/023 and 15/024 of 31 December 2015, which amended the Criminal Code, the Military Penal Code and Code of Criminal Procedure, in the hopes of creating a path for the successful implementation of the Rome Statute into domestic law. As a result, the Criminal Code now contains clear definitions for war crimes, crimes against humanity and genocide, and its provisions are more in line with international criminal law.

Despite such progress, the legislation designed to implement the Rome Statute raises some difficulties: First, punishment is reduced when compared with the amended military legislation that is cited above and that was later repealed; Second, the distribution of powers between civil courts and military courts appear to confer a kind of subsidiary jurisdiction on civil courts; And finally, there appears to be a redundancy with respect to modes of criminal liability.

1 Introduction

La République Démocratique du Congo (ci-après RD Congo) a ratifié le Statut de Rome de la Cour pénale internationale (ci-après Statut de Rome) le 11 avril 2002. Dans le cadre de ce Statut, les États ont souscrit, en vertu du principe de la complémentarité, à une obligation de poursuivre les crimes internationaux devant leurs juridictions.¹ En effet, ‘la complémentarité et l’obligation de poursuite énoncées au Statut peuvent être interprétées comme impliquant une obligation de poursuite à charge de l’État partie’.²

Ainsi, afin de mettre en œuvre la complémentarité, ‘les États doivent adopter une législation permettant l’application, par les autorités judiciaires, du droit pénal international applicable aux crimes les plus graves. Dans ce processus, ils entreprennent des examens de leur cadre législatif applicable à ces crimes en vue d’en dégager et d’en supprimer les lacunes législatives’.³ En effet, le principe ‘*nulum crimen sine lege*’ nécessite dans la plupart des pays, que ces infractions soient criminalisées afin de permettre à leurs tribunaux d’exercer leur compétence sur ces crimes’.⁴

C’est dans cette perspective que le droit congolais a connu des réformes intégrant dans la législation interne les infractions de la compétence de la Cour pénal internationale (ci-après CPI). Aussi, le principe de coopération entre la CPI et la RD Congo a été mis en exergue et se manifeste au travers de la situation de la RD Congo pendante devant la CPI.

Dans la présente étude, nous analysons le parcours d’harmonisation du droit pénal congolais avec les dispositions du Statut de Rome en scrutant ses forces et faiblesses. Mais pour saisir les efforts du législateur congolais, il est important de savoir que la RD Congo disposait déjà d’une législation relative à la répression des crimes de guerre, les crimes contre l’humanité et le génocide. Cette législation qui était essentiellement militaire, soulevait des difficultés car les définitions qu’elle

¹ Burke-White WW, ‘Implementing a policy of positive complementarity in the Rome system of justice’ 19 *Criminal Law Forum*, (2008), 66.

² David E, ‘Les conséquences du Statut de la Cour pénale internationale pour la répression en Droit belge’ 6 *Revue de Droit Pénal et de Criminologie* (2001), 76.

³ Relva H, ‘The implementation of the Rome Statute in Latin American states’ 16 *Leiden Journal of International Law*, 2, (2003), 338; Kleffner KJ, ‘The impact of complementarity on national implementation of substantive international criminal law’ 1 *Journal of International Criminal Justice*, (2003), 88.

⁴ Lee SR, ‘States’ responses: Issues and solutions’ in Lee SR (ed.), *State’s responses to issues arising from the ICC Statute: Constitutional, sovereignty, judicial cooperation and criminal Law*, Transnational Publishers, New York, 2005, 1-2.

donnait de ces crimes, étaient ambiguës et quelque peu contradictoires (2). Voilà pourquoi les lois de mise en œuvre constituent une avancée significative dans la lutte contre l'impunité à travers des définitions claires et un régime juridique respectif des droits des parties (3), nonobstant le fait qu'elle soulève des difficultés, notamment par rapport aux peines (4).

2 De la législation d'avant la loi de mise en œuvre du Statut de Rome

S'il est vrai que la RD Congo avait déjà ratifié certains traités portant sur les infractions internationales,⁵ la consécration des crimes internationaux en droit interne congolais a été faite pour la première fois par l'ordonnance-loi n° 72/060 du 25 septembre 1972 portant institution d'un Code de justice militaire.⁶

Cette ordonnance prévoyait et réprimait les crimes de guerre et les crimes contre l'humanité au titre VI à travers les articles 501 à 505. Ces dispositions étaient mal formulées et ne permettaient pas de dégager les définitions et les éléments constitutifs des crimes.⁷

En plus de l'imprécision des définitions, deux difficultés ressortaient de cette loi. La première difficulté est que cette loi qui ne définissait pas le génocide, faisait de ce crime un acte constitutif des crimes contre l'humanité.⁸

La seconde difficulté est que le Code de justice militaire ne prévoyait aucune peine pour les crimes de guerre et les crimes contre l'humanité.

Elle violait donc le principe *nulla poena sine lege*⁹ et soulevait de ce fait des difficultés d'application au regard des ambiguïtés dans les définitions des crimes et de leurs éléments constitutifs.

⁵ Voir par exemple la *Convention sur prévention et la répression du crime de génocide* du 9 décembre 1948, in *Journal Officiel de la République Démocratique du Congo* (ci-après JORDC), n° spécial, Kinshasa, avril 1999.

⁶ *Journal Officiel du Zaïre*, (ci-après JOZ) n° 6 du 15 mars 1973.

⁷ L'article 502 disposait que 'par crime de guerre, il faut entendre toutes les infractions aux lois de la République qui ne sont pas justifiées par les lois et coutumes de la guerre.' L'article 505 ajoutait que 'les crimes contre l'humanité seront poursuivis et réprimés dans les mêmes conditions que les crimes de guerre'.

⁸ Article 505 dernier alinéa de l'*ordonnance-loi n° 72/060 du 25 septembre 1972 portant institution d'un Code de justice militaire*, in *JOZ*, n° 6 du 15 mars 1973.

⁹ L'article 13 al.2 de l'*Acte constitutionnel de transition* en vigueur au moment de la promulgation de cette consacrait le principe *nullum crimen, nulla poena sine lege*.

Le législateur congolais va alors, dans l'inter fait de la ratification du Statut de Rome, abroger cette ordonnance-loi et consacrer la répression des crimes de guerre, du génocide et des crimes contre l'humanité par la loi n°024-2002 du 18 novembre 2002 portant Code pénal militaire.¹⁰

Ce sont donc les lois pénales militaires qui incriminaient les crimes de guerre, les crimes contre l'humanité et le génocide (2.1), raison pour laquelle elles conféraient aux juridictions militaires, l'exclusivité de la compétence pour les juger (2.2).

2.1 *De la consécration des crimes internationaux graves à travers le Code pénal militaire*

La loi n°024-2002 du 18 novembre 2002 portant Code pénal militaire a été promulguée après l'entrée en vigueur du Statut de Rome, mais ses dispositions demeuraient en deçà des standards internationaux.

En effet, de tous les crimes internationaux, seul le génocide semble avoir attiré l'attention du législateur congolais. La définition que donnait le Code pénal militaire du génocide était identique à celle du Statut de Rome,¹¹ et de la Convention des Nations unies sur la prévention et la répression du crime de génocide.¹²

Toutefois, à la différence de ces deux traités, le législateur congolais avait ajouté un autre groupe protégé aux côtés des quatre autres,¹³ à savoir le groupe politique,¹⁴ pourtant exclu de tous les traités internationaux ayant traité du génocide.¹⁵

Ensuite, en ce qui concerne les crimes contre l'humanité, le Code pénal militaire en donnait trois définitions. Une première tirée de l'article 165 qui considérait les crimes contre l'humanité comme 'des violations graves du droit international humanitaire commises contre toutes populations civiles avant ou pendant la guerre'.¹⁶

¹⁰ Article 161 à 175 de la *loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire*, in *JORDC*, n° Spécial du 20 mars 2003 (ci-après *Code pénal militaire*).

¹¹ La définition est celle reprise à l'article 6 du *Statut de Rome*.

¹² Article II de la *Convention des Nations Unies pour la prévention et la répression du crime de génocide*, in *JORDC*, n° spécial, avril 1999, 55.

¹³ Le Statut de Rome et la Charte des Nations unies citent, de manière limitative, quatre groupes protégés dans l'incrimination du génocide : les groupes national, ethnique, racial et religieux.

¹⁴ Article 164 al.2 du *Code pénal militaire*.

¹⁵ La Convention de 1948 exclut spécifiquement les groupes politiques. La raison est tirée du fait que les groupes politiques n'étaient pas assez stables. Voir Robinson NN, *The Genocide Convention. A commentary*, Institute of Jewish Affairs, New York, 1960, 58.

¹⁶ Article 165 al.1 du *Code pénal militaire*.

Une deuxième définition des crimes contre l'humanité est donnée à l'article 166 en vertu duquel 'constituent des crimes contre l'humanité et réprimées conformément aux dispositions du présent code, les infractions graves énumérées ci-après portant atteinte, par action ou par omission, aux personnes et aux biens protégés par les Conventions de Genève du 12 août 1949 et les protocoles additionnels du 8 juin 1977, sans préjudice des dispositions pénales plus graves prévues par le Code pénal ordinaire'.¹⁷

Cette définition est suivie d'une longue liste des crimes sous-jacents énumérés en 18 points, dont la plupart se rapporte d'ailleurs aux crimes de guerre.¹⁸

Ces deux premières définitions du crime contre l'humanité confondaient ce dernier d'avec les crimes de guerre lorsqu'elles envisageaient les crimes contre l'humanité comme des violations graves du droit international humanitaire,¹⁹ et tout particulièrement les infractions graves aux quatre Conventions de Genève de 1949.²⁰ Elles semblent donc exiger un lien de connexité avec les conflits armés, ce qui caractérise plutôt les crimes de guerre.²¹

Enfin, une troisième définition est tirée de l'article 169 qui dispose que 'constitue également un crime contre l'humanité et puni de mort, qu'il soit commis en temps de paix ou en temps de guerre, l'un des actes ci-après perpétrés dans le cadre d'une attaque généralisée ou systématique lancée sciemment contre la République ou contre la population civile'.²²

¹⁷ Article 166 al.1 du *Code pénal militaire*.

¹⁸ Article 166 al.2 du *Code pénal militaire*. À titre d'exemple, cette disposition cite notamment le fait de contraindre à servir dans les Forces armées de la puissance ennemie ou de la partie adverse un prisonnier de guerre ou une personne civile protégée par les conventions ou les protocoles additionnels relatifs à la protection des personnes civiles pendant la guerre ; le fait de soumettre à une attaque des localités non défendues ou des zones démilitarisées, etc.

¹⁹ Les violations graves du droit international humanitaire sont des violations du *jus in bello* constitutives des crimes de guerre. Voir Abi-Saab G et Abbis-Saab R, 'Chapitre 10. Les crimes de guerre', in Ascensio H, Decaux E, Pellet A, (dir.), *Droit international pénal*, 2^{ème} éd., Paris, Editions A. Pedone, 2012, 152.

²⁰ Labuda IP, 'Applying and "misapplying" the Rome Statute in the Democratic Republic of Congo', in De Vos CH, Kendall S, Stahn C (ed.), *Contested justice. The politics and practice of International Criminal Court interventions*, Cambridge, CUP, 2015, 420.

²¹ Les crimes de guerres sont 'des crimes « matériellement » ordinaires commis dans le contexte d'un conflit armé et en lien avec ce conflit armé. Un comportement criminel ne peut dès lors être qualifié de crime de guerre que s'il a été commis à l'occasion d'un conflit armé.' Voir TPIY, *Affaire Le Procureur c. Dragoljub Kurnac et consorts*, Ch. d'appel, IT-96-23 & IT-96-23/1-A, arrêt du 12 juin 2002, para.58.

²² Article 169 al.1 du *Code pénal militaire*.

S'agissant des crimes de guerre, le Code pénal militaire les définissait sommairement comme 'toutes infractions aux lois de la République commises pendant la guerre et qui ne sont pas justifiées par les lois et coutumes de la guerre'.²³

Cette définition qui était une copie conforme de l'article 502 du Code de justice militaire de 1972,²⁴ ne permet pas de cerner les crimes de guerre. Le législateur ne faisait aucune allusion aux Conventions de Genève, ni à leurs protocoles additionnels, et ne procédait à aucune distinction entre les conflits armés internationaux et conflits armés non internationaux. Il semble plutôt se baser sur la répression de ceux qui étaient au service de l'ennemi pendant un conflit armé.²⁵

Cette imprécision est d'ailleurs fort étonnante dès lors que le Code pénal militaire a été promulgué le 18 novembre 2002, c'est-à-dire après l'entrée en vigueur du Statut de Rome,²⁶ et son exposé des motifs invoque que le législateur s'est inspiré du droit international.²⁷ Il était pourtant plus simple pour le législateur congolais de s'inspirer des définitions contenues dans le texte même du Statut de Rome que la RD Congo avait ratifié depuis le 11 avril 2002.

Les dispositions du Code pénal militaire étaient floues et trop extensives et violaient le principe de la légalité criminelle.

Le principe *nullum crimen nulla poena sine lege* a toujours été droit congolais, un principe à norme constitutionnelle en raison de son incorporation dans toutes les constitutions congolaises post colonial.²⁸

Or, les crimes de guerre prévus aux articles 173 et 174 du Code pénal militaire n'étaient assortis d'aucune peine. Il se posait alors la question de leur caractère infractionnel dans la mesure où ils n'étaient pas pourvus de peine. En effet, l'article 2

²³ Article 173 du *Code pénal militaire*.

²⁴ La définition donnée par les deux articles est identique et considère les crimes de guerre comme 'toutes infractions aux lois de la République commises pendant la guerre et qui ne sont pas justifiées par les lois et coutumes de la guerre'.

²⁵ Article 174 du *Code pénal militaire*.

²⁶ Le *Statut de Rome de la Cour pénale internationale* est entré en vigueur le 1^{er} juillet 2002, alors que le *Code pénal militaire* lui est entré en vigueur 4 mois plus tard, soit en novembre 2002.

²⁷ Ceci appert de l'exposé des motifs du *Code pénal militaire*, duquel on peut lire que 'le Code pénal militaire a innové notamment par l'introduction des incriminations qui tiennent compte des Conventions internationales et autres instruments juridiques sur les droits de l'homme, les crimes de guerre et les crimes contre l'humanité. Cette introduction s'inscrit dans la suite de la ratification par la République Démocratique du Congo du Statut de Rome instituant la Cour pénale internationale'.

²⁸ Article 22 al.2 de la *Constitution de la République Démocratique du Congo du 1^{er} août 1964*, in *Moniteur Congolais*, n° Spécial, 1^{er} août 1964 ; Article 8 de la *Constitution de la République Démocratique du Congo du 24 juin 1967*, in *Moniteur Congolais*, n° 14 du 15 juillet 1967 ; Article 13 al.2 de l'*Acte constitutionnel de la transition du 09 avril 1994*, in *JOZ*, 35e année, n° spécial, avril 1994.

du Code pénal militaire dispose que ‘nulle infraction ne peut être punie des peines qui n’étaient pas prévues par la loi avant que l’infraction fût commise’.²⁹ De ce fait, le juge ne devait prononcer aucune peine dans la répression des crimes de guerre en se fondant sur le Code pénal militaire.

De même, la RD Congo étant un pays de droit romano-germanique, cela implique que ses lois pénales revêtent les caractères de prévisibilité, d’accessibilité, de clarté et de définition de la loi. Ces critères n’étaient pas réunis en l’espèce.

La prévisibilité implique la connaissance du droit, autrement dit un accès physique et intellectuel au contenu des règles juridiques. ‘Si l’accessibilité physique est assurée par la publicité des normes, l’accessibilité intellectuelle l’est par leur intelligibilité qui suppose que la règle écrite, telle qu’interprétée par les autorités judiciaires, soit claire et précise’.³⁰

Dans le cas d’espèce, les règles relatives aux crimes contre l’humanité et aux crimes de guerre n’étaient pas claires et précises. Le législateur donnait trois définitions³¹ des crimes contre l’humanité. Ces définitions étaient imprécises, ambiguës, quelque peu contradictoires et ne faisaient pas ressortir la notion même de ce crime contre l’humanité.

Il fallait donc une certaine gymnastique intellectuelle aux praticiens du droit pour chaque infraction. Ceci ne rend pas aisée la compréhension du droit, ni pour les juges ni pour les avocats, encore moins pour les justiciables. Ces problèmes s’accroissaient davantage devant les tribunaux militaires qui étaient seuls compétents pour juger les crimes internationaux graves.

2.2 *De la compétence exclusive des juridictions militaires dans la répression des crimes internationaux graves*

La compétence exclusive des juridictions militaires dans la répression des crimes internationaux graves découlait à la fois du Code pénal militaire et du Code judiciaire militaire. Néanmoins, aucune disposition de ces lois n’indique les motifs de cette exclusivité de compétence.

Pour Mutata Luaba cependant, ‘cette option procède probablement des droits de Nuremberg et de Tokyo (d’origine militaire), mais aussi du contexte spatio-

²⁹ Article 2 du *Code pénal militaire*.

³⁰ Beauvais P, ‘Le droit à la prévisibilité en matière pénale dans la jurisprudence des cours européennes’, 29 *Archives de politique criminelle* 1 (2007) 7.

³¹ Articles 165, 166 et 169 du *Code pénal militaire*.

temporel du péril public dans lequel surviennent ces faits et devant lesquels les acteurs judiciaires civils sont préoccupés à regagner les lieux sécurisants ou des cachettes'.³²

L'on peut penser qu'une enquête menée sur le terrain par un juge militaire sera plus efficace qu'une instruction menée à distance par un juge civil. Pour les infractions exclusivement militaires, c'est possible, mais pour les crimes internationaux, 'ceux-ci demandent des enquêtes approfondies et la récolte des éléments de preuve et des témoignages qui s'étendent sur une période plus longue et plus souvent en dehors du champ d'opérations militaires'.³³

Dans le cas sous examen, rien ne nous permet de conclure à l'une ou l'autre de ces hypothèses, les travaux préparatoires étant inaccessibles,³⁴ et l'exposé des motifs ne contenant aucune allusion ou explication relative aux motifs ayant poussé le législateur à donner compétence aux lois militaires.

Cela étant, la combinaison des articles 161 et 207 du Code pénal militaire, et 76, du Code judiciaire militaire permet de saisir l'exclusivité de la compétence des juridictions militaires dans la répression des crimes internationaux graves.

En effet, l'article 76 du Code pénal militaire dispose que 'les juridictions militaires connaissent, sur le territoire de la République, des infractions d'ordre militaire punies en application des dispositions du Code pénal militaire. Elles connaissent également des infractions de toute nature, commises par des militaires et punies conformément aux dispositions du Code pénal ordinaire'.³⁵ Ce sont donc les infractions définies au Code pénal militaire ainsi que la qualité de militaire qui définissent la compétence matérielle et personnelle des juridictions militaires.

³² Mutata Luaba L, *Traité des crimes internationaux*, Kinshasa, Editions Universitaires Africaines, 2008, 7-8.

³³ Decaux E, 'La dynamique des travaux de la Sous-commission des droits de l'homme et l'évolution de la position des États', in Abdelgawad LE, (dir.), *Juridictions militaires et tribunaux d'exception en mutation : perspectives comparées et internationale*, UMR de droit comparé, Université Paris 1 Panthéon-Sorbonne-CNRS, Paris, 2007, 66.

³⁴ Le *Code pénal militaire* et le *Code judiciaire militaire* avaient été votés par l'Assemblée constituante et législative, Parlement de transition. Pour plus des détails sur ce Parlement. Voir Boshab E et Matadi Nenga Gamanda, *Le statut de représentants du peuple dans les assemblées politiques délibérantes. Parlementaires, députés provinciaux, conseillers urbains, conseillers communaux, conseillers de secteur ou de chefferie*, Louvain-La-Neuve, Academia-Bruylant, 2010. Nos recherches effectuées au Parlement en vue d'accéder aux travaux préparatoires du Code pénal militaire de 2002 ont été infructueuses.

³⁵ Article 76 al.1 et 2 de la *loi n° 023-2002 du 18 novembre 2002 portant Code judiciaire militaire*, in *JORDC*, n° spécial, 20 mars 2003 (ci-après *Code judiciaire militaire*).

Pour renforcer l'exclusivité de la compétence des juridictions militaires, l'article 207 du Code pénal militaire disposait que 'sous réserve des dispositions des articles 117³⁶ et 119³⁷ du Code judiciaire militaire, seules les juridictions militaires connaissent des infractions prévues par le présent Code'.³⁸

Or, les crimes de guerre, les crimes contre l'humanité et le génocide n'étaient définis et réprimés que dans le seul Code pénal militaire.

A cela s'ajoute l'article 161 du Code pénal militaire qui stipulait qu'en cas 'd'invisibilité³⁹ ou de connexité⁴⁰ d'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contre l'humanité, *les juridictions militaires sont seules compétentes*'.⁴¹

Les tribunaux militaires étaient donc les seuls compétents pour juger les crimes de guerre, les crimes contre l'humanité et le génocide.

Des critiques ont été émises contre la compétence exclusive des juridictions militaires dans la répression des crimes internationaux en raison notamment de la nature de la justice militaire et du fait que la justice militaire doit être une justice des casernes,⁴² des faiblesses institutionnelles, de l'absence de l'indépendance de la justice militaire, de l'absence de contrôle judiciaire de la détention provisoire,⁴³ ou encore des restrictions légales dans la conduite des procès, notamment contre les officiers au sein de la justice militaire,⁴⁴ etc.

³⁶ L'article 117 du *Code judiciaire militaire* dispose que 'lorsque la juridiction ordinaire est appelée à juger une personne justiciable de la juridiction militaire, elle lui applique le Code Pénal Militaire... De même, lorsque les Cours et Tribunaux Militaires sont appelés à juger des personnes qui ne sont pas justiciables des juridictions militaires, conformément au présent Code, le président de la juridiction militaire compétente peut requérir les services d'un juge civil pour faire partie du siège'.

³⁷ L'article 119 se rapporte au cas d'extension de la compétence personnelle des tribunaux militaires en cas d'infraction continue. Il a été modifié par la loi de mise en œuvre du *Statut de Rome*.

³⁸ Article 207 du *Code pénal militaire*.

³⁹ L'hypothèse d'indivisibilité suppose l'existence entre les crimes contre l'humanité et d'autres infractions d'un lien de fait si étroit que la jonction des procédures devant une seule et même juridiction s'impose comme obligatoire. Voir Likulia Bolongo, *Droit pénal militaire zairois, tome 1, l'organisation et la compétence des juridictions des forces armées*, Paris, L.G.D.J., 1977, 144.

⁴⁰ La connexité nécessite un lien de fait rattachant plusieurs infractions les unes aux autres sans qu'elles ne perdent leur caractère délictueux spécial.

⁴¹ Article 161 du *Code pénal militaire*. [Les soulignés sont les nôtres.]

⁴² Nyabirungu mwene Songa, *Les crimes de guerre au regard du statut de la CPI et en Droit congolais*. Projet de renforcement du système de justice militaire, Goma, du 21 au 29 mai 2012, Kinshasa, Editions Droit et Société, 6.

⁴³ Wechokondo Koso M, *République Démocratique du Congo. La justice militaire et le respect des droits de l'homme, l'urgence du parachèvement de la réforme*, Johannesburg, Open Society Initiative for Southern Africa, 2009, 9.

⁴⁴ Haut-commissariat des Nations Unies aux droits de l'homme, *Avancées et obstacles dans la lutte contre*

C'est ainsi que par la loi n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire,⁴⁵ le législateur a accordé compétence aux Cours d'appel pour connaître des crimes de guerre, des crimes contre l'humanité et du génocide (voir infra, 3.1.2), ce qui sera réaffirmé dans les lois de mise en œuvre du Statut de Rome.

3 Des lois de mise en œuvre du Statut de Rome en droit congolais

La question de la loi de mise en œuvre du Statut de Rome date des premières années de ratification dudit Statut. En effet, dans l'inter fait de la ratification du Statut de Rome, certains ONG avaient préparé en 2002 une proposition de loi de mise en œuvre du Statut de Rome, mais qui n'avait pas reçu l'approbation des autorités congolaises.⁴⁶

Pendant la transition politique de 2003-2006,⁴⁷ un projet de loi avait été préparé par le gouvernement et déposé au Parlement en 2005, mais n'avait pas été soumis à discussion au Parlement jusqu'à la fin de la transition.⁴⁸

Au cours de la session de mars 2008, les députés nationaux Nyabirungu mwe-ne Songa et Crispin Mutumbe Mbuya avaient déposé au Parlement la proposition de loi relative à la mise en œuvre du Statut de Rome, mais elle rencontra des résistances politique, et deux ans durant, elle ne fut pas débattue.⁴⁹

Cette proposition de loi fut cependant soumise aux débats à l'Assemblée nationale le 4 novembre 2010. Beaucoup des députés s'opposèrent à la proposition

l'impunité des violences sexuelles en République Démocratique du Congo, 19, http://www.ohchr.org/Documents/Countries/CD/UNJHROApril2014_fr.pdf 15 septembre 2015.

⁴⁵ *Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*, in *JORDC*, n° spécial, Kinshasa, 11 avril 2013.

⁴⁶ Musila MG, *Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC*, Monograph 164, Institute for Security Studies, 2009, 16-17.

⁴⁷ Il s'agit de la transition politique issue de l'*Accord de paix de Sun City* et aux termes duquel les anciens belligérants se partagèrent le pouvoir, avec un Président et 4 vices présidents. Elle déboucha aux élections de 2006. Pour plus des détails, voir Bouvier P et Bomboko F, 'Le dialogue inter congolais, anatomie d'une négociation à la lisière du chaos,' 63-64 *Cahiers africains* (2004), 177-178 ; Minani Bihuzo, *1990-2007, 17 ans de transition politique et perspectives démocratiques en RDC*, Kinshasa, CEPAS/RODHECIC, 2008, 67-70.

⁴⁸ Ngondji Ongombe L, 'L'impact de la peine de mort dans le processus d'adoption de la loi de mise en œuvre du Statut de Rome en République Démocratique du Congo', in Ambos K, Maunganidze A. O (eds), *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa*, Gottingen Studies in Criminal Law and Justice, Volume 24, Konrad Adenauer Stiftung, 2012, 80.

⁴⁹ Aucune raison valable ne fut avancée pour ne pas programmer la proposition de loi aux débats. À ce sujet le bureau de l'Assemblée nationale semble avoir un pouvoir discrétionnaire.

de loi, et le véritable objectif, celui de l'harmonisation du droit congolais avec les dispositions du Statut de la CPI, fut occulté par les débats sur la peine de mort au motif que la loi de mise en œuvre risque d'amener la RD Congo à abolir la peine de mort, ce à quoi s'opposait la majorité des députés nationaux.⁵⁰

Lors de la session parlementaire de septembre 2012, le député national Boniface Balamage N'kolo endossa la précédente proposition et soumit à l'Assemblée nationale en septembre 2012, une proposition de loi modifiant le Code pénal ordinaire, le Code de procédure pénale, le Code pénal militaire et le Code judiciaire militaire en vue de la mise en œuvre du Statut de Rome.⁵¹

Compte tenu de son caractère technique et des spécificités particulières à chacun de ces textes, la loi fut éclatée en quatre propositions⁵² et renvoyée à la Commission politique, administrative et juridique de l'Assemblée nationale. Le 2 juin 2015, la loi fut votée à l'Assemblée nationale⁵³, avant d'être transmise au Sénat pour le même but.

Elle fut votée au Sénat à la séance du mardi 2 novembre 2015 au cours de la session ordinaire de septembre 2015, mais en des termes différents qu'à l'Assemblée nationale.

Les deux Chambres du parlement renvoyèrent alors les deux textes à la commission mixte paritaire (Assemblée nationale-Sénat) en charge de questions politiques, administratives et juridiques afin d'harmoniser les divergences.⁵⁴

Ayant harmonisé le texte et dissipé les divergences, le texte fut voté définitivement lors de la plénière du 15 décembre 2015 dans chacune des chambres.

⁵⁰ Ngondji Ongombe L, 'L'impact de la peine de mort', 80.

⁵¹ Proposition de loi modifiant et complétant le Code pénal, le Code de procédure pénale, le Code judiciaire militaire et le Code pénal militaire en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale, Kinshasa, Assemblée nationale, 06 septembre 2012.

⁵² La loi modifiant et complétant le décret du 30 janvier 1940 portant Code pénal ; La loi modifiant et complétant le décret du 6 août 1959 portant Code de procédure pénale, la loi modifiant la loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire et la proposition de loi organique modifiant et complétant la loi n° 023-2002 du 18 novembre 2002 portant Code judiciaire militaire.

⁵³ <http://www.assemblee-nationale.cd/v2/?p=5058> 12 octobre 2016.

⁵⁴ Les divergences portaient sur la structure du texte, sur l'exposé des motifs et aux articles 1, 2 et 3. Voir République Démocratique du Congo, Assemblée Nationale-Sénat, Commission Mixte Paritaire, Session ordinaire de Septembre 2015, Rapport relatif à l'harmonisation des divergences apparues lors de l'examen des propositions des lois 1. Modifiant et complétant le Décret du 30 janvier 1940 portant code pénal ; 2. Modifiant et complétant le Décret du 6 août 1959 portant code de procédure pénale ; modifiant la loi n° 024-2002 du 18 novembre portant code pénal militaire ; 4. Organique modifiant et complétant la loi n°023-2002 portant Code judiciaire militaire, Kinshasa, décembre 2015, p.4 Cependant ce rapport n'indique pas exactement le contenu des divergences, quelle était la proposition de l'Assemblée nationale, quelle était celle du Sénat et quel fut le compromis.

Le Parlement vota les quatre lois et transmit au Président de la République pour promulgation. Cependant, seules trois lois⁵⁵ furent promulguées par le Président de la République sans passer par la procédure de contrôle *a priori* de constitutionnalité.⁵⁶

La loi modifiant et complétant le Code judiciaire militaire fut quant à elle soumise à la Cour constitutionnelle pour un contrôle *a priori* de constitutionnalité.⁵⁷ La Cour l'ayant déclaré conforme à la Constitution,⁵⁸ elle n'attend donc que sa promulgation et sa publication au journal officiel.

S'agissant de l'adaptation du droit pénal congolais au Statut de Rome, ce dernier ne fournit pas de cadre de référence à l'harmonisation de ses dispositions avec les lois nationales.

Cependant, Manacorda et Werle ont identifié deux modèles principaux d'adaptation. 'L'État partie au Statut de Rome soit privilégiera une identité parfaite entre le texte international et la loi nationale, soit optera pour une adaptation de la seconde au premier, tout en assumant la possibilité de certaines « disharmonies » entre eux'.⁵⁹

La RD Congo a combiné les deux options dans la mesure où elle a opté pour une identité parfaite en ce qui est de certaines dispositions,⁶⁰ et pour d'autres, elle a adapté sa loi nationale au Statut de Rome,⁶¹ tout en assumant certaines désharmonies à travers notamment les peines.⁶²

⁵⁵ Il s'agit de la loi modifiant et complétant le Code pénal, de la loi modifiant et complétant le Code de procédure pénale et de la loi modifiant le Code pénal militaire.

⁵⁶ La Constitution de la RD Congo n'exige pas que les lois ordinaires soient au préalable soumises à la Cour constitutionnelle afin de vérifier leur conformité à la Constitution, contrairement aux lois organiques.

⁵⁷ Aux termes de l'article 156 al.3 de la Constitution, la loi modifiant et complétant le Code judiciaire militaire est une loi organique. En tant que telle, en application de l'article 124 de la Constitution, elle ne peut pas être promulguée avant d'avoir été déclarée conforme à la Constitution par la Cour constitutionnelle.

⁵⁸ Cour constitutionnelle, R. Const. 214, *Arrêt relatif à la conformité à la Constitution de la loi organique modifiant et complétant la loi n° 023-2002 du 18 novembre 2002 portant Code judiciaire militaire*, arrêt du 19 février 2016.

⁵⁹ Manacorda S et Werle G, 'L'adaptation des systèmes pénaux nationaux au Statut de Rome. Le paradigme du « Völkerstrafgesetzbuch » allemand', 3 *Revue de sciences criminelles et de droit pénal comparé*, (2003), 507.

⁶⁰ En ce qui concerne le génocide et la responsabilité pénale individuelle et celle du supérieur hiérarchique, le législateur congolais a intégré textuellement les articles 6, 25 para.3 et 28 du *Statut de Rome*.

⁶¹ Voir en ce sens, l'intégration des crimes de guerre, des crimes contre l'humanité et les causes d'exonération de la responsabilité pénale.

⁶² À ce sujet, voir infra 4.3.

Il nous semble à ce sujet que la mesure où le Statut de Rome ne fournit pas lui-même des indications claires quant au degré d'harmonisation ou d'identité entre le texte international et la loi nationale, d'éventuelles disparités entre eux ne semblent pas contraires aux exigences d'harmonisation du Code pénal congolais au Statut de Rome.

Cela étant, la promulgation des lois de mise en œuvre du Statut de Rome est une avancée majeure non seulement dans la définition des crimes et de leurs éléments constitutifs à travers le droit pénal de fond (3.1), mais aussi elles renforcent les droits des parties à travers le droit pénal de forme (3.2).

3.1 De la loi de mise en œuvre du Statut de Rome en droit pénal de fond

L'harmonisation du droit pénal congolais avec le Statut de Rome a été faite à travers la modification du Code pénal ordinaire et du Code pénal militaire.

Le Code pénal ordinaire a été modifié par la loi n° 15/022 du 31 décembre 2015⁶³ et entrée en vigueur le 30 mars 2016.⁶⁴

Dans son exposé des motifs, il est notamment indiqué que la compétence de la Cour étant complémentaire à celle des juridictions pénales nationales, la RD Congo a souscrit à une l'obligation d'harmonisation de son droit pénal avec les dispositions dudit Statut.⁶⁵

La deuxième loi est celle n° 15/023 du 31 décembre 2015 modifiant la loi n°024-2002 du 18 novembre 2002 portant Code pénal militaire,⁶⁶ entrée en vigueur à la même date que la loi n° 15/022 du 31 décembre 2015.

La loi n° 15/022 du 31 décembre 2015 ayant modifié et complété le Code pénal ordinaire a apporté trois principales innovations du point de vue du rapprochement des dispositions du droit pénal congolais avec le Statut de Rome. Ces innovations portent sur les principes généraux du droit pénal, sur les incriminations et sur la responsabilité pénale individuelle.⁶⁷

⁶³ Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, in *JORDC*, 57^{ème} année, n° spécial, Kinshasa, 29 février 2016.

⁶⁴ La loi est certes du 31 décembre 2015, mais elle n'a été publiée au journal officiel que le 29 février 2016. Or en vertu de son article 5, elle n'entre en vigueur que 30 jours après sa publication au journal officiel, ce qui donne le 30 mars 2016.

⁶⁵ Exposé des motifs de la loi du 31 décembre 2015.

⁶⁶ Loi n° 15/023 du 31 décembre 2015 modifiant la loi n°024-2002 du 18 novembre 2002 portant Code pénal militaire, in *JORDC*, 57^{ème} année, n° spécial, Kinshasa, 29 février 2016.

⁶⁷ La responsabilité pénale individuelle est un principe général de droit pénal, mais nous l'abordons séparément des autres dans la mesure où elle a toujours été consacrée en droit congolais d'avant le Statut de Rome.

D'abord sur le plan des principes généraux de droit pénal, la loi de mise en œuvre du Statut de Rome réaffirme l'imprescriptibilité de crimes de guerre, des crimes contre l'humanité et du génocide ainsi que de leurs peines. Elle les écarte aussi de l'amnistie et de la grâce,⁶⁸ et confirme le défaut de pertinence de la qualité officielle.⁶⁹

Le législateur congolais n'a pas repris la légitime défense comme cause d'exonération de responsabilité pénale telle que cela appert de l'article 31 para.1 litera c) du Statut de Rome. Ceci constitue à notre point de vue une avancée car nul ne peut commettre un génocide, un crime contre l'humanité ou un crime de guerre sous prétexte qu'il exercerait une légitime défense.⁷⁰ En effet, ces crimes sont généralement des crimes de masse, caractérisés par une atrocité sans pareille, une grande magnitude qui heurtent la conscience collective. La légitime défense ne peut donc les justifier.

Le Code pénal congolais reprend cependant le principe que l'ordre d'un gouvernement ou d'un supérieur, militaire ou civil, n'exonère pas son auteur de sa responsabilité pénale pour les crimes internationaux graves⁷¹ ; tout comme il institue le principe de l'indifférence de l'ordre dans la poursuite des crimes de guerre, des crimes contre l'humanité et du génocide,⁷² l'ordre de les commettre étant manifestement illégal.

Sur ce point le législateur congolais est allé au-delà du Statut de Rome⁷³ lorsqu'il institue l'illégalité manifeste de tout ordre de commettre les crimes de guerre.⁷⁴

Ensuite en ce qui concerne la responsabilité pénale individuelle, le législateur a copié textuellement les prescrits de l'article 25 para.3 du Statut de Rome.⁷⁵ Cependant une certaine incohérence législative est consacrée par le législateur à

⁶⁸ Article 34 *bis* du *Code pénal*.

⁶⁹ Article 20 *quater*. Par ce fait, la loi réaffirme que la qualité de chef d'État ou de gouvernement, de membre du gouvernement, de membre du parlement ou de représentant élu ou d'agent public de l'État, n'exonère en aucun cas de la responsabilité pénale, pas plus qu'elle ne constitue en tant que telle un motif de réduction de peine. De ce point de vue, elle reprend le principe consacré à l'article 27 du *Statut de Rome*.

⁷⁰ En ce sens, Verhaegen J, 'L'article 31.1.c du Statut de la Cour pénale internationale, un autre négationnisme ?', 6 *Revue de Droit Pénal et de Criminologie*, (2001), 107.

⁷¹ Article 23 *quater* du *Code pénal*.

⁷² Article 23 *quinquies* du *Code pénal*.

⁷³ L'article 33 § 2 du *Statut de Rome* dispose que 'l'ordre de commettre un génocide ou un crime contre l'humanité est manifestement illégal'. Cette disposition ne reprend pas les crimes de guerre.

⁷⁴ Article 23 *quinquies* du *Code pénal*.

⁷⁵ Article 21 *bis* du *Code pénal*.

travers un dédoublement textuel sur les modes de responsabilité pénale individuelle. À ce sujet voir *infra*, section 4.

S'agissant de la responsabilité du supérieur hiérarchique, le législateur l'a scindée en deux. La responsabilité du supérieur hiérarchique militaire, régit par le Code pénal militaire, et la responsabilité du supérieur hiérarchique non militaire consacrée dans le Code pénal ordinaire.

Sur ce point aucune difficulté ne se pose dans la mesure où le Statut de Rome a établi un régime différent de responsabilité pénale du supérieur hiérarchique, selon que celui-ci est un militaire ou un civil.⁷⁶

Relativement à la responsabilité pénale du supérieur hiérarchique non militaire, le législateur congolais reprend textuellement les prescrits de l'article 28 paragraphe b) du Statut de Rome,⁷⁷ et aucune différence n'appert de deux textes.

Quant à la responsabilité pénale des chefs militaires ou des personnes faisant effectivement fonction de chef militaire, le législateur a repris les dispositions de l'article 28 paragraphe a) du Statut de Rome.⁷⁸

Il s'agit ici d'une avancée importante dans la mesure où la loi de mise en œuvre du Statut de Rome comble une carence du droit pénal congolais.⁷⁹

Enfin en ce qui concerne les incriminations, deux innovations ont été introduites par le législateur congolais.

La première innovation est l'introduction des infractions réprimant toute forme d'atteinte à la bonne administration de la justice en vue de garantir l'indépendance du juge dans sa mission de dire le droit,⁸⁰ en exécution de l'obligation d'incriminer découlant du Statut de Rome.⁸¹

⁷⁶ L'article 28 du *Statut de Rome* est subdivisé en deux parties, 'la première encadrant la responsabilité du supérieur militaire, la seconde, celle du supérieur civil. La différence la plus substantielle entre les deux types de chefs est la norme de faute minimale exigée pour chacun d'entre eux : pour le chef militaire, le fait qu'il aurait dû savoir ; pour le chef civil, le fait qu'il a délibérément négligé de tenir compte d'informations. Autrement dit, pour le militaire, la norme est la négligence, alors qu'elle est l'aveuglement volontaire pour le civil'. Voir Robert M-P, 'La responsabilité du supérieur hiérarchique basée sur la négligence en droit pénal international', 49 *Les Cahiers de droit*, 3 (2008), 416.

⁷⁷ Article 22bis du *Code pénal*.

⁷⁸ Article 1^{er} al.2 du *Code pénal militaire*.

⁷⁹ Le *Code pénal congolais* ne contenait aucune disposition sur la responsabilité pénale des supérieurs hiérarchiques civils. La loi comble donc cette carence législative.

⁸⁰ Article 129 du *Code pénal*.

⁸¹ L'article 70 §§ 2 et 4 a) du *Statut de Rome* requiert des États d'adopter des législations qui incriminent les atteintes à l'administration de la justice.

La seconde innovation est l'introduction des crimes de guerre, des crimes contre l'humanité et du génocide dans le Code pénal ordinaire. Par ailleurs, ces crimes ont été abrogés dans le Code pénal militaire.⁸² Dès lors qu'une juridiction militaire veut poursuivre quelqu'un pour crimes de guerre, crime contre l'humanité ou génocide, elle appliquera les dispositions du Code pénal ordinaire.⁸³

En ce qui concerne le génocide, aucune différence n'existe entre le Statut de Rome et le Code pénal congolais, le législateur ayant repris les dispositions de l'article 6 du Statut de Rome.⁸⁴

Pour les crimes contre l'humanité, excepté quelques différences minimes,⁸⁵ le législateur⁸⁶ a repris l'essentiel des dispositions de l'article 7 du Statut de Rome, à l'exception notable du *littera a*) du paragraphe 2 de l'article 7 du Statut de Rome.⁸⁷

Sur ce point, nous partageons l'option du législateur congolais.⁸⁸ En effet, la question de l'élément politique a soulevé une controverse, non seulement entre doctrinaires,⁸⁹ mais aussi devant la CPI relativement à son

⁸² Article 2 du *Code pénal militaire* introduit.

⁸³ Article 1^{er} al.1 du *Code pénal militaire*.

⁸⁴ Article 221 du *Code pénal*.

⁸⁵ Ces différences portent essentiellement sur la structure de l'article. Dans le *Code pénal* congolais, le législateur a fondu les deux paragraphes en un seul car chaque crime sous-jacent est suivi directement de sa définition, alors que dans le Statut de Rome, les crimes sous-jacents sont cités au paragraphe 1^{er}, et leurs définitions, au paragraphe 2. Une autre différence porte sur le *littera g*) du paragraphe 1^{er} de l'article 7. Le législateur congolais l'a repris intégralement, mais en séparant la grossesse forcée des autres crimes sous-jacents.

⁸⁶ Article 222 du *Code pénal* introduit.

⁸⁷ Il s'agit de la commission multiple d'actes et de l'élément politique d'un État ou d'une organisation ayant pour but la commission des crimes contre l'humanité.

⁸⁸ L'option du législateur congolais que nous partageons ne saurait être envisagée comme une régression par rapport au droit international. En effet, l'harmonisation pénale ne permet pas remplacement *in integrum* les dispositions du droit interne. Il s'agit simplement d'un rapprochement qui permette aux juridictions nationales de réprimer sans être en deçà du droit international pénal.

⁸⁹ D'aucuns voient ici une restriction du champ de l'application du concept de crime contre l'humanité, voire même une contradiction avec les termes du para. 1 de l'article 7, en ce qu'il rend la condition alternative de l'attaque (généralisée ou systématique), une condition cumulative (généralisée et systématique). Voir Boot M, *Genocide, crimes against humanity, war crimes: Nullum crimen sine lege and subject matter jurisdiction of the International Criminal Court*, Antwerpen, New York, Oxford, Intersentia, 2002, 479. Certains auteurs suggèrent qu'il faut supprimer purement et simplement cet élément des dispositions de l'article 7 du *Statut de Rome*. Voir Halling M, 'Push the envelope-watch it bend: Removing the policy requirement and extending crimes against humanity' 23 *Leiden Journal of International Law* (2010) 833-845. D'autres estiment que la suppression de l'élément politique ôterait au Statut de Rome un filtre important en terme de compétence *rationae materiae et personae* de la CPI, en permettant d'ériger tout crime de droit commun, normalement du ressort des juridictions internes en un crime international relevant de la compétence de cette cour, pour peu qu'il soit commis de manière généralisée ou systématique (Bassiouni MC, *Crimes against humanity in international criminal law*, 2nd ed., Kluwer Law International, 1999, 244-247.)

contenu.⁹⁰ En plus, la politique d'un État ou d'une organisation ayant pour but la commission des crimes, n'est définie ni dans le Statut, ni dans les éléments de crime, ce qui n'est pas sans soulever des difficultés par rapport au principe de la légalité.

Le législateur congolais a donc poursuivi dans l'élan de la position qu'il avait soutenue à la Conférence diplomatique de Rome. En effet, le délégué de la RD Congo avait indiqué que 'l'inclusion de l'élément constitue un seuil inacceptable qui ne reflète en aucune façon les réalités contemporaines du droit international'.⁹¹

Ceci dit, le Code pénal congolais reprend des définitions claires du crime contre l'humanité. Il est donc conforme au droit international pénal existant.

Quant aux crimes de guerre, le Code pénal congolais reprend, à quelques différences près et non substantielles,⁹² les prescrits de l'article 8 du Statut de Rome.⁹³

Deux observations méritent cependant d'être soulevées ici. La première est qu'en ce qui concerne les conflits armés non internationaux, la liste des crimes contenue dans le Code pénal congolais est un peu restrictive que celle de l'article 8 du Statut de Rome.⁹⁴

⁹⁰ CPI, *Affaire Le Procureur c. Germain Katanga*, Ch. Ière Inst. II, ICC-01/04-01/07-717-tFRA-Corr, Jugement rendu en application de l'article 74 du Statut, 7 mars 2014, para. 397, 413, 412 et 414-416 ; CPI, *Affaire Le Procureur c Jean-Pierre Bemba*, Ch. préI. II, CC-01/05-01/08-424-tFRA, Décision rendue en application des alinéas a) et b) de l'article 61-7 du Statut de Rome, relativement aux charges portées par le Procureur à l'encontre de Jean-Pierre Bemba Gombo, 15 juin 2009, para.81 et 115 ; CPI, *Affaire Le Procureur c Laurent Koudou Gbagbo*, Ch. PréI. III, ICC-02/11-01/11- 9-Red-tFRA, Décision relative à la demande de délivrance d'un mandat d'arrêt à l'encontre de Laurent Koudou Gbagbo, déposée par le Procureur en vertu de l'article 58, 30 novembre 2011, para. 37. *Contra* CPI, *Situation en République de Côte d'Ivoire*, Ch. préI. III, ICC-02/11-14-Corr-tFRA, Rectificatif à la Décision relative à l'autorisation d'ouverture d'une enquête dans le cadre de la situation en République de Côte d'Ivoire rendue en application de l'article 15 du Statut de Rome, 15 novembre 2011, para. 54 ; ICC, *The Prosecutor v Bosco Ntaganda*, Pre-Trial Chamber II, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014 au para.24.

⁹¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, *Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 328, UN Doc. A/CONF.183/13 (Vol. II), 15 June-17 July, 1998, 344-345.

⁹² Le législateur a ajouté la Charte de l'Union africaine dans en ce qui concerne les attaques dirigées intentionnellement contre le personnel, le matériel, les installations les unités ou les véhicules employés dans le cadre d'une mission de maintien de la paix conformément à ladite Charte ; le fait d'utiliser indument l'uniforme de l'Union africaine et le fait de diriger les attaques contre les bâtiments destinés à la culture.

⁹³ Article 223 du *Code pénal*.

⁹⁴ Le *Code pénal* ne reprend pas les points xiii, xiv et xv) de l'article 8 para.2 litera e) du *Statut de Rome*.

La seconde observation est que le législateur cite un âge différent en ce qui concerne l'enrôlement ou la conscription des enfants dans les forces armées ou le fait de les faire participer à des hostilités selon qu'il s'agisse des conflits armés internationaux⁹⁵ ou des conflits armés internationaux.⁹⁶

Nous estimons cependant que seul l'âge de 15 doit être retenu par le juge quelle que soit la nature du conflit armé pour deux raisons. La première est que le législateur indique que les crimes internationaux graves doivent être interprétés et appliqués conformément aux éléments des crimes.⁹⁷ Or ceux-ci fixent l'âge à 15 ans.⁹⁸ La seconde raison est tirée du fait que la loi portant protection de l'enfant porte cet âge aussi à 15 ans.⁹⁹ En raison du principe selon lequel la loi spéciale déroge à la loi générale, la loi portant protection de l'enfant étant une loi spéciale, dérogera au Code pénal ordinaire qui est une loi générale dans ce cas.

3.2 *De la loi de mise en œuvre du Statut de Rome en droit pénal de forme*

Les règles de procédure pénale régissent les rapports souvent antagonistes entre les parties au procès. Voilà pourquoi le législateur doit intégrer des normes internationales des droits de l'homme dans l'administration de la justice qui est une exigence, non seulement juridique, mais aussi politique et de conscience.¹⁰⁰

L'harmonisation du Statut de Rome avec le droit congolais ne porte pas que sur le seul Code pénal. Elle porte aussi sur le droit pénal de forme à travers la coopération avec la CPI (3.2.1), ainsi que sur la répartition des compétences entre tribunaux civils et tribunaux militaires (3.2.2).

3.2.1 Des dispositions sur la coopération avec la CPI

Le Statut de Rome crée plus qu'une cour. Il crée un système d'échanges entre les États, la société civile, les organisations internationales et la Cour, fondé sur le principe de la coopération.¹⁰¹

⁹⁵ Pour les conflits armés internationaux, l'âge de l'enfant est porté à 15.

⁹⁶ En cas de conflits armés non internationaux, l'âge est porté à 18 ans.

⁹⁷ Article 224 du *Code pénal* introduit par la loi du 31 décembre 2015, supra note 64.

⁹⁸ Article 8 2) b) xxvi), point 2, *Éléments des crimes*, Cour pénale internationale, ICC-PIDS-LT-03-002/11_Fra, 32.

⁹⁹ Article 187 al.2 de la loi n° 09/001 du 10 janvier 2009 portant protection de l'enfant, in *JORDC*, n° spécial, Kinshasa, 25 mai 2009.

¹⁰⁰ Akele Adu P, 'La justice militaire dans le système judiciaire congolais', 352 *Congo-Afrique*, (2001), 80.

¹⁰¹ BA A 'L'effet et l'exécution des décisions internationales', in *Cours suprêmes francophones, internationalisation du droit, internalisation de la justice*, 3^{ème} congrès de l'AHJUCAF, Cour suprême du Canada, OIF, Ottawa 21-23 juin 2010, 55.

Le Chapitre IX du Statut de Rome se rapporte à la coopération avec la Cour pénale internationale.¹⁰² Aux termes du Statut, les États parties coopèrent pleinement avec la CPI dans les enquêtes et les poursuites qu'elle mène en rapport avec les crimes de la compétence de la Cour.¹⁰³

La mesure dans laquelle les États parties sont tenus de l'obligation de coopérer avec la Cour ne semble pas être limitée aux formes de coopération et d'assistance prévues dans l'article 86 Statut. Afin d'évaluer le contenu de l'obligation des États parties à coopérer avec la Cour, il faut se pencher sur l'ensemble Statut.¹⁰⁴ Par ailleurs, le terme 'Cour' doit être compris comme incluant ses organes, y compris le Procureur.¹⁰⁵

Aux termes de l'article 88 du Statut de Rome exige que les 'États parties veillent à prévoir dans leurs législations nationales les procédures qui permettent la réalisation de toutes les formes de coopération indiquées dans la partie IX du Statut'.¹⁰⁶ L'article 88 du Statut de Rome institue dès lors une obligation de résultat.¹⁰⁷

La meilleure forme de coopération que les États pourraient donc fournir à la Cour, serait d'assurer que leurs législations pénales nationales sont adéquates pour servir des procédures et pratiques qui soutiennent les processus d'enquêtes judiciaires.

En RD Congo, avant la promulgation de la loi n°15/024, la coopération était régie par les accords intérimaires de coopération de 2004.

En effet, dans la foulée du renvoi de la situation de la RD Congo à la CPI,¹⁰⁸ deux accords intérimaires avaient été signés aux fins de faciliter la coopération avec la CPI. Le premier est l'accord provisoire du 03 mars 2004 sur les privilèges et immunités de la CPI.¹⁰⁹ Cet accord avait facilité les activités de la CPI sur le

¹⁰² Articles 86 à 102 du *Statut de Rome de la Cour pénale internationale*.

¹⁰³ Article 86 du *Statut de la Cour pénale internationale*.

¹⁰⁴ Ciampi A, 'The obligation to cooperate', in Cassese A, Gaeta P, Jones RWD (eds.), *The Rome Statute of International Criminal Court: A commentary*, volume II, Oxford, Oxford University Press, 2002, 1612.

¹⁰⁵ Rapport du comité préparatoire pour l'établissement d'une Cour criminelle internationale contenant le Draft du Statut de Rome de la CPI et le rapport final de la conférence de Rome, UN Doc. A/CONF.183/2/Add.1, 163.

¹⁰⁶ Article 88 du *Statut de Rome de la Cour pénale internationale*.

¹⁰⁷ Ciampi A, 'The obligation to cooperate', 1625.

¹⁰⁸ Lettre du Président Joseph Kabila du 03 mars 2004 au Procureur de la Cour pénale internationale, ICC-01-04-01-07-11, annexe 2.1 du 25 février 2008 reclassée publique en application de la décision du 20 février 2008.

¹⁰⁹ <http://www.un.org/apps/newsFr/storyF.asp?NewsID=9167&Cr=CPI&Cr1=RDC#.WAozUSTG7IV12> septembre 2016.

territoire congolais avant la ratification par les autorités congolaises de l'Accord sur les privilèges et immunités de la Cour pénale internationale.¹¹⁰

Le second est l'accord de coopération judiciaire intérimaire du 06 octobre 2004 sur la coopération proprement dite avec la CPI et le Bureau du Procureur.¹¹¹

Les accords de coopération judiciaire entre la CPI et la RD Congo de 2004 n'étaient qu'intérimaires et ne pouvaient demeurer définitivement sous cet attribut. C'est pourquoi, en exécution de son obligation découlant de l'article 88 du Statut de Rome, la RD Congo a promulgué une législation de mise en œuvre de la coopération avec la CPI.

Ainsi, par la loi n°15/024 du 31 décembre 2015,¹¹² le législateur a ajouté au Code de procédure pénale 30 articles relatifs à la coopération avec la CPI.¹¹³

La RD Congo réaffirme à travers le Code de procédure pénale, le principe de sa pleine coopération avec la CPI. En effet, 'pour l'application du Statut de la Cour pénale internationale, la République Démocratique du Congo participe à la coopération et coopèrent pleinement avec la Cour dans les enquêtes et poursuites pour les crimes de sa compétence, dans les conditions et suivant la procédure fixée par le présent chapitre et par les autres dispositions nationales ainsi que par le Statut de la Cour'.¹¹⁴

Toutes les modalités de coopération avec la Cour sont couvertes par la nouvelle loi à savoir la coopération en matière d'entraide judiciaire relative à tous les actes de procédure, y compris l'identification des personnes, des lieux où elles se trouvent et la localisation des biens, le gel et la saisie des avoirs¹¹⁵ ; l'arrestation et la remise d'une personne, y compris la procédure, les actes de procédure, leur forme et les droits de la personne arrêtée¹¹⁶ ; l'exécution des peines et mesures prises par la Cour¹¹⁷ ; les privilèges et immunités de la Cour et de son personnel,¹¹⁸ etc.

¹¹⁰ La RD Congo a ratifié sans réserve l'Accord sur les privilèges et immunités de la Cour pénale internationale le 03 juillet 2007.

¹¹¹ Accord de coopération judiciaire entre la République Démocratique du Congo et le Bureau du procureur de la Cour pénale internationale, ICC-01/04-01/06-39-AnxB9, 6 octobre 2004.

¹¹² Loi n°15/024 du 31 décembre 2015 modifiant et complétant le décret du 06 août 1959 portant Code de procédure pénale, in JORDC, n° spécial, 29 février 2016 (ci-après Code de procédure pénale).

¹¹³ Il s'agit des articles 21 bis à 21-31è du Code de procédure pénale.

¹¹⁴ Article 21 bis du Code de procédure pénale.

¹¹⁵ Article 21-13è du Code de procédure pénale.

¹¹⁶ Article 21-14è à 21-24è du Code de procédure pénale.

¹¹⁷ Article 21-25è à 21-30è du Code de procédure pénale.

¹¹⁸ Article 21 bis al.2 du Code de procédure pénale.

La loi détermine aussi la procédure de coopération avec la Cour en ce compris en cas d'urgence,¹¹⁹ ainsi que les personnes habilités de coopérer avec la Cour au niveau national. Il s'agit du Procureur général près la Cour de cassation¹²⁰ et du Procureur général près la Cour constitutionnelle.¹²¹

Cependant, sur ce point, la loi n'indique pas les mécanismes de collaboration entre le Procureur général près la Cour de cassation et l'Auditeur général des forces armées lorsque la coopération porte sur les justiciables ayant la qualité de militaire. Ceci pourra ralentir les mécanismes d'exécution des mandats de la Cour dans la mesure où aucune loi ne régit ce genre de rapports. Le problème devrait néanmoins être résolu par voie réglementaire entre le ministre de la justice et celui de la défense.

La loi régit aussi la question des demandes concurrentes et renvoie à l'article 90 du Statut de Rome.¹²² L'article 90 distingue selon que la demande concurrente provient d'un État partie au Statut de Rome, auquel cas priorité sera donnée à la Cour selon les modalités déterminées aux paragraphes 2 et 3. Si par contre l'État requérant n'est pas partie au Statut, des difficultés peuvent subvenir.

En effet, aux termes des dispositions de l'article 90 para.4, il est prévu que 'si l'État requérant est un État non partie au présent Statut, l'État requis, s'il n'est pas tenu par une obligation internationale d'extrader l'intéressé vers l'État requérant, donne la priorité à la demande de remise de la Cour, si celle-ci a jugé que l'affaire était recevable'.¹²³ *A contrario*, lorsqu'un traité d'extradition existe, l'État requis, fut-ce un État partie au Statut, ne donnerait pas priorité à la demande de la Cour.

Comme le relève le professeur Éric David, 'conventionnellement ou coutumièrement, l'obligation de coopérer est, de plus, assorties des modalités qui, eu égard au principe de la complémentarité, ne confèrent pas nécessairement priorité à la Cour en cas d'une demande concurrente d'une personne ou en cas de demande de remise d'une personne protégée par une forme d'immunité'.¹²⁴

Ainsi, le Statut de la Cour est considéré comme un accord *inter alios acta*, dans la mesure où il semble évident dans l'esprit de cette disposition qu'un traité bilatéral d'extradition a la primauté sur le Statut de la Cour en raison du principe

¹¹⁹ Article 21 *ter*, Article 21 *quater* et article 21-13è du *Code de procédure pénale*.

¹²⁰ Article 21 *bis* al.3 du *Code de procédure pénale*.

¹²¹ Article 21 *bis* al.4 du *Code de procédure pénale*. Cette distinction s'explique par le fait qu'en vertu de l'article 163 de la Constitution de la RD Congo, seuls le Président de la République et le Premier ministre sont justiciables de la Cour constitutionnelle.

¹²² Article 21 *sixties* du *Code de procédure pénale*.

¹²³ Article 94 §4 du *Statut de Rome de la Cour pénale internationale*.

¹²⁴ DAVID E, *Eléments de droit pénal international et européen*, Bruxelles, Bruylant, 2009, 951.

relatif des traités.¹²⁵

Aussi, lorsque le Procureur de la CPI intervient directement sur le territoire national, il en avise immédiatement le Procureur général concerné. Le Procureur général peut faire valoir des préoccupations et proposer au Procureur de la Cour pénale internationale d'exécuter lui-même ces actes s'ils peuvent être exécutés dans le même délai et selon les mêmes modalités, en réponse à une demande d'entraide judiciaire.¹²⁶

Ceci peut entraver à la coopération car la loi n'indique pas ce qu'il faut entendre par préoccupations et surtout quelle est la nature de celles-ci. C'est donc au Procureur Général qu'il reviendrait les soins d'en apprécier la nature. Il nous semble qu'il s'agisse ici d'un mécanisme destiné à limiter le pouvoir d'action ou de mouvement du Procureur de la CPI sur le territoire national.

Enfin, la loi indique la répartition des charges afférentes à l'exécution des demandes de la Cour entre celle-ci et la RD Congo. Cette dernière prend en charge les frais des demandes adressées par elle à la Cour, et celle-ci prend en charges les frais occasionnés par ses requêtes, y compris les frais extraordinaires.¹²⁷

En sommes, la loi n°15/024 du 31 décembre 2015 ayant intégré dans le Code de procédure pénale les dispositions relatives à la coopération avec la CPI est une avancée significative. Par ce biais, le RD Congo a mis en exécution l'obligation par elle contactée en vertu de l'article 88 du Statut de Rome. En plus, la loi intègre très largement en droit national congolais tous les mécanismes de coopération envisageables en vertu du Statut de Rome. Sur ce point le droit congolais est très largement conforme au Statut de Rome.

La loi ne s'est pas limitée à la coopération avec la Cour. Elle consacre aussi des mécanismes applicables à la répartition de la compétence entre tribunaux militaires et tribunaux civils dans la répression des crimes internationaux graves.

3.2.2 De la répartition de compétence entre tribunaux militaires et tribunaux civils

Jusqu'en 2013, seuls les tribunaux militaires étaient compétents pour juger les infractions internationales graves dans la mesure où c'est seulement dans le Code pénal militaire qu'elles étaient prévues et punies.

¹²⁵ David E, *Eléments de droit pénal international*, 951.

¹²⁶ Article 21-11è du *Code de procédure pénale*.

¹²⁷ Article 21-12è du *Code de procédure pénale*.

Cependant, par la loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire,¹²⁸ le législateur a confié à la Cour d'appel la compétence de juger les crimes de guerre, les crimes contre l'humanité et le génocide commis par les personnes relevant de leur compétence et celle des tribunaux de grande instance.¹²⁹

Nonobstant cette loi, les crimes internationaux graves continuaient à être régis que par le seul Code pénal militaire dont l'article 207 donnait compétence aux seules juridictions militaires. Or le juge est en règle tenu d'appliquer la législation en vigueur lors du prononcé de la décision.¹³⁰ Il fallait donc attendre que la loi n°15/022 du 31 décembre 2015 qui a intégré dans le Code pénal ordinaire ces crimes internationaux graves, entre en vigueur¹³¹ pour voir les juridictions ordinaire ou civiles¹³² être dans la possibilité d'exercer pleinement leurs nouvelles compétences.

Cependant, au regard des mécanismes légaux de répartition de compétence mis en place, la loi semble donner priorité aux tribunaux militaires.

En effet, aux termes de l'article 115 'les juridictions de droit commun sont compétentes dès lors que l'un des coauteurs ou complices n'est pas justiciables des juridictions militaires *sauf pendant la guerre ou dans la zone opérationnelle, sous l'état de siège ou l'état d'urgence*'.¹³³ L'article 119 ajoute seulement qu' 'en cas d'infraction continue s'étendant d'une part sur une période où le justiciable relevait de la juridiction de droit commun et d'autre part, sur une période pendant laquelle il relève de la juridiction militaire ou vice-versa, la juridiction de dernière qualité est seule compétente'.¹³⁴

Cette loi posera un problème de l'exercice effectif par les Cours d'appel de leur compétence matérielle pour juger les crimes de guerre, les crimes contre l'humanité et le génocide.

¹²⁸ Loi organique n° 13/011-B du 11 Avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, in *JORDC*, N° spécial, Kinshasa, 11 avril 2013.

¹²⁹ Article 91 point 1 de la loi n° 13/011-B du 11 avril 2013.

¹³⁰ Kity FR, *Principes généraux de droit pénal belge, tome 1 : La loi pénale*, 2^{ème} éd., Bruxelles, Larcier, 2009, 255.

¹³¹ Elle est entrée en vigueur le 30 mars 2016.

¹³² Les juridictions civiles doivent s'entendre ici, non pas par rapport à la compétence civile des juridictions ordinaires, mais au sens générique à savoir les juridictions ordinaires (et non spécialisées comme le tribunal de commerce ou le tribunal du travail) autres que militaires.

¹³³ Article 115 du *Code judiciaire militaire* modifié par l'article 1^{er} de proposition de la loi organique modifiant et complétant la loi n° 023-2002 du 18 novembre 2002 portant *Code judiciaire militaire*. [Les soulignés sont les nôtres.]

¹³⁴ Article 119 du *Code judiciaire militaire*.

Pour les crimes de guerre, étant entendu que ceux-ci ne peuvent être commis que pendant un conflit armé,¹³⁵ ils ne seront pas jugés par les cours d'appel, mais seulement par les tribunaux militaires.¹³⁶

De même, et au regard de cette disposition, les cours d'appel ne jugeront pas le génocide et les crimes contre l'humanité commis pendant la guerre, dans les zones d'opération militaire ou sous l'état de siège ou d'état d'urgence, alors que les crimes internationaux graves sont le plus souvent commis dans un contexte de violence caractérisée ou de conflit armé.

La loi superpose donc la compétence des juridictions civiles à celle des juridictions militaires et établit ainsi en réalité une compétence « subsidiaire » des cours d'appel.

Quant aux droits des accusés, victimes et témoins, il y a lieu d'indiquer que les droits de l'accusé ont été renforcés par une série des dispositions qui leurs garantissent une certaine équité au cours de la procédure. Ces droits étaient déjà consacrés dans la Constitution du 18 février 2006,¹³⁷ et le Code de procédure pénale en contenait déjà un énoncé rudimentaire.¹³⁸

La loi du 31 décembre 2015 modifiant et complétant le Code de procédure pénale est allée loin en renforçant ces droits. Ainsi, outre la publicité, l'impartialité et l'équité qui doivent caractériser l'examen des charges portées contre un accusé,¹³⁹ trois types des droits lui sont garantis : les droits à l'information, les garanties pendant sa détention, et d'autres droits et garanties pendant la procédure.¹⁴⁰

¹³⁵ Les crimes de guerre ne peuvent être commis que dans le conflit armé. Voir TPIY, *Affaire Le Procureur c. Dragoljub Kurnac et consorts*, Ch. d'appel, arrêt du 12 juin 2002, para.58. On peut lire dans ce paragraphe que 'les crimes de guerre se distinguent des infractions de pur droit interne en ce qu'ils sont déterminés par le contexte dans lequel ils sont commis, le conflit armé, ou en dépendent...'. Voir aussi Kolb R, *Droit international pénal*, précis, Bâle, Helbing Lichtenhahn, Bruxelles, Bruylant, 2008, 138.

¹³⁶ Ceci ressort de l'article 115 du *Code judiciaire militaire*, lorsqu'il dispose 'les juridictions de droit commun sont compétentes dès lors que l'un des coauteurs ou complices n'est pas justiciables des juridictions militaires *sauf pendant la guerre ou dans la zone opérationnelle, sous l'état de siège ou l'état d'urgence*'. [Les soulignés sont les nôtres.]

¹³⁷ La Constitution congolaise consacre la légalité des infractions, des peines et de procédure avec toutes les conséquences que cela entraîne (la non rétroactivité des lois pénales, le fait que les peines cessent d'être exécutées si elles sont abrogées par une loi postérieure, ou qu'elles soient l'être en fonction de la loi la plus favorable au condamné, etc.). Elle consacre aussi la présomption d'innocence, ou à un certain nombre de garanties pendant l'arrestation, la détention et le jugement, voir Article 17 à 21 de la *Constitution de la RD Congo*.

¹³⁸ Ces droits ne se rapportaient qu'au contrôle de la détention par le juge, le caractère exceptionnel de celle-ci, le droit d'être assisté par un conseil de son choix. Voir les articles 27 à 33 et article 73 du *Code de procédure pénale*.

¹³⁹ Article 26 bis du *Code de procédure pénale*, supra 113.

¹⁴⁰ Article 126 bis du *Code de procédure pénale*.

Le Code de procédure pénale congolaise organise aussi les droits des victimes qui ont la possibilité de soutenir leurs intérêts, d'intervenir à des phases de procédure sous diverses formes et solliciter une réparation.¹⁴¹

Quant à la protection des victimes, des témoins et intermédiaires, le Code de procédure pénale indique que 'dans le cadre de la répression des crimes prévus au titre IX du Code pénal,¹⁴² la juridiction saisie prend des mesures propres à protéger la sécurité, le bien-être physique et psychologique, la dignité et le respect de la vie privée des victimes, témoins et intermédiaires'.¹⁴³

Cette disposition est trop générale et n'indique pas les mécanismes de son opérationnalité. Il faudra donc des actes réglementaires indiquant aux juges et procureurs les mesures idoines à prendre pour assurer la protection des victimes, des témoins et intermédiaires, et les flexibilités nécessaires pour les adapter aux éventuelles particularités.

4 Les problèmes soulevés par la loi de mise en œuvre du Statut de Rome en droit congolais

Les lois promulguées le 31 décembre 2015 en vue d'harmoniser le droit congolais avec le Statut de Rome reprennent largement les définitions et principes du Statut de Rome. Sur ce point, elles constituent une avancée notable par rapport à la législation pénale militaire. Cependant, elles soulèvent aussi quelques difficultés par rapport à l'élément moral (4.1), aux modes de responsabilité pénale individuelle (4.2) et aux peines (4.3).

4.1 Le défaut de définition de l'élément moral

Chacun des éléments constitutifs de l'infraction constitue dans la dogmatique pénale une limite essentielle à la répression pénale, un seuil en deçà duquel la liberté individuelle est accrochée, doit se trouver affraîchie de toute forme d'intervention.

¹⁴¹ En droit congolais, les victimes participent aux procédures, avant ou pendant le procès. Elles peuvent même déclencher les poursuites par une saisine du tribunal au moyen d'une citation directe. Voir Article 54, 69 et 70 du *Code de procédure pénale*. En comparaison avec la participation des victimes devant la CPI, voir Muhindo Magadju P, Inman D and Smis S, 'International crimes, national trials and the role of victims' rights : Locating the problem and possibilities of victim participation in Democratic Republic of Congo', in Hansen TH (Ed.), *Comparative study of post-conflict justice mechanisms in African countries*, 2016, 28-47.

¹⁴² Les crimes concernés au titre IX du *Code pénal* sont les crimes de guerre, les crimes contre l'humanité et le génocide.

¹⁴³ Article 26 *ter* du *Code de procédure pénale*.

‘L’élément légal de l’infraction constitue un rempart essentiel contre l’insécurité et l’arbitraire. L’élément matériel de l’infraction apparait une garantie de la liberté de pensée, de la liberté d’opinion. Et l’élément moral, c’est très simple. Ça répond à une exigence fondamentale de justice’.¹⁴⁴

En droit congolais, la Commission permanente de réforme du droit congolais, avait, avant même le vote de la loi de mise en œuvre du Statut de Rome, adopté des orientations qui indiquent que le Code pénal doit définir l’élément moral, et faire de la faute le minimum exigible pour toute infraction pénale.¹⁴⁵

De même, les rédacteurs du Statut de Rome en insérant une disposition consacrée à l’élément psychologique des crimes, tentent de réaliser un double objectif : ‘standardiser l’élément intentionnel comme condition de la responsabilité pénale internationale, et affirmer leur attachement à la maxime latine *actus non facit reum nisi mens rea*,¹⁴⁶ en faisant de la culpabilité morale une condition de la responsabilité pénale individuelle’.¹⁴⁷ L’élément moral est donc un élément déterminant de la responsabilité pénale.

Dans le cas d’espèce, la loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Code pénal congolais ne définit pas l’élément moral, contrairement à la proposition initiale.¹⁴⁸ La législation congolaise de mise en œuvre du Statut de Rome est donc inachevée sur ce point car elle a consacré la responsabilité pénale individuelle sans définir l’élément moral.

Dès lors, la question est celle de savoir si le juge combinera, pour établir la responsabilité pénale individuelle des auteurs, les articles 21*bis*, 21*ter* et 21*quater* du Code pénal, et l’article 30 du Statut de Rome pour caractériser l’élément moral comme condition de responsabilité pénale individuelle.

¹⁴⁴ Tulkens F, ‘Politique criminelle et droits de l’homme en Afrique centrale’, in Akele Adu, (dir.) *Réformes du code pénal, options axiologiques et techniques fondamentales, Vol.1., options axiologiques*, Kinshasa, Editions du CEPAS, 2009, 87.

¹⁴⁵ Nyabirungu mwene Songa, ‘L’infraction, la responsabilité, la sanction et la réparation dans la réforme du droit pénal congolais’, in Akele Adu (dir.) *Réformes du code pénal, options axiologiques et techniques fondamentales, Vol.1, options axiologiques*, Kinshasa, Editions du CEPAS, 2009, 310.

¹⁴⁶ La maxime selon laquelle, en général, une personne ne peut pas être coupable d’un crime à moins que deux éléments, à savoir l’*actus reus* et le *mens rea*, soient réunis.

¹⁴⁷ Gantheret F, ‘Principes généraux de droit pénal. Article 30, Élément psychologique’, in Fernandez J, Pacreau X, (dir.), *Statut de Rome de la Cour pénale internationale, commentaire article par article*, tom 1, Paris, Editions A. Pedone, 2012, 897.

¹⁴⁸ Article 21 *ter* de la proposition de loi modifiant et complétant le code pénal ordinaire, le code de procédure pénale, le code judiciaire militaire et le code pénal militaire en vue de la mise en œuvre du Statut de Rome de la Cour Pénale Internationale, Kinshasa, Assemblée nationale, Sess. ord. Septembre 2012. Cette proposition fut soumise par le député national Boniface Balamage N’kolo.

Ceci ne sera pas sans poser des problèmes. D'abord parce le juge congolais a du mal à caractériser l'élément moral dans les affaires des crimes internationaux graves jugées.¹⁴⁹ En plus la combinaison de plusieurs textes pénaux n'est pas un tout cohérent qui permette au juge congolais, au regard de son contexte, de sa tradition juridique et de sa formation juridique, de réprimer de manière efficiente ces crimes dont la complexité requiert une cohérence normative.

Il faudra donc au législateur de compléter le Code pénal par la définition de l'élément moral afin de consacrer une cohérence dans la responsabilité pénale individuelle.

4.2 *De la responsabilité pénale individuelle : incohérence et chevauchement législatif*

Les lois n° 15/022 et 15/023 du 31 décembre 2015 ont intégré dans le Code pénal ordinaire et dans le Code pénal militaire, respectivement la responsabilité pénale des supérieurs hiérarchiques civils et militaires ou des personnes faisant effectivement fonction de chef militaire. Elles ont, sur ce point, comblé une lacune du droit congolais.

Néanmoins, en ce qui est de la responsabilité pénale individuelle entant qu'auteur, coauteur ou complice, le Code pénal ordinaire congolais consacre un chevauchement des textes. Ce chevauchement qui concerne l'action ou la coaction ainsi que la complicité ne sera pas sans conséquence sur l'œuvre du juge.

La loi n° 15/022 n'a pas abrogé l'article 21 du Code pénal,¹⁵⁰ mais lui a simplement ajouté l'article 21*bis*. De ce fait, le législateur consacre deux modes de responsabilité pénale individuelle en cas de commission individuelle des crimes ou de coaction : une responsabilité pénale individuelle pour les crimes internationaux graves régie par l'article 21*bis* du Code pénal,¹⁵¹ et une responsabilité pénale individuelle en cas de commission individuelle ou de coaction en vertu de l'article 21 du Code pénal pour les autres crimes.¹⁵²

¹⁴⁹ Mbokani BJ, 'L'application du Statut de Rome par les tribunaux congolais. Vers une banalisation des crimes de droit international ?', 1 *Revue de droit international et de droit comparé*, (2014), 113-166 ; Avocats Sans Frontière, *La mise en œuvre judiciaire du statut de Rome en République Démocratique du Congo*, Bruxelles, Kinshasa, Avocats Sans Frontière, 2014.

¹⁵⁰ L'article 21 du *Code pénal* définit la responsabilité pénale individuelle entant qu'auteur, coauteur ou instigateur.

¹⁵¹ L'article 21 *bis* est une copie conforme de l'article 25 para.3 du *Statut de Rome*. Il ne s'applique que pour les crimes internationaux graves.

¹⁵² Article 21 du *Code pénal congolais*.

Le juge congolais face à cette complexité ne sera pas sans difficulté pour appliquer ces dispositions. Certains juges pourraient, en vertu de la non rétroactivité des lois pénales, appliquer l'article 21 du Code pénal dont ils maîtrisent les arcanes, alors que d'autres pourront faire application de l'article 21*ter*.

Aucun motif fondé sur le droit international pénal, sur le droit national ou sur les difficultés pratiques ; aucun fondement philosophique ou sociologique ne permet de justifier deux textes des lois sur la même institution à savoir la responsabilité pénale individuelle.

Le droit congolais n'était pas sur ce point en deçà du droit international, la seule carence de la législation nationale ne portait en effet que sur la responsabilité du supérieur hiérarchique.

À l'exception des literas d)¹⁵³ et e)¹⁵⁴ du paragraphe 3, les dispositions des litera a à c) ainsi que du litera f)¹⁵⁵ de l'article 25 existaient déjà en droit congolais *ante* Statut de Rome. Il aurait donc fallu au législateur de reformuler l'article 21 du Code pénal en y intégrant les dispositions des litera d) et e) du Statut de l'article 21 paragraphe 3.

En ce qui concerne la complicité, la loi n° 15/022 du 31 décembre 2015 a ajouté au Code pénal l'article 21*ter* sur la complicité et qui reprend mot pour mot les dispositions de l'article 22 du Code pénal.¹⁵⁶ Contrairement à l'article 21*bis*, le législateur n'a pas indiqué que l'article 21*ter* s'appliquait lorsqu'il s'agissait des crimes internationaux graves.

De ce fait, le juge congolais se trouve confronté à trois dispositions qui régissent toutes la complicité et qui, quoi qu'ayant la même portée, ne sont pas formulées dans les mêmes termes ou interprétées de la même manière. Cela aura pour conséquence que pour la complicité, certains juges appliqueront l'article 22 du Code pénal, d'autres, l'article 21*ter*, voire l'article 21*bis* en ses points 3 et 4. Cela peut aussi avoir un impact sur le travail de la Cour de cassation dans son contrôle de la légalité des décisions des juridictions inférieures.

¹⁵³ Il dispose qu'elle contribue de toute autre manière à la commission ou à la tentative de commission d'un tel crime par un groupe de personnes agissant de concert. Cette contribution doit être intentionnelle et, selon le cas : a) Viser à faciliter l'activité criminelle ou le dessein criminel du groupe, si cette activité ou ce dessein comporte l'exécution d'un crime relevant de la compétence de la Cour pénale internationale ; b) Être faite en pleine connaissance de l'intention du groupe de commettre ce crime'.

¹⁵⁴ Le litera e) consacre la responsabilité de l'auteur en cas d'incitation directe et publique au génocide.

¹⁵⁵ Voir article 4 du *Code pénal congolais* sur la tentative punissable. Son contenu est le même que celui du litera f) de l'article 25 § 3 du *Statut de Rome*.

¹⁵⁶ Les deux dispositions, (article 21 *ter* tel qu'intégré dans le *Code pénal* par la loi n° 15/022 du 31 décembre 2015, et l'article 22 du *Code pénal*) sont rédigées de manière parfaitement identique.

4.3 Les problèmes soulevés par les peines

La loi n° 15/022 s'étant substituée à certaines dispositions de la loi ancienne,¹⁵⁷ elle s'applique aux faits commis avant son entrée en vigueur et non encore jugés. C'est en ce sens qu'a décidé la Chambre criminelle de la Cour de cassation française lorsqu'elle arrête que 'les faits poursuivis, bien que commis sous l'empire d'une loi abrogée, entrent dans les prévisions de la loi nouvelle qui s'est substituée et justifient la condamnation prononcée, au regard de l'une ou de l'autre de ces lois'.¹⁵⁸

Ceci ne soulève aucune objection, si l'incrimination et les peines sont les mêmes, c'est-à-dire si la loi nouvelle procède à droit constant à savoir même incrimination et même peine. Or, la législation de mise en œuvre du Statut de Rome n'est pas constante quant aux peines par rapport au Code pénal militaire non seulement en ce qui concerne la peine de mort mais aussi en ce qui est des peines la complicité.

La question de la peine de mort et l'emprisonnement à perpétuité pour réprimer les crimes de la compétence de la CPI¹⁵⁹ avait soulevé des débats lors des travaux de Rome.

A la conférence de Rome, 'certains États avaient proposé, au regard de la gravité des crimes, la peine de mort et réclusion criminelle à perpétuité, mais d'autres États avaient fait valoir les limites de ces peines au regard des droits de l'homme'.¹⁶⁰

Ces dissensions ont logiquement entraîné la réserve contenue à l'article 80 qui énonce 'la liberté pour les États de choisir et d'appliquer les peines qu'ils souhaitent au niveau national, et qui entraîne une absence d'une obligation de mettre en accord leur législation avec le Statut de Rome pour ce qui concerne les peines'.¹⁶¹

¹⁵⁷ Il s'agit du titre V du *Code pénal militaire* sur les crimes de guerre, les crimes contre l'humanité et le génocide.

¹⁵⁸ Crim. 16 oct. 1989, Bull. crim., n° 359 ; Crim. 4 sept. 1990, Bull. crim. n° 309 'une loi déterminant autrement que la précédente les éléments d'une infraction est applicable aux faits commis avant son entrée en vigueur, si ceux-ci entre dans les prévisions de l'ancienne et de la nouvelle loi'.

¹⁵⁹ Scalia D, 'Article 80. Le Statut, l'application des peines par les États et le droit international', in Fernandez J, Pacreau X, (dir.), *Statut de Rome de la Cour pénale internationale, commentaire article par article*, tom 1, Paris, Editions A. Pedone, 2012, 1717.

¹⁶⁰ À la Conférence de Rome, 'stressing that the penalties under consideration were related to the most serious crimes of international concern including international armed conflict, a number of delegations stressed the importance of severe penalties commensurate to the gravity of the crimes. Against this background, they supported the inclusion of death penalty, or in some cases life imprisonment, as prerequisite for the credibility of the Court and its deterrent functions. A number of other delegations underlined limitations derived from human rights law on the mode of punishment'. Voir Fife RE, 'Part 7. Penalties. Article 77 Applicable penalties', in Triffterer O (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's notes, article by article*, 2nd Edition, Munichen, C.H. Beck, Oxford, Hart Publishing, Baden-Baden, Nomos, 2008, 1419.

¹⁶¹ Scalia D, 'Article 80', 1717.

Bon nombre d'auteurs considèrent de ce fait que l'article 80 démontre clairement que la solution retenue dans le Statut au sujet des peines ne peut influencer les lois nationales, et sont applicables ou consacrées uniquement pour la Cour.¹⁶²

Sur ce plan donc, le Statut de Rome ne peut nous être d'une grande utilité dans la mesure où il n'interdit pas la peine de mort dans les législations nationales des États parties comme le disait le président de la Conférence diplomatique de Rome dans sa déclaration faite lors de l'adoption du Statut de Rome le 17 juillet 1998.¹⁶³

Cela étant, plusieurs objections sont faites contre la peine de mort en droit congolais.¹⁶⁴ En droit interne congolais, la question de la peine de mort¹⁶⁵ a été omniprésente lors des débats sur les différents projets et propositions de loi de mise en œuvre du Statut de Rome, et son absence dans le texte initial¹⁶⁶ a été souvent à la base de leur rejet.¹⁶⁷

Il ne s'agit pas ici de traiter de l'interdiction de la peine de mort,¹⁶⁸ ni de sa conformité aux droits de l'homme,¹⁶⁹ encore moins à la Constitution de la RD

¹⁶² Fife RE, 'Part.7 Penalties', 1444; Scalia D, 'Article 80', 1717; Schabas W, 'Penalties', in Cassese A, Gaeta P, Jones J.W.R, (eds.) *The Rome Statute of the International Criminal Court: A commentary*, Oxford, Oxford University Press, vol. II, 1505.

¹⁶³ 'The debate at this Conference on the issue of which penalties should be applied by the Court has shown there is non-international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance of the principle of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or any other way, the legality of penalties imposed by national systems for serious crimes'. FIFE RE, 'Part 7. Penalties', 1443-1444.

¹⁶⁴ Ngondji Ongombe L, 'La problématique de l'abolition de la peine de mort en droit pénal et judiciaire congolais', in Akele Adau (dir.) *Réformes du Code pénal, options axiologiques et techniques fondamentales, Vol.1., options axiologiques*, Kinshasa, Editions du CEPAS, 2009, 227-231.

¹⁶⁵ Une proposition de loi sur l'abolition de la peine de mort avait été déposée en 2010 par le Député André MBATA. Cette proposition fut débattue à la session de septembre 2010, mais elle avait été rejetée à la séance du 25 novembre 2010.

¹⁶⁶ Dans la proposition initiale du député Boniface Balamage, les crimes de guerre, les crimes contre l'humanité et le génocide étaient punis d'une servitude pénale à perpétuité.

¹⁶⁷ Ngondji Ongombe L 'La question de la peine de mort', 80.

¹⁶⁸ Aucune obligation juridique internationale ne lie la RD Congo et l'enjoignant d'abolir la peine de mort. Elle n'a pas adhéré au *Deuxième protocole facultatif du Pacte international relatif aux droits civils et politiques relatif à l'abolition de la peine de mort*.

¹⁶⁹ Plusieurs études spécialisées traitent de la peine de mort par rapport aux droits de l'homme, voir Schabas W, *The abolition of death penalty in international law*, 3^e ed., Cambridge, CUP 2002 ; Bernaz N, *Le droit international et la peine de mort*, Paris, La Documentation Française, 2008 ; Wachsmann P, *Les droits de l'Homme*, Dalloz, 5^{ème} éd., 2008.

Congo, la Cour constitutionnelle s'étant déjà prononcée à ce sujet.¹⁷⁰

Il s'agit plutôt de réfuter la punition des crimes internationaux de la mort pour deux raisons fondamentales liées à la régression du Code pénal par rapport au Code pénal militaire ainsi qu'à la difficulté de coopérer avec d'autres États pour mettre fin à l'impunité de ces crimes internationaux graves.

D'abord, la législation de mise en œuvre du Statut de Rome constitue une régression par rapport au Code pénal militaire pour deux raisons. La première raison est que le Code pénal militaire ne punissait certains crimes de mort que lorsqu'il y a de circonstances aggravantes. En effet, si le Code pénal militaire réprimait le génocide de mort,¹⁷¹ les crimes contre l'humanité n'étaient punis que de servitude pénale à perpétuité.¹⁷² Ce n'est qu'en cas de circonstances aggravantes tenant notamment au résultat¹⁷³ ou au temps à savoir en temps de guerre ou pendant les circonstances exceptionnelles que les crimes contre l'humanité étaient punis de mort.

La deuxième raison est que le Code pénal ordinaire prévoit des peines constantes, sans possibilité pour le juge de les moduler en dehors des circonstances atténuantes,¹⁷⁴ contrairement au Code pénal militaire qui à son article 27, donne la possibilité au juge de prononcer la servitude pénale à perpétuité ou en à temps pour tous les cas punissables de mort.¹⁷⁵

Le législateur n'a pas tenu compte ici de l'interprétation évolutive de la jurisprudence des tribunaux congolais qui, pour ces crimes internationaux graves, n'ont prononcé que la servitude pénale à perpétuité¹⁷⁶ ou des peines inférieures.¹⁷⁷

¹⁷⁰ La Cour Suprême de Justice toutes sections réunies siégeant en matière de constitutionnalité avait indiqué que 'contrairement à ce qui y est affirmé, le point 1 de l'article 61 de la Constitution n'abroge pas la peine de mort, l'interdiction de déroger au droit à la vie signifiant simplement qu'en dehors des cas prévus par la loi, le droit à la vie est protégé en toutes circonstances et qu'il ne peut être mis fin à la vie d'autrui de manière arbitraire'. Voir Cour Suprême de Justice, *R. CONST.128/TSR, arrêt du 28 janvier 2011*, 9.

¹⁷¹ Article 164 al.1 du *Code pénal militaire*.

¹⁷² Article 167 al.1 du *Code pénal militaire*.

¹⁷³ Article 167 al.2 du *Code pénal militaire*.

¹⁷⁴ Article 18 du *Code pénal ordinaire*.

¹⁷⁵ L'article 27 du *Code pénal militaire* dispose que 'Dans tous les cas punissables de mort, la juridiction militaire pourra prononcer la peine de servitude pénale à perpétuité ou une peine de servitude pénale principale, en précisant une durée minimale de sûreté incompressible, c'est-à-dire la période de temps pendant laquelle le condamné ne peut prétendre à aucune remise de peine'.

¹⁷⁶ A titre d'exemple, dans l'affaire Maniraguha, le tribunal a prononcé la servitude pénale à perpétuité (*Affaire Maniraguha Jean Bosco alias Kazungu*, TMG de Bukavu, RP 275/09 et 521/10 / RMP 581/07 et 1573/KMC/10, jugement du 16 aout 2011, p.51), etc.

¹⁷⁷ A titre illustratif, voir *Affaire Minova*, les peines varient entre 10 et 20 ans de réclusion criminelle (*Affaire Minova*, Cour Militaire Opérationnelle, RP 003/2013, RMP 0372/BBM/013, arrêt du 5 mai

Or, le législateur doit veiller à l'intégration, dans la loi, des acquis jurisprudentiels de l'interprétation évolutive.¹⁷⁸

Ensuite en ce qui concerne la coopération, la RD Congo réprime depuis 2005 les crimes internationaux graves commis sur son territoire.¹⁷⁹ Dans les faits, certaines personnes soupçonnées d'avoir commis des crimes internationaux graves¹⁸⁰ se trouvent en Ouganda¹⁸¹ et au Rwanda.¹⁸² Ces États pourront refuser d'extrader lesdites personnes vers la RD Congo dans la mesure où elles y risquent la peine de mort. En effet, aucun État n'est tenu d'extrader une personne vers un pays où elle risque la peine de mort ou dans lequel la peine de mort est exécutée.¹⁸³

C'est dans cet angle qu'aborde Manacorda lorsqu'il conclut 'qu'il existe donc un lien entre harmonisation des sanctions et coopération en matière pénale'.¹⁸⁴

La peine de mort pourra donc être un fondement du refus de toute coopération avec la RD Congo. Dès lors, pour faciliter la coopération judiciaire et la lutte contre l'impunité, la peine de mort devrait être remplacée par une servitude pénale de 30 ans ou par l'emprisonnement à perpétuité en cas des circonstances aggravantes.

2014, pp.93-99) ; Affaire Kibibi, 10 à 20 ans de réclusion criminelle (*Affaire Kibibi Mutaure*, Cour Militaire du Sud Kivu, RP 043, RMP 1337/MTL/11, arrêt du 21 février 2011, pp.33-40) ; *Affaire Kakwavu*, 10 ans de servitude pénale (*Affaire Kakwavu*, Haute Cour militaire, RP 004/2010, arrêt du 07 novembre 2014, p.78).

¹⁷⁸ Il est fréquent en effet que certaines créations jurisprudentielles soient reprises par le législateur. De manière plus systématique, le Code pénal français de 1994 fournit des exemples caractéristiques de l'influence que peuvent avoir les décisions jurisprudentielles sur le législateur. En effet, nombre de dispositions nouvelles insérées dans ce Code ne sont que l'incorporation de solution préalablement dégagées par la chambre criminelle de la Cour de cassation. Voir en ce sens, LE GUNHEC CH, 'Le nouveau Code pénal et la jurisprudence de la Cour de cassation', in *Le nouveau Code pénal, enjeux et perspectives*, Dalloz coll. Thèmes et commentaires, 1994, 129-136.

¹⁷⁹ Mbokani BJ, 'L'application du Statut de Rome', 114.

¹⁸⁰ Haut-Commissariat des Nations Unies aux droits de l'homme, Rapport du Bureau conjoint des Nations Unies aux droits de l'homme sur les violations des droits de l'homme commises par le Mouvement du 23 mars (M23) dans la province du Nord-Kivu avril 2012 - novembre 2013 ; Muleefu A, 'Beyond the single story: Rwanda's support to the March 23 Movement (M23) ?', *5 Amsterdam Law Forum*, 1 (2013), 106-120 ; UN Security Council, 'Final report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council resolution 2021 (2011)', UN Doc. S/2012/84315 November 2012.

¹⁸¹ Haut-Commissariat des Nations Unies aux droits de l'homme, 5, §10 ; Pourtier R, 'Le Kivu dans la guerre : acteurs et enjeux', *EchoGéo* <http://echogeo.revues.org/10793> ; DOI : 10.4000/echogeo.10793, 1-14.

¹⁸² Muleefu A 'Beyond the single story', 106-107.

¹⁸³ *Soering c. Royaume-Uni*, CEDH arrêt du 7 juillet 1989 ; *Jabari c. Turquie*, CEDH, arrêté du 11 juillet 2000 ; *Öcalan c. Turquie*, CEDH, arrêt du 12 mai 2005.

¹⁸⁴ Manacorda S, 'Harmonisation et coopération : la nature et l'articulation des rapports', in Delmas-Marty M, Giudicelli-Delage G et Lambert-Abdelgawad E, (dir.), *L'harmonisation des sanctions pénales en Europe*, Unité Mixte de Recherche de Droit comparé de Paris, Paris, Société de législation comparée, 2003, 572.

S'agissant de la complicité, elle a toujours été envisagée en droit congolais comme un mode atténué de responsabilité pénale individuelle.¹⁸⁵ Cette approche que nous partageons, est consacrée aussi dans le Statut de Rome qui, nonobstant certaines objections minoritaires,¹⁸⁶ a été retenue par la majorité des juges de CPI et la doctrine.¹⁸⁷

Cependant, l'article 21 *quater* du Code pénal dispose que 'par dérogation aux dispositions de l'alinéa précédent, les complices des crimes visés au titre IX relatif aux crimes contre la paix et la sécurité de l'humanité seront punis de la peine prévue par la loi à l'égard des auteurs de ces crimes'.¹⁸⁸ Or la peine dont parle le législateur est la peine de mort.

Cette disposition soulève le problème de la proportionnalité de la peine. En vertu de l'article 25 para.3 du Statut de Rome, la distinction entre les auteurs principaux et les complices est également pertinente pour la peine,¹⁸⁹ et toute rigueur qui ne serait pas nécessaire pour s'assurer de la personne du complice devrait être prohibée par la loi.

Au regard de la non rétroactivité des lois pénales,¹⁹⁰ deux systèmes des peines seront appliqués jusqu'à une certaine période en RD Congo. Le premier pour les crimes commis avant le 29 février 2016 et pour lesquels les éventuels complices seront punis de moitié de la peine qu'ils auraient encourue s'ils avaient été auteurs en vertu de l'article 23 du Code pénal.¹⁹¹ Le second pour les crimes commis après cette date et pour lesquels les complices seront punis de mort.¹⁹²

¹⁸⁵ Esika Makambo eso Bina, *Le Code Pénal Zaïrois annoté, livre premier, des infractions et de la répression en général*, Lubumbashi, 1977, 251.

¹⁸⁶ CPI, *Affaire Le Procureur c. Mathieu Ngudjolo Chui*, Ch. Ière Inst. II, jugement, ICC-01/04-02/12-4-tFRA 18 décembre 2012. Opinion concordante de la juge Christine Van den Wyngaert, para.6 ; CPI, *Affaire Le Procureur c. Thomas Lubanga Dyilo*, Ch. de Ière Inst. I, jugement du 14 mars 2012, Opinion individuelle du juge Adrian Fulford, para. 10.

¹⁸⁷ Olisoló H, 'Developments in the distinction between principal and accessory liability in light of the first case law of the International Criminal Court', in Stahn C and Sluiter G (eds.), *The emerging practice of the International Criminal Court*, Leiden, Martinus Nijhoff Publishers, 2009, 339-359; Werle G, 'Individual criminal responsibility in Article 25 ICC Statute', 5 *Journal of International Criminal Justice*, 4 (2007), 957.

¹⁸⁸ Article 21 *quater* al.2 du *Code pénal ordinaire*.

¹⁸⁹ Olisoló H, 'Developments in the distinction', 341.

¹⁹⁰ Article 17 de la *Constitution de la R D Congo du 18 février 2006*.

¹⁹¹ Aux termes de l'article 23 du *Code pénal congolais*, le complice est puni de la moitié de la peine qu'il aurait encourue s'il avait été reconnu comme auteur.

¹⁹² Article 23 *bis* du *Code pénal ordinaire*.

Le droit pénal congolais a régressé sur ce point car aucun motif tiré de la pratique des tribunaux congolais, du droit comparé ou fondé sur un quelconque autre point ne justifie cette rigueur du législateur congolais.

5 Conclusion

Le législateur congolais incriminait les crimes de guerre, les crimes contre l'humanité et le génocide dans les lois pénales militaires. La définition des crimes que donnaient ces lois étaient imprécises, ambiguës et quelque peu contradictoires. Il fallait donc au législateur de promulguer une législation qui se conforme à la Constitution et qui intègre les obligations contractées par la ratification du Statut de Rome. Ceci fut fait par le vote et la promulgation des quatre lois qui modifient et complètent le Code pénal ordinaire, le Code de procédure pénale et qui modifient le Code pénal militaire et le Code judiciaire militaire en vue de la mise en œuvre du Statut de Rome.

Le législateur a alors harmonisé le Code pénal avec le Statut de Rome. Ainsi, les définitions des crimes et les principes généraux de droit pénal sont conformes aux dispositions du Statut de Rome. De même, le législateur a incriminé les atteintes à l'administration de la justice, et a intégré des dispositions sur la coopération avec la Cour. De ce fait, le législateur a réalisé son obligation contractée en vertu du Statut de Rome.

Nonobstant ces avancées indéniables, il a lieu d'indiquer que les lois de mise en œuvre du Statut de Rome posent de problèmes relatifs à une superposition des mécanismes de responsabilité pénale individuelle et au défaut de définition de l'élément moral. De même, la peine constante de mort assortie des crimes de guerre, des crimes contre l'humanité et le génocide, même lorsqu'il s'agit d'un complice constitue une régression par rapport au Code pénal militaire. Il a mis ainsi en place un mécanisme qui pourrait empêcher les autres États de coopérer avec la RD Congo pour lutter contre l'impunité.

La législation congolaise relative à la mise en œuvre du Statut de Rome quoi qu'étant un progrès indéniable, devrait cependant être complétée par la définition de l'élément moral, la suppression des redondances législatives relatives à la complicité, à l'action et à la coaction. Elle devrait aussi supprimer la peine de mort et assortir les crimes contre l'humanité, le génocide et les crimes de guerre d'une peine d'emprisonnement à perpétuité avec une disposition générale qui permette au juge de tenir compte des circonstances de commission des crimes et de prononcer une peine en deçà du maximum dans le respect du principe de la légalité.

CHAPTER 7

THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE: A SURVEY OF CONGOLESE LEGISLATION IMPLEMENTING THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

BALINGENE KAHOMBO

Abstract

The principle of complementarity under the Rome Statute of the International Criminal Court ('ICC' or 'Court') imbues states with the primary responsibility to prosecute core international crimes committed within their jurisdiction, while the ICC only intervenes when states are unwilling or unable to carry out genuine investigations and prosecutions of alleged perpetrators. Faced with numerous deficiencies in the national legislation of the Democratic Republic of Congo (DRC), the military tribunals, which had exclusive jurisdiction over international crimes up to 2013, declined to apply such legislation. Instead, they directly applied the Rome Statute pursuant to Article 215 of the DRC Constitution. On 31 December 2015, three new laws were promulgated in order to harmonise national law in the DRC with the Rome Statute as well as provide a legal framework for cooperation with the Court. The current chapter aims to discuss one of these new laws, the DRC Implementation Act, which modifies and complements the Penal Code of 30 January 1940. The chapter aims to assess the Act's potential to contribute to the struggle against impunity by Congolese domestic courts. The drafting methodology in respect of the DRC Implementation Act has mostly consisted of re-writing the provisions of the Rome Statute instead of simply referring to its relevant articles. This particular approach presents risks: To begin with, it may lead to terminological differences, ambiguity and omission. It also risks the creation of legislation that

diverges from expected legal standards. Finally, it may lead to national laws that contradict positive international law. This chapter addresses three main questions: First, to what extent has the new legislation avoided these potential risks? Second, how has it taken into account the progressive case law of the competent military tribunals? Third, can the new legislation settle the debate over the direct application of the Rome Statute in the DRC? The chapter concludes that the new law has gone far beyond the provisions of positive international law by reducing its scope, contradicting it and bringing new legal ambiguities into play. Rather than contributing to the fight against impunity, certain parts of the new legislation are likely to be set aside. As a result, Congolese tribunals may continue to favour direct application of the Rome Statute.

LE PRINCIPE DE COMPLEMENTARITE EN PRATIQUE: UNE ETUDE SUR LA LEGISLATION CONGOLAISE DE MISE EN OEUVRE DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

Résumé

Selon le principe de complémentarité dans le Statut de Rome, il incombe en premier lieu aux Etats de prévenir et de sanctionner les crimes internationaux fondamentaux commis sur leurs territoires. La Cour pénale internationale (CPI) n'intervient que lorsqu'un Etat n'est pas en mesure ou ne veut pas mener des enquêtes et poursuites sérieuses contre les auteurs présumés. Face aux nombreuses lacunes dans la législation nationale de la République Démocratique du Congo, les tribunaux militaires, qui avaient la compétence exclusive sur les crimes internationaux jusqu'en 2013, ont refusé d'appliquer la loi en la matière en faveur de l'application directe du Statut de Rome conformément à l'Article 215 de la Constitution de la République Démocratique du Congo. En décembre 2015, trois nouvelles lois ont été promulguées en vue d'harmoniser la législation nationale congolaise avec le Statut de Rome et de fournir un cadre juridique pour la coopération avec la Cour. L'objectif de cette étude est d'analyser l'une de ces nouvelles lois, modifiant et complétant le Code pénal du 30 janvier 1940, et d'évaluer son potentiel de contribuer à la lutte contre l'impunité par les tribunaux nationaux de la République Démocratique du Congo. La méthodologie de rédaction de la nouvelle loi de mise en œuvre du Statut de Rome a principalement consisté en la réécriture des dispositions du Statut de Rome au lieu de faire référence aux articles pertinents. Cette approche particulière présente trois risques: Premièrement, elle peut conduire à la différenciation terminologique, à l'ambiguïté et à l'omission. Deuxièmement, il y a un risque d'adopter une loi qui ne s'accorde pas avec les normes juridiques internationales prévues. Troisièmement, elle peut conduire aux normes nationales qui sont contraires au droit international positif. Cet article aborde trois grandes questions:

Premièrement, jusqu'à quel point la nouvelle loi a-t-elle évité ces risques potentiels? Deuxièmement, a-t-elle pris en compte la jurisprudence progressive des tribunaux militaires compétents? Troisièmement, la nouvelle loi a-t-elle tranché le débat sur l'application directe du Statut de Rome en RDC? L'article conclut à cet égard que la nouvelle loi a très largement dépassé les dispositions du droit international positif par la réduction de son champ d'application, la contradiction et le rapport de nouvelles ambiguïtés juridiques. Plutôt que de contribuer à la lutte contre l'impunité, il y a la possibilité d'écarter certaines dispositions de cette nouvelle loi. En conséquence, les tribunaux congolais peuvent continuer à privilégier l'application directe du Statut de Rome.

1 Introduction

The Democratic Republic of Congo (DRC) ratified the Rome Statute of the International Criminal Court (ICC) on 30 March 2002.¹ On 19 April 2004, the DRC became the second country after Uganda to trigger the jurisdiction of the ICC by way of a self-referral.² These steps were taken in the expectation of some form of ICC intervention in the context of the armed conflict and numerous crimes committed in the DRC.³ The government of the DRC acknowledged that its 'competent authorities are unfortunately not capable of conducting investigations of these aforementioned crimes, nor are they able to conduct the necessary prosecutions without the participation of the International Criminal Court.'⁴

However, the intervention by the ICC has so far failed to address the Congolese national demand for justice. There appear to be four broad reasons for this state of affairs: First, in terms of the principle of complementarity, the ICC is not designed to deal with all crimes and offenders in the DRC. In accordance with the division of work between the Court and state parties, the ICC focuses only on perpetrators bearing the greatest criminal responsibility, notably those at the command

¹ This ratification was acted upon by the depositary of the Rome Statute, the Secretary General of the United Nations, on 11 April 2002. See Kazadi Mpiana J, 'La position du droit international dans l'ordre juridique congolais et l'application de ses normes' Unpublished PhD Thesis, Sapienza Università di Roma, 2012, 61.

² Uganda has referred the first situation to the ICC Prosecutor on 29 January 2004.

³ Musila GM, *Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC*, Institute for Security Studies, Monograph 164, July 2009, viii.

⁴ Democratic Republic of Congo, 'Letter of Referral from President Joseph Kabila to Prosecutor of the ICC', 3 March 2004, <https://www.issafrika.org/uploads/M164APPEND1.PDF> on 1 August 2006.

level, for international crimes within its jurisdiction. At the same time, states hold the primary responsibility to investigate and prosecute such crimes, and should be encouraged to do so, whereas the Court intervenes only as a means of last resort in case of their failure.⁵

Second, the Court's temporal competence does not allow it to investigate and prosecute crimes committed before the entry into force of the Rome Statute on 1 July 2002.⁶ However, many of the crimes committed in the DRC and documented by the United Nations in the Mapping Report of 2010 have been perpetrated during armed conflicts of various types that have been ongoing since 1993.⁷

Third, calls for the establishment of an *ad hoc* international criminal tribunal for the DRC, which might have covered the period outside the ICC's jurisdiction, have not been successful. The international community, which had sponsored the peace negotiations between at least eight countries directly involved in the conflict in the DRC and numerous Congolese rebel groups, seems lukewarm to the idea. Arguably, this is due to the fact that funding such a court would be very expensive and burdensome.

Fourth, apart from an attempt to indict and prosecute some presumed offenders in Spain (February 2008)⁸ and Belgium (April 2000)⁹ as well as the trial of the Rwandan rebel leadership in Germany under the principle of universal jurisdiction,¹⁰ no other country has conducted prosecutions in respect of the DRC conflict.¹¹

In light of the absence of any significant international judicial intervention in the situation in DRC outside of the ICC¹², there arose a need to find a realis-

⁵ Burke-White WW, 'Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice' 49 *Harvard International Law Journal*, 2008, 54-55.

⁶ See Article 24, *Rome Statute of the International Criminal Court*, July 17 1998, 2187 UNTS 9.

⁷ Office of the United Nations High Commissioner for Human Rights, 'Democratic Republic of the Congo, 1993-2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003', August 2010, http://www.ohchr.org/Documents/Countries/CD/DR_C_MAPPING_REPORT_FINAL_EN.pdf on 15 July 2015.

⁸ See Commentator, 'The Spanish indictment of high-ranking Rwandan officials' 6 *Journal of International Criminal Justice*, 2008, 1003-1011.

⁹ See Cassese A, 'When may senior state officials be tried for international crimes? Some comments on the Congo v Belgium case' 4 *The European Journal of International Law* 4, 2002, 853-875.

¹⁰ See European Centre for Constitutional and Human Rights (ECCHR), 'Universal jurisdiction in Germany? The Congo War Crimes Trial: First case under the Code of Crimes against International Law – Executive summary', 8 June 2016, <https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports.html> on 4 July 2016.

¹¹ United Nations High Commissioner for Human Rights, 'Democratic Republic of the Congo, 1993–2003', para 15.

¹² The ICC has conducted investigations in the DRC focusing on alleged war crimes and crimes against

tic domestic alternative to combat impunity in the DRC. The Congolese domestic courts were called into action, albeit in the context of a failing state with very little chance of prosecuting suspects beyond its borders. The initial judgment was issued on 20 December 2004 in the *Ankoro* case on crimes against humanity.¹³ Faced with numerous deficiencies in the existing national legislation, the military tribunals (which had exclusive jurisdiction over core international crimes until 2013)¹⁴ systematically refused to apply existing legislation, instead favouring the direct application of the Rome Statute pursuant to Article 215 of the Constitution of 18 February 2006. Since then, the case law has increased and even become progressive on certain issues, such as the non-application of the death penalty.¹⁵

On 31 December 2015, three new laws were promulgated in order to harmonise the said national legislation with the Rome Statute and to provide a legal framework for effective cooperation with the Court.¹⁶

The current study aims to outline one of these new laws, that is to say Law No.15/022 of 31 December 2015 (the DRC Implementation Act), insofar as it modifies and complements the Penal Code of 30 January 1940, and to assess its potential to contribute to the struggle against impunity for international crimes committed in the DRC. The DRC Implementation Act has gone far beyond the provisions of positive international law by reducing the scope of application of international law, contradicting it and creating new legal ambiguities. Instead of contributing to efforts geared towards accountability for international crimes, some parts of DRC

humanity committed mainly in eastern DRC, in the Ituri region and the North and South Kivu Provinces, since 1 July 2002. This was the Office of the Prosecutor's first investigation, and led to its two first convictions, in the case of *Prosecutor v Thomas Lubanga Dyilo* and *The Prosecutor v Germain Katanga*, and to the acquittal of Mr Ngudojolo Chui. There is an ongoing trial of Bosco Ntaganda.

¹³ *Public Prosecutor and 54 Civil Parties v Émile Tabwangu Kayembe and 29 Others*, Judgment of 20 December 2004, Military Court of Appeal of Katanga Province, RP 01/2003 (unpublished).

¹⁴ The rule was set forth in Article 161, *Military Penal Code* (2002) which provides: 'In the case of indivisibility or connection between certain offences and crimes of genocide, war crimes or crimes against humanity, military courts have exclusive jurisdiction.' It implies that genocide, war crimes and crimes against humanity fall under the exclusive jurisdiction of military tribunals, so much so that when they are committed indivisibly or in connection with other offences, which may fall under the jurisdiction of other courts, military tribunals remain competent to try the latter offences irrespective of the status (military or civil) of their perpetrators. This exclusive jurisdiction is reiterated in Article 207 of the same law. See *Avocats Sans Frontières, Recueil de jurisprudence congolaise en matière des crimes internationaux: édition critique*, ed. *Avocats Sans Frontières*, December 2013, 24.

¹⁵ See *Public Prosecutor and Civil Parties v Bokila and others*, Judgment of 12 April 2006, Garrison Military Tribunal of Mbandaka, RP 084/2005 (unpublished).

¹⁶ Law No.15/022 of 31 December 2015 Modifying and Complementing the Decree of 30 January 1940 Laying down the Penal Code; (Law No.15/023), 31 December 2015 Modifying the Law (No.024-2002), 18 November 2002 Laying down the Military Criminal Code; (Law No.15/024), 31 December 2015 Modifying and Complementing the Decree of 6 August 1959 Laying down the Code of Criminal Procedure.

Implementation Act is likely to be set aside. As a result, Congolese tribunals may continue to apply the Rome Statute directly in accordance with the Constitution.

This chapter consists of three parts. The first part justifies the enactment of the DRC Implementation Act, describes its background and explains why it has persistently remained relevant to the Congolese domestic legal order. The second part deals with the content of the said law highlighting, its drafting methodology and problems of application. It also identifies some critical issues which although important according to case law and the general legal framework obtaining in the country, have been omitted by the legislature and could negatively affect the domestic struggle for accountability. The third part of the chapter comments briefly on the issue of immunity that may attach to official capacity and the exclusion of amnesty, before embarking on a more substantial critique of the definition of crimes and the retention of the death penalty in the DRC Implementation Act.

2 Background to the enactment of the DRC Implementation Act

The adoption of the DRC Implementation Act is linked to the reform of the national law applicable to international crimes, which started in 2002.

2.1 The legislative background

Prior to 31 December 2015, national law was governed by four main legislative acts. In 2002, two special laws were passed shortly after the DRC's ratification of the Rome Statute and its entry into force. They were the laws of 12 November 2002 laying down the Military Criminal Code (MCC) and the Military Judicial Code (MJC).¹⁷ While the MCC elaborates on criminal offences to be tried before military tribunals, the MJC determines the competences of these jurisdictions and the applicable criminal procedure. These two laws have repealed the Military Justice Code of 25 September 1972.

The MCC criminalised 'crimes of genocide, crimes against humanity and war crimes.' It can be perceived as the initial substantive legislation implementing the Rome Statute in the country.¹⁸ However, the MCC contained various drafting deficiencies. These include: confusion between war crimes and crimes against humanity, omission of certain acts that constitute crimes against humanity and war crimes

¹⁷ *Military Criminal Code* (Law No. 024 of 2002); *Military Judicial Code* (Law No. 023 of 2002).

¹⁸ Kahombo B, 'The Congolese legal system and the fight against impunity for the most serious international crimes' in Krieger H (ed), *Inducing compliance with international humanitarian law: Lessons from the African Great Lakes Region*, Cambridge University Press, Cambridge, 2015, 247-260.

under the Rome Statute, and the lack of penalties for war crimes. In particular, Article 169(1)(7) criminalises sexual abuse offences as crimes against humanity, incorporating those listed under Article 7(1)(g) of the Rome Statute. However, the MCC does not define any of these offences, namely rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation and all other forms of sexual abuse of a comparable gravity, for example, sexual mutilation and indecent assault. More importantly, the MCC can be challenged for restricting sexual violence merely to crimes against humanity whilst the Rome Statute also includes sexual violence as war crimes. The International Criminal Tribunal for Rwanda (ICTR) also held that acts of sexual violence could constitute genocide in the same way as any other act as long as they are committed with the ‘specific intent to destroy, in whole or in part, a particular group, targeted as such.’¹⁹ These shortcomings resulted from the fact that the MCC was not well drafted and hastily adopted by an unelected legislative body during an on-going armed conflict.²⁰

After the adoption of the Constitution on 18 February 2006, two new laws were enacted, namely, the laws of 20 July 2006 modifying and complementing the Congolese Penal Code of 1940 and the Code of Criminal Procedure of 1959. Concerning the Penal Code, the legislature clarified its objectives as follows:

Since now, Congolese penal law did not contain all the incriminations that international law has considered as infractions, as a protective barrier since 1946 against those who, powerful or powerless, infringe international law, namely humanitarian law, hence denying the civil population the quality and the values of humanity.²¹

The benefit of this new legislation was its incorporation of definitions of acts of sexual violence and their criminalisation as ordinary offences, which complemented the MCC of 2002. However, some legal defects were left in place and have survived all subsequent reforms of the Congolese legislation. In particular, one must mention in this regard the proposed creation of the specialised criminal chambers within the Congolese courts in 2010 according to the so-called ‘Draft Law on Specialised Chambers for the Repression of Serious Violations of International Humanitarian Law: Organisation, Functioning, Applicable Law, Jurisdiction and Procedure.’²²

¹⁹ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 731; *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999), para. 95.

²⁰ Kahombo, ‘The Congolese legal system and the fight against impunity for the most serious international crimes’, 251.

²¹ Law No. 06/018, Modifying and Complementing the Decree of 30 January 1940 Laying down the Penal Code, Preamble, para 4.

²² See Luzolo Bambi Lessa and Bayona Ba Meyya, *Manuel de procédure pénale*, Presses Universitaires du Congo, 2011, 749-761.

This was, on the Congolese part, a positive effect of the publication of the UN Mapping Report, which recommended the creation of a hybrid judicial mechanism.²³ Nonetheless, the proposal was rejected by the Senate on 22 August 2011 on the grounds that it would jeopardise national sovereignty by admitting foreign personnel to work within the Congolese judicial apparatus and also as a result of controversy over the competencies of the Chambers, notably their jurisdiction *ratione personae* over military and police officials.²⁴ In 2014, the proposal was transformed into a draft bill for the creation of a specialised court of human rights in addition to the draft law modifying the Penal Code and the MCC. Again, it was rejected by the Parliament. This time, the main reason given was that the country did not need a new judicial jurisdiction but rather the reinforcement of the existing judicial apparatus.²⁵

For a long time, these legislative vacillations have left it to domestic courts to find the law most applicable to cases involving the core international crimes. The gap was partly covered by the direct application of the Rome Statute.²⁶ However, military courts used different arguments in this regard. For example, in a case in which several members of the national armed forces were prosecuted for crimes against humanity after a deadly attack on civilians in a village called *Songo Mboyo* in retaliation against the non-payment of their salaries, the Garrison Military Tribunal of Mbandaka (Equatorial Province) observed that the MCC was in conflict with the Rome Statute on the definition of crimes.²⁷ It thus relied on Article 215 of the Constitution, which gives primacy to international treaties duly ratified and published in the official journal over national laws in order to apply the Rome Statute.²⁸

²³ United Nations High Commissioner for Human Rights, 'Democratic Republic of the Congo, 1993–2003', para 86.

²⁴ Wakenge Ngimbin R, 'La problématique de la création des chambres spécialisées en RDC' in NRC Justice & Démocratie and Avocats Sans Frontières, *Les 10 ans de la Cour pénale internationale: Bilan et perspectives – Recueil des actes des journées scientifiques tenues à Kinshasa du 23 au 25 octobre 2012*, 2012, 132–133.

²⁵ Kumbu JM, 'National courts: The Situation in the Democratic Republic of Congo' in Krieger H (ed), *Inducing compliance with international humanitarian law: Lessons from the African Great Lakes Region*, 246.

²⁶ This was also to conform with Article 153(4) of the Constitution which provides: 'The civil and military courts apply the ratified international treaties, laws and regulatory acts so long as they are in conformity with the laws as well as customary law, unless the latter is contrary to public order or morality.'

²⁷ *Public Prosecutor and Civil Parties v Bokila and others* (n 14), 8 (unpublished).

²⁸ *Public Prosecutor and Civil Parties v Bokila and others* (n 14), 8. See also *Public Prosecutor and Civil Parties v Bokila and others*, Judgment of 7 June 2006, Military Court of Equatorial Province, RPA 014/2006 (unpublished).

This approach to the direct application of treaties has been so successful that the debate over the adoption of new national legislation implementing the Rome Statute remained side-lined for several years. Regardless, the DRC had commenced preparation of draft implementation legislation through the Ministry of Justice and the Permanent Law Reform Commission as early as 2002.²⁹ The process culminated in the creation of draft implementation legislation in October 2005³⁰ which was, however, not submitted to Parliament for deliberation and adoption. In 2008, a parliamentary proposal to consider the draft legislation in Parliament was made without success.³¹ It appears that the adoption of the implementation legislation was not yet a political priority.³² This changed when a recommendation to adopt implementation legislation was made after meetings organised by the Ministry of Justice and the Supreme Council of the Magistracy in order to evaluate the functioning of the Congolese judicial apparatus. These meetings are known as the '*Etats généraux*' of the DRC's justice system and were held from 27 April to 2 May 2015.³³ It is under these circumstances that the DRC Implementation Act was adopted by Parliament and promulgated on 31 December 2015.

2.2 *The relevance of the implementation legislation to the Congolese domestic legal order*

The direct application of the Rome Statute by the DRC's military courts was in line with the monist tradition of the Congolese legal order.³⁴ Per the monist approach, courts should not wait for legislation implementing a treaty to which the country is party if the said treaty fulfils the principal constitutional conditions to be

²⁹ Musila, *Between rhetoric and action*, 16.

³⁰ Musila, *Between rhetoric and action*, 16.

³¹ In 2008, two national deputies, namely, Nyabirungu Mwene Songa and Balamage Nkolo, submitted the proposal. In 2012, Balamage Nkolo submitted the proposal to the National Assembly for the second time without success. The proposal was not put on the parliamentary agenda. See Parliamentarians for Global Action, 'PGA salue l'adoption de la loi de mise en œuvre du Statut de Rome de la CPI par le Sénat de la RDC', 2 November 2015 <http://www.pgaction.org/pdf/2015-11-02-PR-DRC-Implementing-Rome%20Statute-Adopted%20Senate-FR.pdf> on 7 August 2016.

³² Musila, *Between rhetoric and action*, 16.

³³ There was also some pressure from human rights organisations. See Human Rights Watch, '*Etats Généraux* of the justice system in the Democratic Republic of Congo: Recommendations on the fight against impunity for grave international crimes', 27 April 2015 <https://www.hrw.org/news/2015/04/27/etats-generaux-justice-system-democratic-republic-congo> on 7 August 2016.

³⁴ See Kazadi Mpiana J, *La position du droit international dans l'ordre juridique congolais et l'application de ses normes*, Publilbook, 2013; 'La Cour pénale internationale et la République démocratique du Congo: 10 après. Etude de l'impact du Statut de Rome dans le droit interne congolais' 25 *Revue québécoise de droit international* 1, 2012, 57-90.

applied as part of the national law, that is to say its ratification and publication in the official journal of the Republic.³⁵ However, the applicable provisions of that treaty must be self-executing, that is to say they should be written so clearly that they can be invoked automatically by litigating parties or applied automatically by a court.³⁶

It follows that, in the DRC's case, the substantive law necessary to discharge the country's primary responsibility to repress core international crimes is available through the direct application of the Rome Statute. However, there are at least three main legal exigencies that have continued to make the adoption of the DRC Implementation Act relevant to the country.

First, the Rome Statute enjoins states parties to adopt certain national implementation measures. States are not obliged to incorporate substantive international criminal law into their national legal orders. They are in principle free not only to domesticate international law rules but also to modify them. However, in certain cases, a treaty may create a duty upon contracting parties to take such measures as may be necessary to implement it at the national level or even indicate which ones they should adopt to this effect. In the framework of the Rome Statute, states parties do not have any general duty to incorporate its rules into national laws. This lack of obligation has led to the statement that, compared with the relevant provisions of other treaties, such as the Geneva Conventions of 12 August 1949 or the Convention against Torture, the Rome Statute is a weaker international legal instrument.³⁷

The Rome Statute does impose, however, an obligation on states to implement legislation in two cases. On the one hand, it stipulates that '[s]tates Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part IX of the Statute concerning international cooperation and judicial assistance].'³⁸ This provision is not the subject matter of the current study. The Rome Statute also obliges each state party to extend 'its criminal laws penalising offences against the integrity of its own

³⁵ Reciprocity is not required for penal and human rights treaties.

³⁶ This monist tradition is the opposite of the dualist tradition in which the domestic application of rules contained in an international treaty is generally subordinated to their transformation (normally through a legislative act) into national law. This is because international law is considered to be a different and distinct legal order in the dualist system. See Denza E, 'The relationship between international and national law' in Evans MD (ed), *International law*, 1ed, Oxford University Press, London, 2003, 415-442.

³⁷ Kemp G, 'The implementation of the Rome Statute in Africa' in Werle G, Fernandez L and Vormbaum M (eds), *Africa and the International Criminal Court – International Criminal Justice Series*, Asser Press/Springer, the Hague, 2014, 62.

³⁸ Article 88, *Rome Statute*.

investigative or judicial process to offences against the administration of justice,³⁹ referred to in Article 70(1), ‘committed on its territory, or by one of its nationals.’⁴⁰ Hence, the adoption of the DRC Implementation Act should resolve at least three different issues, namely, the criminalisation of such offences against the administration of justice, the adoption of related applicable penalties and the establishment of the corresponding criminal jurisdiction for domestic courts (territoriality or active personality).

In 2013, the Legislature abolished the exclusive jurisdiction of military courts over genocide, crimes against humanity and war crimes under Articles 161 and 207 of the MCC.⁴¹ The Law of 11 April 2013 granted parallel jurisdiction to ordinary (civilian) courts of appeal, provided that these crimes were ‘committed by persons falling under their jurisdiction and that of the *Tribunaux de grande instance*.’⁴²

³⁹ Article 70(4)(a), *Rome Statute*.

⁴⁰ Article 70(4)(a), *Rome Statute*.

⁴¹ Article 161 provides: ‘In the case of indivisibility or connection between certain offences and crimes of genocide, war crimes or crimes against humanity, military courts have exclusive jurisdiction.’ Article 207 prescribes that subject to the provisions of Articles 117 and 119, *Military Judicial Code*, military courts are exclusively competent over offences provided for under the Military Criminal Court.’

⁴² Article 91(1), (Law No.13/011-B), 11 April 2013 concerning the Organization, Functioning and Competences of Ordinary Courts of the Judicial Order. This provision does not apply when the alleged perpetrators are statesmen who benefit from ‘privileges of jurisdiction’ under Congolese law, that is persons who are not ordinarily tried by the civilian courts of appeal or the *Tribunaux de Grande Instance*, beginning with the President of the Republic, members of the government, members of the national parliament and members of the armed forces and the national police. It means that the provision is emptied of its substance. However, the alleged offenders who do not fall under the jurisdiction of the courts of appeal can be tried by the respective competent jurisdictions provided for by law. Hence, military tribunals shall try members of the police and armed forces pursuant to Article 56(1) of the Constitution. As for ministers and members of the national parliament, the competent jurisdiction is the Court of Cassation, which sits at the first and last instance in accordance with Article 153(3) of the Constitution. The term ‘offences’ used by the Constitution should be understood here as encompassing not only ordinary offences but also international crimes. The President of the Republic and the Prime Minister shall be tried before the Constitutional Court. In their respect, Article 163 of the Constitution provides that this Court is the competent criminal jurisdiction for both state authorities ‘in the cases and conditions provided for by the Constitution.’ Even if the case of international crimes is not expressly envisaged, it is suggested that it may fall under the offense of high treason. In this regard, Article 165(1) of the Constitution prescribes: ‘Without prejudice to other provisions of the present Constitution, there is high treason when the President of the Republic has intentionally violated the Constitution *or when he or the Prime Minister are convicted as authors, co-authors or accomplices of serious and characterised violations of human rights*, of cession of a part of the national territory’ (author’s emphasis). This means that the Constitutional Court should first establish such ‘serious and characterised violations of human rights’ before condemning the perpetrator for high treason. One may also uphold that the crime of genocide, crimes against humanity and war crimes are no longer military offences given that the DRC Implementation Act had incorporated them into the (ordinary) Penal Code. They are not political offences either. As such, they may fall under the category of ‘other offences of (ordinary) law’ (the so-called *droit commun*) committed by the President of the Republic or the Prime Minister in the exercise or in the course of the exercise of their functions and for which the Constitutional Court is also

However, the parallel substantive national legislation to be applied by the courts of appeal remained missing. In fact, as a matter of principle, the courts of appeal, which have ordinary criminal jurisdiction, cannot apply the MCC to civilians. The latter are a special law designed for application by military tribunals only. The DRC Implementation Act had to fill this vacuum. As explained in the Act's Preamble, this is why the Legislature thought it necessary to incorporate genocide, crimes against humanity and war crimes into the (ordinary) Penal Code of 30 January 1940.⁴³

Third, there was a necessity to put an end to the controversy surrounding the kind of penalties that could be imposed by domestic courts in respect of core international crimes. As mentioned above, the Congolese military courts have opted for the direct application of the Rome Statute, including the penalties listed under Article 77, which does not include capital punishment. In the *Songo Mboyo* case, for instance, the Garrison Military Tribunal of Mbandaka also justified this option by the fact that the Rome Statute was indeed a treaty favourable to the accused. The tribunal reasoned that the Statute, unlike the MCC (in respect of genocide and crimes against humanity) did not prescribe the death penalty.⁴⁴ The same reasoning was followed in the so-called *Mutineers of Mbandaka* case, in which several members of the national army were prosecuted for crimes against humanity after a deadly attack (including acts of rape) on civilians in the town of Mbandaka (north-west of the DRC) in revenge for the killing of their comrade.⁴⁵ However, this argument was irrelevant. The principle of the least penalty operates only when a tribunal has at its disposal legal texts that are equivalent in force and value.⁴⁶ In the present cases, the instruments at stake were of different legal force, namely a national law and a treaty.

competent (Article 164 of the Constitution). Thus, everything may depend on how the Constitutional Court interprets the Constitution. But, it remains that high treason is punishable by life imprisonment – a lesser sentence than the death penalty which is the sentence provided for by the DRC Implementation Act against perpetrators of genocide, crimes against humanity and war crimes pursuant to Article 75 of the Organic Law No.13/026 of 15 October 2013 Laying down the Organisation and Functioning of the Constitutional Court. In any event, prosecutions against the President of the Republic or the Prime Minister are very difficult to initiate due to multifarious procedural obstacles. See Kamukuny Mukinay A and Kalala Mupingani F, 'La Constitution congolaise du 18 février 2006 et la responsabilité pénale du chef de l'État: Un édifice constitutionnel fictif?' 2 and 3 *African Journal of Democracy and Governance*, 2014, 73-75.

⁴³ (Law No.15/022), 31 December 2015 (n 15), para 4.

⁴⁴ *Public Prosecutor and Civil Parties v Bokila and others* (n 14), 8.

⁴⁵ *Public Prosecutor and Civil Parties v Etike Likunda and others*, Judgment of 20 June 2006, Garrison Military Tribunal of Mbandaka, RP 086/005 and RP 101/006, 16 (unpublished).

⁴⁶ Nyabirungu mwene Songo R, 'De l'interprétation en droit congolais' in Parquet Général de la République Démocratique du Congo, *Interprétation, cassation et annulation en droit congolais*, 2013, 47.

The solution to the conflict between the two sources of law is found in the Congolese Constitution itself.⁴⁷ For one thing, there is the principle of hierarchy between applicable sources of Congolese law. In this regard, the Constitution provides that ‘the civil and military courts apply duly ratified international treaties, laws, regulatory acts so long as they are in conformity with the laws as well as customary law, unless the latter is contrary to public order or morality.’⁴⁸ On the other hand, as already indicated, it is explicit under Article 215 of the Constitution that such treaties prevail over national laws upon publication in the official journal of the Republic.

Another argument was developed by the Garrison Military Tribunal of Ituri (north-east of the DRC) in the so-called *Bongi* case, in which a military officer of the national armed forces was prosecuted for war crimes after the unit under his command pillaged private property in the villages of Tchekele et Olongba (Ituri region) and killed five civilians. The Tribunal held that the lack of penalties for war crimes under the MCC was ‘a drafting error.’⁴⁹ However, ‘the Congolese legislature did not at all have the intention of letting this heinous crime go unpunished especially as it recognised the gravity of this crime by ratifying the Rome Statute.’⁵⁰ According to the Tribunal, it was therefore legitimate to directly apply not only the tangible elements of war crimes but also the sentences under the Rome Statute.⁵¹

It is worth noting that the language of Article 77 of the Rome Statute, prescribing that the Court ‘may impose one of the following penalties on a person convicted of a crime [...]’, may imply that these penalties are solely destined to be applied by itself rather than by domestic tribunals of states parties. This is probably why Article 80 of the Rome Statute additionally provides that ‘nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.’ But, according to Nyabirungu mwene Songa, Article 80 is a special provision.⁵² It does not preclude the direct application by Congolese domestic courts of penalties prescribed under

⁴⁷ See Mapuya Kanunk’a-Tshiabo A, *Traité de droit international public*, Médiaspaul, 2016, 483-489.

⁴⁸ Article 53(4), *Constitution of the Democratic Republic of Congo* (2006).

⁴⁹ *Public Prosecutor and Civil Parties v Bongi Massaba*, Judgment of 24 March 2006, Garrison Military Tribunal of Ituri, RP 018/2006, 10.

⁵⁰ *Public Prosecutor and Civil Parties v Bongi Massaba*, 10-11.

⁵¹ *Public Prosecutor and Civil Parties v Bongi Massaba*, 11.

⁵² Nyabirungu mwene Songa R, ‘L’impact du rejet par l’Assemblée nationale de la proposition de loi portant abolition de la peine de mort sur la mise en œuvre du Statut de Rome’ in Ndeshyo O (ed), *Mélanges Célestin Nguya-Ndila. La République démocratique du Congo: Les défis récurrents de décolonisation et de développement économique et social*, Centre de Documentation de l’Enseignement Supérieur, Universitaire et de la Recherche de Kinshasa, 2012, 774-775.

Article 77.⁵³ Although this position may be disputed, the abolition of the death penalty in respect of international crimes has not been codified by the legislature via the DRC Implementation Act. Before commenting on this issue, it is necessary to provide an overview of the content of the DRC Implementation Act.

3 The content of the implementation legislation

The content of the DRC Implementation Act modifying and complementing the Penal Code of 30 January 1940 is discussed in two parts. First, the study of its drafting methodology can help summarise the rules set down under its various subtitles. Second, it is important to comment on its applicability and to highlight deficiencies and gaps in the legislation, which could negatively affect the struggle against impunity.

3.1 *The drafting methodology and summary of the new legislation*

The DRC Implementation Act is made up of five Articles in addition to a Preamble. The language used signifies that it inserts new Articles into the Penal Code of 1940 and modifies others. The general impression is that the legislature seems to have had the intention not just to harmonise national law with the Rome Statute, but also to fill certain gaps within the Penal Code. In this regard, there are provisions that are relevant only to core international crimes (for example Articles 2*bis* and 21*bis*) and others to ordinary offences as well (for example Articles 1*bis* and 21*quater*). This mixture of provisions in the new legislation, which is said to be exclusively devoted to the implementation of the Rome Statute, has been a source of some confusion. Generally, as far as core international crimes are concerned, the drafting methodology has mostly consisted of re-writing the rules of the Rome Statute instead of simply referring to its relevant Articles. Some other francophone countries have done the same (Burundi⁵⁴ and the Central African Republic).⁵⁵ In anglophone states, some have just variously or partly referred to the Rome Statute (Uganda),⁵⁶ while others have attached the treaty to their implementation acts

⁵³ Nyabirungu, 'L'impact du rejet par l'Assemblée nationale', 774-775.

⁵⁴ See (Law No.1/05) Revising the Penal Code (22 April 2009). This Act was preceded by the Law No.1/004 of 8 May 2003 Laying down the Repression of the Crime of Genocide, Crime against Humanity and War Crime.

⁵⁵ Law No.10.001 Laying down the Central African Penal Code (6 January 2010). Title IV of this Code is entirely devoted to genocide, crimes against humanity and war crimes (Articles 152-161).

⁵⁶ *International Criminal Court Act* (2010).

(South Africa).⁵⁷ The Congolese approach presents three risks: First, it may lead to terminological differentiation, ambiguity and omission. Second, it risks the creation of legislation that diverges from expected legal standards. Third, it may lead to national laws that contradict positive international law.

Article 1 of the DRC Implementation Act inserts Articles *1bis* and *34bis* into the Penal Code. Article *1bis* relates to the method of interpretation of criminal law. It states that the penal law should be strictly interpreted. In case of ambiguity, interpretation should favour the accused (the *in dubio pro reo* principle). Article *34bis* domesticates the non-applicability of statute of limitations to genocide, crimes against humanity and war crimes. It also precludes the benefit of amnesty and pardon for perpetrators of such crimes.

Article 2 of the new law modifies Section VI of Book I of the Congolese Penal Code regarding the regime of criminal responsibility. It contains four paragraphs.

Paragraph one is a set of three new Articles and deals with the exclusive criminal responsibility of natural persons. Like the Rome Statute, Article *20bis* does not make any reference to the criminal responsibility of legal entities. Article *20ter* provides that only persons of at least eighteen years old may be held criminally responsible, whereas Article *20quater* confirms the rule of irrelevance of functional immunity. It implements the corresponding Article 27(1) of the Rome Statute, which provides:

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.

Paragraph two consists of three new Articles relating to ‘participation of several persons in the same offence.’ Article *21bis* domesticates in similar terms Article 25(3) of the Rome Statute concerning ‘individual criminal responsibility.’ However, it must be noted that the issue is not entirely about ‘participation of several persons in the same offense’ as indicated under the second paragraph of the subtitle of the Congolese Law. Rather, the subtitle under Article 25 of the Rome Statute correctly indicates that it is about individual criminal responsibility. Beyond those modes of criminal participation (co-perpetration or co-action and complicity), the latter may also result from direct participation in crime.

⁵⁷ *Implementation of the Rome Statute Act* (2002).

Moreover, the Congolese Law clearly states that Article 21*bis* only applies to core international crimes. This means that modes of co-perpetration for ordinary offences still fall under Article 21 of the Penal Code.⁵⁸ Article 21*ter* codifies modes of complicity in the commission of offences.⁵⁹ However, it is very problematic. Its content, to begin with, is similar to that of Article 22 of the Penal Code, the fate of which is unclear since Article 21*ter* applies to core international crimes and ordinary offences at the same time. The applicability of Article 22, which has not been repealed, thus becomes ambiguous.

Next, as concerns core international crimes, several modes of complicity under Article 21*ter* are already codified as under individual criminal responsibility. This is the case for ordering or assisting in the commission of an offence. This confusion is a source of ambiguity in law and renders Article 21*ter* (1), (2) and

⁵⁸ This Article provides: 'Shall be deemed perpetrators of an offense: 1. those who commit it or have directly cooperated for its perpetration; 2. those who, by any fact, have contributed to the perpetration such as, without their assistance, the offence could not have been committed; 3. those who, by offers, presents, promises, threats, abuse of authority or power, plot or illicit tricks, have directly provoked this offence; 4. those who, either through speeches held during meetings or in public places, either through placards, either through documents, printed or not and sold or distributed, either through drawings or emblems, have directly caused to commit it, without prejudice to penalties which could be provided for under laws or decrees against authors of incitements to commit offences, even in the event that these incitements have not yielded results.' The original version of this Article reads as follows: '*Sont considérés comme auteurs d'une infraction: 1. ceux qui l'auront exécutée ou qui auront coopéré directement à son exécution; 2. ceux qui, par un fait quelconque, auront prêté pour l'exécution une aide telle que, sans leur assistance, l'infraction n'eût pu être commise; 3. ceux qui, par offres, dons, promesses, menaces, abus d'autorité ou de pouvoir, machinations ou artifices coupables, auront directement provoqué cette infraction; 4. ceux qui, soit par des discours tenus dans des réunions ou dans des lieux publics, soit par des placards affichés, soit par des écrits, imprimés ou non et vendus ou distribués, soit par des dessins ou des emblèmes, auront provoqué directement à la commettre, sans préjudice des peines qui pourraient être portées par décrets ou arrêtés contre les auteurs de provocations à des infractions, même dans le cas où ces provocations ne seraient pas suivies d'effets.*' (author's translation)

⁵⁹ This Article provides: 'Shall be deemed accomplices: 1. those who will have given orders to commit the offense; 2. those who will have provided weapons, tools or any other mean which has served to the commission of the offense knowing that they should be used to that effect; 3. those who, outside the case provided for under paragraph 3 of article 22, will have with knowledge helped or assisted the perpetrator or the perpetrators of the offense in the facts which have prepared or facilitated it or in those constituting its commission; 4. those who, knowing the criminal conduct of offenders who commit brigandage or violence against the safety of the state, public peace, persons or properties, will have habitually provided them accommodation, place of refuge or meeting'. The original version of this Article reads as follows: '*Seront considérés comme complices: 1. ceux qui auront donné des instructions pour commettre l'infraction; 2. ceux qui auront procuré des armes, des instruments ou tout autre moyen qui a servi à l'infraction sachant qu'ils devaient y servir; 3. ceux qui, hors le cas prévu par l'alinéa 3 de l'article 22, auront avec connaissance aidé ou assisté l'auteur ou les auteurs de l'infraction dans les faits qui l'ont préparée ou facilitée ou dans ceux qui l'ont consommée; 4. ceux qui, connaissant la conduite criminelle des malfaiteurs exerçant des brigandages ou des violences contre la sûreté de l'Etat, la paix publique, les personnes ou les propriétés, leur auront fourni habituellement logement, lieu de retraite ou de réunion.*' (author's translation)

(3) meaningless. Finally, Article 21*ter* (4) indicates that one may be complicit in respect of core international crimes, as for ordinary offences, by habitually providing the perpetrator, in knowledge of his criminal conduct against the security of the state, public peace, persons or properties, with accommodation or places of refuge or meeting. This provision is not contained as such in the Rome Statute. However, its usefulness is questionable if one keeps in mind the forms of complicity under Article 25(3)(c) of the Rome Statute,⁶⁰ which are already domesticated under Article 21*bis*.

The objective distinction of modes of perpetration of offences, co-perpetration and complicity under national law loses its practical pertinence since Article 21*quater* provides that, regarding core international crimes, authors, co-authors and accomplices are equally punishable. Punishable, that is to say, by the death penalty. In such conditions, it may be assumed that Article 21*ter* did not deserve a place under the DRC Implementation Act.

Paragraph 3 deals with superiors' criminal responsibility. Article 22*bis* domesticates in similar terms Article 28(b) of the Rome Statute.⁶¹ Instead, the criminal responsibility of commanders has been implemented under Article 1 of a separate law of 31 December 2015 modifying the MCC.⁶² It is a restatement of Article 28(a) of the Rome Statute.⁶³ The legislature has not provided any ground for this separation of laws. However, one may imagine that it has been dictated by the consideration

⁶⁰ This Article provides: '[...] In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'

⁶¹ This Article stipulates: 'With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.'

⁶² (Law No.15/023), 31 December 2015 (n 15).

⁶³ This Article provides: 'A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.'

that this mode of responsibility does not apply to civilians but to military superiors who are normally subject to the Congolese military courts, which apply the MCC. Otherwise, it would have been meaningless to insert such a special provision into the Penal Code whereas no ordinary court is competent to apply it. This statement does not signify that military courts cannot apply the Penal Code. The latter constitutes the so-called *droit commun*. It means that it is applicable by all competent jurisdictions, not only ordinary tribunals but also any specialised criminal jurisdiction. The possibility has been explicitly provided for in respect of military courts.⁶⁴

Paragraph 4 concerns grounds for excluding criminal responsibility and contains four new articles. Article 23*bis* restates all the grounds under Article 31 of the Rome Statute,⁶⁵ except subsection (c) on self-defence. There is no legislative explanation for this omission. Furthermore, if Article 23*bis* includes in the list of those grounds the fact that criminal conduct has been caused by duress resulting from a threat, it omits the causation of the said threat. Such causation may be, according to the Rome Statute, ‘made by other persons’ or ‘constituted by other circumstances’ beyond the accused person’s control. Article 23*ter* alludes to mistake of fact or mistake of law.

The content is radically different from that of Article 32 of the Rome Statute. The DRC Implementation Act provides that mistake of fact or mistake of law can exclude criminal responsibility only if – from an evaluation of the conduct of a diligent person in respect of interests at stake and material facts – it comes to the conclusion that the mistake was *invincible*, that is to say inevitable.⁶⁶ This gives a large margin of appreciation to the competent court and may result in arbitrariness unless objective criteria for determining the ‘invincible’ character of a mistake are not clearly determined by case law. It seems to be a step backwards when compared to the rule in Article 32 of the Rome Statute that such a mistake is only founded if it negates the mental element of the crime in question.

Finally, concerning the specificity of mistake of law, the Congolese law omits the possibility that it may result from ‘superior orders and prescription of law’ as envisaged under Article 33(1) of the Rome Statute. The legislature has only restated, under Article 23*quater*, the principle according to which such orders and pre-

⁶⁴ Article 1(1), (Law No.15/023), 31 December 2015 (n 15).

⁶⁵ These grounds are mental disease or defect that destroys the person’s capacity to appreciate the lawfulness of his conduct or to control it, the state of intoxication that destroys the person’s capacity, self-defence and duress.

⁶⁶ See Nyabirungu Mwene Songa R, *Traité de droit pénal congolais*, 2ed, Editions Universitaires Africaines, 2007, 293-298.

scription are not grounds for excluding criminal responsibility. At the same time, it prescribes under Article 23*quinqüies* that an order to commit genocide, crimes against humanity and war crimes is manifestly unlawful.

The problem is that these provisions are too generalising. In fact, it is quite possible to imagine that a subordinate executes an order from a superior, which then results in the commission of a crime without that order having been given to achieve that purpose. This can regularly happen in the course of military operations. For example, an attack unit can target a civilian objective (such as a church) due to their commander's false identification of the church as the military headquarters of their adversary. In such circumstances, the Rome Statute excludes criminal responsibility under three conditions: First, the accused person was under the obligation to obey the orders given; second, he did not know that the order was unlawful (for example, if he does not know himself that the said target is a church and so a non-military objective); and third, the order was not manifestly unlawful. Unlike the DRC Implementation Act, the Rome Statute thus rightly specifies that an order to commit a war crime must be manifestly unlawful. The Congolese legislature has erroneously omitted to take into account potential special circumstances such as those relating to the conduct of military operations, which may lead to the exclusion of criminal responsibility.

Article 3 of the same law modifies Articles 128, 129 and 131 of the Penal Code and incriminates offences against the administration of justice, namely: giving false testimony (Article 128); intimidation of or exerting influence on witnesses, falsification of, or interference with the collection of evidential material (Article 129); falsification of words and documents by an interpreter; and false declarations or falsification of reports by expert witnesses (Article 131). It is remarkable that the Legislature has not domesticated several other offences envisaged under Article 70(1) of the Rome Statute, such as, bribery and corruption of officials of the ICC (including judges) and retaliation against an official of the ICC. In Uganda, the ICC Act of 2010 includes other offences such as conspiracy to defeat justice in the ICC and interference with ICC officials.⁶⁷ In this regard, the DRC Implementation Act is clearly deficient. A technical stopgap for this problem may be found through the use of alternative criminal laws. For example, bribery or corruption of ICC officials may be prosecuted via the DRC Anti-Corruption Act of 2005.⁶⁸

⁶⁷ Sections 10-16, *International Criminal Court Act*, 2010 (Uganda).

⁶⁸ (Law No.05/006), 29 March 2005 Modifying and Complementing the Decree of 30 January 1940 Laying down the Penal Code.

Furthermore, Article 4 of the DRC Implementation Act introduces in Book II of the Penal Code Article 128*bis* and Title IX concerning ‘Crimes against the Peace and Security of Mankind,’ which contains three main Articles. Article 221 restates the definition of genocide as per the Rome Statute. Article 222 domesticates crimes against humanity while Article 223 defines war crimes. Linked to this, Article 128*bis* incriminates the wilful failure to give testimony in favour of a person prosecuted for genocide, crimes against humanity or war crimes, or convicted of such crimes, when he is aware of evidence according to which that person is innocent. The penalty for this offence is quite significant (up to six months of imprisonment).

The last Article (5) provides that the present Law enters into force thirty days after publication in the official gazette of the Republic. This publication has been made on 29 February 2016.⁶⁹ The Law has thus been in force since 30 March 2016. Pursuant to the principle of non-retroactivity of penal laws, the DRC Implementation Act cannot cover criminal conduct that occurred prior to this date. Therefore, Congolese courts will continue to directly apply the Rome Statute as the dominant source of law with respect to crimes committed before 30 March 2016.

3.2 The persistence of legal flaws undermining the applicability of the new legislation

The previous sections have shed light on some of the legal flaws of the DRC Implementation Act. These flaws can be categorised in two groups, namely, those flaws that are likely to ensure that Congolese courts will continue to apply the Rome Statute and those that are likely to have a broader negative impact on the national struggle against impunity.

With regard to the first category, the Rome Statute applies in respect of gaps in the implementation legislation. This is the case for the omission of self-defence as a ground for excluding criminal responsibility. It is also the case for the omission on the requirement of mental element in order to hold a person liable for punishment of any of the core international crimes at stake. Article 30(1) of the Rome Statute requires that ‘the material elements are committed with intent and knowledge.’ The phrase is clarified as follows:

For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means

⁶⁹ *Journal officiel de la République démocratique du Congo (JORDC)*, Première Partie, Numéro spécial, 57^e année, 2016, 1-17.

to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.⁷⁰

Furthermore, the constitutional principle on conflict of sources of law, according to which a treaty duly ratified by the DRC prevails over national laws under certain conditions, will continue to be invoked to solve those legal issues in respect of which the DRC Implementation Act contradicts the Rome Statute. This applies to the modes of criminal responsibility concerning acts of co-perpetration under the Rome Statute and those of complicity under the Congolese legislation, as well as to the question of mistake of fact or law as grounds for excluding criminal responsibility.

Among the flaws likely to have a broader negative effect on the fight against impunity, one is the omission of several offences against the administration of justice listed under Article 70(1) of the Rome Statute. The problem is that these offences are not self-executing. It means that they cannot be enforced automatically within the domestic orders of states parties without their incorporation into national penal laws. Accordingly, where alternative criminal offences under domestic law cannot be found, these offences will not be punishable until they are criminalised by the legislature. Second, one must deplore the legislative failure to advance the law on corporate criminal liability. The failure to include corporate criminal responsibility in the Rome Statute could not have served blindly as an example in this regard.⁷¹

There are three main reasons favouring the acknowledgement of criminal liability of corporations for core international crimes under Congolese legislation. First, the DRC plays host to numerous gross violations of human rights in situations where corporations are suspected of being engaged in illegal business activities (for example control and plundering of natural resources and trade and trafficking of weapons) with states or non-states actors. Penal law could have contributed as a measure of last resort to finding a solution to a crucial problem that even the United Nations has failed to resolve for more than a decade.

Moreover, it has been demonstrated that many African countries in conflicts are at extreme and high risks for corporate complicity in the perpetration of in-

⁷⁰ Article 30(2), *Rome Statute of the ICC*.

⁷¹ Article 25(1), *Rome Statute of the ICC*.

ternational crimes.⁷² Consequently, it is unwise to criminalise only the behaviour of individuals, whereas companies may pursue profits with impunity. The Legislature has failed to take into account the United Nations' Guiding Principles on Business and Human Rights, which invites states to ensure that corporations respect human rights within their territory.⁷³ States are also invited to ensure that those victims affected by business-related human rights abuses have access to an effective national judicial remedy, notably by eliminating all 'legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed.'⁷⁴

Second, criminal liability of legal persons is no longer a myth under Congolese law.⁷⁵ It is already provided for under certain special criminal acts. For example, the Law of 9 July 2011 Implementing the Mine Ban Treaty, concluded in Ottawa (Canada) on 3 December 1997, recognises corporate criminal liability for certain offences, for which those legal persons are punishable by fines, prohibition of social activities and different forms of property confiscation.⁷⁶ It is reasonably foreseeable that such improvement of the legislation might result in practical cases before the courts.⁷⁷

⁷² Chella J, 'The complicity of multinational corporations in international crimes: An examination of principles' Unpublished PhD Thesis, Bond University, 2012, 10-11.

⁷³ Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', 2011, 13 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf on 23 November 2016.

⁷⁴ Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights', 28-29.

⁷⁵ Nyabirungu, *Traité de droit pénal*, 252-254.

⁷⁶ Articles 26-28, (Law No. 11/007), 9 July 2011 implementing the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997) in the Democratic Republic of Congo,

⁷⁷ For example, in 2004, the Australian company, *Anvil Mining Company*, was suspected of having participated, through providing logistical assistance to a unit of the Congolese armed forces, in the commission of war crimes in the village of Kilwa (south-east of the DRC). A hundred of civilians were reportedly executed by the army during the military operations aiming to re-capture the village of Kilwa, which had been occupied by a militia group from 13 to 15 October 2004. However, in the so-called *Kilwa* case, the Military Court of Katanga did not examine the criminal liability of *Anvil Mining Company* due to the lack of appropriate law. It restricted itself to (civil) responsibility for acts committed by its agents. It must be noted that the Military Court of Katanga failed to establish this kind of responsibility because the three agents of *Anvil Mining Company*, who were prosecuted for their own acts of complicity of war crimes in the *Kilwa* case, were finally acquitted due to a lack of evidence. See *Public Prosecutor and Civil Parties v Adémar Ilunga and others*, Judgment of 28 June 2007, Military Court of Katanga, RP 010/2006 (unpublished).

Third, the international legal environment is now conducive to the recognition of corporate criminal liability. The Protocol on the African Court of Justice and Human Rights, adopted in Malabo (Equatorial Guinea) in July 2014, provides, for instance, that ‘the Court shall have jurisdiction over legal persons, with the exception of States.’⁷⁸ For its part, the Appeal Panel of the Special Tribunal for Lebanon has delivered, in January 2015, the first international judicial decisions supporting criminal jurisdiction over corporations, specifically for the offence of contempt of court, even though without an explicit provision granting such jurisdiction.⁷⁹

These developments are in line with the work undertaken by the Human Rights Council, which has adopted Resolution 26/9 of 26 June 2014 deciding to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, ‘whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.’⁸⁰ This trend might help end the debate which was also engaged in during the negotiation of the Rome Statute in Rome. States did not totally reject corporate criminal liability. Rather there was not sufficient time to focus on the issue and reach a consensus. In this respect, William A Schabas writes:

Proposals that the Court also exercise jurisdiction over corporate bodies in addition to individuals were seriously considered at the Rome Conference. While all national legal systems provide for individual criminal responsibility, their approaches to corporate criminal liability vary considerably. With a Court predicated on the principle of complementarity, it would have been unfair to establish a form of jurisdiction that would in effect be inapplicable to those States that do not punish corporate bodies under criminal law. During negotiations, attempts at encompassing some form of corporate liability made

⁷⁸ Article 46C, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Para 1: ‘For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.’

⁷⁹ *New TV SAL and AI Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015, Para 91; *Akhtar Beirut SAL and Ibrahim Mohamed Al-Amin*, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings (STL-14-06/PT/AP/AR126.1), Appeals Panel, 23 January 2015, Para 71. See Bernaz N, ‘Corporate criminal liability under international law: The *New TV SAL* and *Akhtar Beirut SAL* cases at the Special Tribunal for Lebanon’ 13 *Journal of International Criminal Justice*, 2015, 315-316.

⁸⁰ Human Rights Council Resolution 26/9, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights’ (A/HRC/RES/26/9), 14 July 2014, para 1.

considerable progress. But time was simply too short for the delegates to reach a consensus and ultimately the concept had to be abandoned.⁸¹

Finally, the DRC Implementation Act has missed the opportunity to clarify the exercise of universal jurisdiction under Article 3 of the Penal Code. This kind of jurisdictional power means that a perpetrator of an extraterritorial crime may be prosecuted irrespective of his nationality and that of the victim, or any other connection with the prosecuting State, except maybe his presence within its territory.⁸² In this vein, the Penal Code prescribes that extraterritorial offences which are punishable by more than two months in prison under Congolese law can be prosecuted and tried in the DRC if the offender is present in its territory, and provided that the proceedings are initiated on the request of the public prosecution.⁸³ However, the problem is that the Penal Code imposes, in respect of an offence committed against an individual that is punishable by at least five years of imprisonment, two additional conditions to trigger that request of the public prosecution. In fact, the crime in question must be subject to a complaint of the victim or the official denunciation of the competent authority of the foreign state in the territory of which it has been committed.⁸⁴

The Penal Code and the jurisprudence do not define the expression ‘offence against an individual.’ However, it appears that the expression refers to the opposite of offences against the state or its direct interests, that is to say offences provided for in Book II under Title III (offences against public honesty),⁸⁵ Title IV (offences against public order),⁸⁶ Title V (offences against public security)⁸⁷ and Title VIII (offences against the security of the state).⁸⁸ Instead, offences against individuals

⁸¹ Schabas WA, *An introduction to the International Criminal Court*, Cambridge University Press, New York, 2004, 101.

⁸² Henzelin M, *Le principe de l'universalité en droit pénal international: Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Bruylant, 2000, 29.

⁸³ Articles 3(2) and (5), *Penal Code of the Democratic Republic of Congo* (1940).

⁸⁴ Article 3(3), *Penal Code of the Democratic Republic of Congo*.

⁸⁵ These offences include counterfeiting (all types), usurpation of public functions, illegal wearing of decorations and perjury. It is submitted, however, that forgery and false testimony can be regarded either as offences against the state (or its interests) or against an individual, depending on material facts of each case.

⁸⁶ These offences include rebellion, outrages or violence against public authorities, corruption and embezzlement of public funds.

⁸⁷ These offences include conspiracy in order to launch attacks against persons or properties and evasion of prisoners. It is submitted, however, that threats of attack against persons or properties (Articles 159-160) can be regarded either as offences against the state or against individuals (insofar as these threats have been directed against an individual victim who is well identified).

⁸⁸ These include offences against the interior and foreign security of the state (Articles 181-220).

include those provided for in Book II under Title I (offences against persons),⁸⁹ Title II (offences against properties),⁹⁰ Title VI (offences against the security of the family)⁹¹ and Title VII (attempts to rights recognised to individuals).⁹²

It is submitted that genocide, crimes against humanity and war crimes constitute offences against individuals *par excellence*. Pursuant to international law, they are regarded as ‘crimes against the peace and security of mankind’ – of which these individuals form a part – under the new Title IX incorporated into the Penal Code by the DRC Implementation Act.

Furthermore, the same conditions for the exercise of universal jurisdiction apply to any national public prosecution or court having jurisdiction to proceed, including military tribunals relying on Article 100 of the MJC.⁹³ This is because, as already indicated, the Penal Code is at this point the so-called applicable *droit commun*. By extrapolation, these conditions may lead to the conclusion that the DRC could tolerate and leave unpunished foreign perpetrators of core international crimes committed against non-nationals outside its territory. This done merely on the ground that no victim has lodged a complaint with the public prosecution or the competent authority of the said foreign state has not officially denounced them.

In addition, even if the said conditions are met, the Penal Code only prescribes a discretionary but not mandatory principle of universality. This perception of universal jurisdiction could hardly be consistent with the DRC’s international obligations such as the duty to repress acts of torture under the Convention against Torture⁹⁴ or to punish grave breaches of the Geneva Conventions and additional Protocols.⁹⁵ Moreover, under the Rome Statute, such a legal deficiency might be

⁸⁹ These include homicide and assault.

⁹⁰ These include theft and extortion.

⁹¹ These include abortion and rape.

⁹² These includes offences against the freedom of religion and offences committed by public servants against the rights of individuals.

⁹³ This Article provides that: ‘Military jurisdictions are competent over anyone who appears to be an author, co-author or accomplice of (criminal) conducts under their jurisdiction committed abroad’ (the information in brackets added by the author). To be clear, it must be recalled that the legislature has expressly provided that Book I (so including Article 3 of the Penal Code) is applicable to military tribunals, pursuant to Article 1(1), (Law No.15/023), 31 December 2015 (n 15).

⁹⁴ Article 5, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984.

⁹⁵ Article 49(2), *Geneva Convention I*, 12 August 1949; Article 50(2), *Geneva Convention II*, 12 August 1949; Article 129(2), *Geneva Convention III*, 12 August 1949; Article 146(2), *Geneva Convention IV*, 12 August 1949; Articles 86 and 88, *Protocol I additional to the Geneva Conventions* of 12 August 1949, 8 June 1977. For example, the Geneva Conventions commonly state: ‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered

interpreted as a state's inability to investigate and prosecute the crimes in question. This is because the lack of adequate rules implies the unavailability of the national judicial system, which renders the state unable genuinely to investigate or prosecute,⁹⁶ thereby possibly rendering the case admissible to the ICC.⁹⁷ The problem could have been solved by the legislature through a provision that the territorial presence of the offender and the request of the public prosecution remained the primary conditions for the exercise of universal jurisdiction by Congolese courts, provided that a country having a proximate connection with the crime (territoriality) or the offender (nationality) is not willing to prosecute (principle of subsidiarity).

On the whole, these flaws reduce the practicality of the new legislation and inhibit the fight against impunity.

4 The legislative treatment of a number of special issues

The DRC Implementation Act also regulates immunities under Congolese domestic law and the exclusion of amnesty and pardon for core international crimes. These two issues deserve separate comprehensive analyses. As regards the issue of immunity, it is significant that the Act domesticates the rule excluding functional immunity but not the rule on the irrelevance of personal immunity attached to official capacity as envisaged under Article 27(2) of the Rome Statute.⁹⁸ In addition, the Congolese law continues to allocate multiple procedural privileges to certain high-ranking authorities, including under the Constitution of 18 February 2006.⁹⁹ Accordingly, the Rome Statute is in conflict with the Congolese Constitution.

to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.'

⁹⁶ Stigen J, *The relationship between the International Criminal Court and national jurisdictions: The principle of complementarity*, Martinus Nijhoff, The Hague, 2008, 313-314 and 316-319.

⁹⁷ Article 17(3), *Rome Statute*. This provision says: 'In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'

⁹⁸ This Article is read as follows: '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.'

⁹⁹ See Kilala Pene-Amuna G, *Immunités et privilèges en droit positif congolais*, Amuna, 2010; Kahombo B, 'Le statut judiciaire exorbitant des élus provinciaux et locaux en droit congolais' in Kumbu JM (ed), *La décentralisation territoriale en République démocratique du Congo sous le régime de la Constitution du 18 février 2006: Bilan et perspectives*, édition de la Campagne pour les droits de l'homme au Congo, 2014, 83-105.

The scope of the prohibition of amnesty and pardon should also be clarified. In particular, it is remarkable that, despite the increasing exclusion of amnesty for core international crimes by international human rights monitoring mechanisms, the Rome Statute does not prohibit nor permit it. It seems that the lawfulness of amnesties should be decided on a case-by-case basis in a manner that avoids impunity.¹⁰⁰ In principle, only blanket amnesties should be declared unlawful. The DRC Implementation Act is, however, more stringent. In essence, the exclusion of pardon as a bar to prosecution may lead to an interpretation of the Act that precludes amnesty after prosecutions and trial. Yet, the European Court of Human Rights seemingly admitted the legality of amnesty in the *Ould Dah* case.¹⁰¹ At the national level, an interesting case occurred in South Africa in respect of crimes committed during the apartheid regime. In the *AZAPO* case, the South African Constitutional Court confirmed the validity of amnesties granted pursuant to the Promotion of National Unity and Reconciliation Act (1995).¹⁰² Therefore, it would seem that the DRC Implementation Act places itself far beyond the parameters of international and comparative law. This could be counter-productive to certain imperatives of social reconciliation in post-conflict circumstances.

The rest of this section is devoted to more detailed discussion of two issues arising from the new Act: First, the Act's definitions for genocide and war crimes and second, the retention of the death penalty in respect of international crimes.

¹⁰⁰ Sunga LS, 'Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions' in Doria J, Gasser HP and Bassiouni MC (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff, The Hague, 2009, 1101.

¹⁰¹ *Ould Dah v France (decision)*, No. 13113/03, Decision of 17 March 2009, ECtHR 2009-I, 463-464. The Court stated: 'It has to be said that in the present case the Mauritanian amnesty law was enacted not after the applicant had been tried and convicted, but specifically with a view to preventing him from being prosecuted. Admittedly, the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country's determination to promote reconciliation in society cannot, generally speaking, be ruled out. In any event, no reconciliation process of this type has been put in place in Mauritania. However, as the Court has already observed, the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State, as can be seen for example from Article 17 of the Statute of the International Criminal Court, which does not list this situation among the grounds for dismissing a case as inadmissible.' (author's emphasis)

¹⁰² *The Azanian Peoples Organization (AZAPO) and Others v The President of the Republic of South Africa* (CCT 17/96) [1996] (25 July 1996), paras 21 and 32.

4.1 *The definition of crimes*

The definitions of genocide, crimes against humanity and war crimes under the DRC Implementation Act are identical to those enshrined in the Rome Statute. As discussed below, there are positive and negative aspects to this approach.

On the positive side, the legislature has codified and given lawful authority to the ICC's Elements of Crimes referred to under Article 9 of the Rome Statute. The ICC's Elements of Crimes, adopted by the ICC Assembly of States Parties on 9 September 2002, is separate from the Rome Statute and designed to assist the Court in the interpretation and application of the relevant articles of the Statute on crimes falling under its jurisdiction.

Normally, the ICC's Elements of Crimes do not bind domestic legal orders. However, prior to their incorporation by the DRC Implementation Act, Congolese military courts have progressively resorted to them even though they do not obviously constitute an international treaty. For example, in the *Mutineers of Mbandaka* case, the offense of rape as crime against humanity was defined pursuant to the ICC's Elements of Crimes.¹⁰³ This approach enabled the Garrison Military Tribunal of Mbandaka to establish rape against men as a crime. This came at a time when the aforementioned Law of 20 July 2006 modifying and complementing the Penal Code for the repression of offences of sexual abuse was not yet adopted and promulgated.

The same approach was applied in *Bongi* case to define pillage and homicide as war crimes.¹⁰⁴ After July 2006, a striking example comes from the *Minova* case, in which 39 members of the national armed forces were prosecuted for acts of murder, rape and pillage as war crimes allegedly committed in the village of Minova (on the border with South Kivu Province) when several units of the national army fled there after the capture of the town of Goma (North Kivu Province) by M23 rebels on 20 November 2012.¹⁰⁵ In this case, the Mobile Military Court of Appeal of North Kivu referred to the ICC's Elements of Crimes to define the offense of rape.¹⁰⁶ However, none of the above-mentioned cases provides any justification as to why the ICC's Elements of Crimes constitutes a source of Congolese national law in the same way as international treaties. Likewise, no reason has been given as

¹⁰³ *Public Prosecutor and Civil Parties v Etike Likunda and others* (n 44), 19.

¹⁰⁴ *Public Prosecutor and Civil Parties v Bongi Massaba* (n 48).

¹⁰⁵ *Public Prosecutor and Civil Parties v Nzale Nkumu Ngando and 38 others*, Judgment of 5 May 2014, Mobile Military Court of Appeal of North Kivu, RP No 003/2013 (unpublished).

¹⁰⁶ *Public Prosecutor and Civil Parties v Nzale Nkumu Ngando and 38 others*, 74.

to why it had been relevant to resort to the Elements of Crimes on the definitions of offences of sexual abuses whereas they could also be found in the Law of 20 July 2006. It is probably in order to address this uncertainty that Article 4 of the DRC Implementation Act has introduced Article 224 into the Penal Code, which authorises competent courts to interpret and apply the relevant crimes codified pursuant to the ICC's Elements of Crimes.¹⁰⁷

A further observation relates to the definition of the crime of genocide. The MCC protected political groups in addition to national, racial, ethnical or religious groups.¹⁰⁸ This was a significant departure from both the Genocide Convention (1948)¹⁰⁹ and the Rome Statute. Examples of domestic laws expanding the definition of genocide are found in several other African states. The most prominent example is to be found in the Ethiopian Penal Code of 2004.¹¹⁰ The reason the DRC Legislature expunged political groups from the ambit of protection under the crime of genocide has not been specified. It seems that the exclusion of political groups in the Genocide Convention was motivated by political reasons relating to the Cold War and ideological divisions among states at that time. Arguably, states from the Eastern European bloc would not have voted for the Genocide Convention without such exclusion,¹¹¹ even though political and other groups were already included in the resolution of 11 December 1946 of the UN General Assembly.¹¹² The latter called upon member states to adopt the necessary legislation for the prevention and punishment of genocide and to draft a related international treaty.¹¹³

If the Rome Statute reproduces the provisions of the Genocide Convention, it is likely true that the exclusion of political groups, or others (social, sexual, linguistic or geographical groups), is simply arbitrary. This is because the exclusion does not find support in state practice. In various parts of the world, domestic legislation

¹⁰⁷ Article 4 and Article 124, (Law No.15/022), 31 December 2015 (n 15).

¹⁰⁸ Article 164, (Law No. 024/2002), 18 November 2002 (n 16).

¹⁰⁹ Article 2, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

¹¹⁰ See Article 269, which reads as follows: 'Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or *political group*, organizes, orders or engaged in, be it in time of war or in time of peace: (a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.' (author's emphasis)

¹¹¹ Verhoeven J, 'Le crime de génocide: Originalité et ambiguïté' 1 *Revue belge de droit international* (1991), 21.

¹¹² UNGA Resolution 96 (I), 11 December 1946, Preamble, para 2.

¹¹³ UNGA Resolution 96 (I), paras 1-4.

deviates from the Genocide Convention to expand the list of protected groups.¹¹⁴ In this regard, John Quigley has noted that ‘to date, no controversy has arisen as a result of such variances. The most common variances have been the addition of additional acts committed against members of a group, and the addition of more types of protected groups.’¹¹⁵ Furthermore, the ideological reason, which led to the restrictive wording of the Genocide Convention in 1948, disappeared with the end of the Cold War in 1990.

It may be argued that the list of groups protected against genocide should be expanded for policy reasons.¹¹⁶ Rather than being exhaustive, the list could even be left open so as to potentially include protection for other groups.¹¹⁷ In the view of Joe Verhoeven, there is no technical obstacle in law for such expansion.¹¹⁸ In contrast, it has the advantage of widening the protection of human beings.¹¹⁹ Accordingly, in the DRC and other African states where political oppression is often a mode of governance, the retention of genocide against political groups could have been symbolic of such an expanded protection of human rights and may have served as a deterrent for potential offenders.

A further negative aspect of the DRC Implementation Act is that it poses several formal and substantive problems in relation to the definition of war crimes. First, among other acts constitutive of this crime, in the context of international and non-international armed conflicts, it mentions the fact of intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions ‘in accordance with the Charter of the United Nations *or that of the African Union*,’¹²⁰ as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

It must be noted that the phrase in italics is not contained in the corresponding Article 8(2)(b)(iii) and (e)(iii) of the Rome Statute. This phrase does not bring anything new into the provisions as stipulated under the Rome Statute. The Legislature might have thought that only *UN peacekeeping operations* were envisaged. But, it

¹¹⁴ Quigley J, *The Genocide Convention: An international law analysis*, Ashgate, Aldershot-Hampshire, 2006, 16-17.

¹¹⁵ Quigley ‘The Genocide Convention’, 16.

¹¹⁶ See Schabas WA, *Genocide in international law: The crime of the crimes*, 102-103.

¹¹⁷ Simon TW, *The laws of genocide: Prescription for a just world*, Praeger Security International, Westport, 2007, 96.

¹¹⁸ Verhoeven, ‘Le crime de génocide’, 23.

¹¹⁹ Verhoeven, ‘Le crime de génocide’, 23.

¹²⁰ Article 4, Article 223(2)(c) and 5(c), Law No.15/022 of 31 December 2015 (n 15).

has to be underscored that these operations and *missions deployed in accordance with the Charter* are expressions having different meanings. African Union missions were already envisaged under those provisions as this organisation may be presented as a regional arrangement pursuant to Chapter VIII of the UN Charter. The additional phrase in the DRC Implementation Act is therefore redundant. This is not the case, however, concerning the incrimination of acts of perfidy in international armed conflict. Article 223(2)(g) of the DRC Implementation Act mentions the act of making improper use of a flag of truce, of the flag, or of the military insignia and uniform of the enemy or of the United Nations, 'of the African Union or of any other international organisation,'¹²¹ as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury. It is therefore a national extension of the initial ambit of corresponding Article 8(2)(b)(vii) of the Rome Statute.

Finally, the definition of war crimes is problematic in respect of the conscription or enlistment of children into armed forces or groups or using them to participate actively in hostilities. The DRC Implementation Act is very ambiguous on the critical age of such children. In the context of international armed conflicts, it prohibits conscription or enlistment of children under 15 years old, whereas in the context of non-international armed conflicts, it prohibits the same for children under 18 years old. The reason behind this differentiation of level of protection is unclear. Yet, the definitions enshrined in the Rome Statute, which rely on the Additional Protocols (1977) to the Geneva Conventions (1949),¹²² maintains the same age in the context of both types of conflict, that is to say children under 15 years old.¹²³

That being said, the Rome Statute is not the best reference for the Congolese Legislature since it contradicts itself on this issue. It does not prohibit the practice of recruiting child soldiers over the age of 15 years, while excluding them from the Court's jurisdiction if they commit crimes when they are less than 18 years old.¹²⁴ The Malabo Protocol has corrected this incoherence. It prohibits the recruitment of children under the age of 18 years old in any type of armed conflict.¹²⁵ This was inspired by the African Charter on the Rights and Welfare of the Child, which refers

¹²¹ Article 4, Article 223(2)(g), (Law No.15/022), 31 December 2015 (n 15).

¹²² Article 77(2), *Geneva Convention I*, 12 August 1949; Article 4(3)(c), *Protocol II additional to the Geneva Conventions* of 12 August 1949, 8 June 1977.

¹²³ Article 8(2)(b)(xxvi) and (e)(vii), *Rome Statute*.

¹²⁴ Article 26, *Rome Statute*: 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.'

¹²⁵ Article 28D(b)(xxvii) and (e)(vii), *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*.

to a child as ‘every human being below the age of 18 years.’¹²⁶ The Charter does not permit any exception to this definition.¹²⁷ It means that all children and not just a category of them must be protected. Although the DRC has not yet ratified the said Charter, it has been a signatory state since 2 February 2010¹²⁸ and, as such, could have adopted the same ambit of protection for children rather than reducing its scope in the expectation of its ratification of the Charter at a later stage. In any event, the DRC should have respected the definition of children under its own Law of 10 January 2009 on the protection of the child¹²⁹ and the age of criminal majority, which is set at 18 years old under Article 2 of its Implementation Act.

4.2 *The retention of the death penalty*

Under the DRC Implementation Act, genocide, crimes against humanity and war crimes are now all subject to the death penalty. One may argue that the retention of capital punishment is a setback for human rights in the DRC. In previous case law applying directly the Rome Statute, the death penalty was not an option. Also, in line with this jurisprudence, the initial bill implementing the Rome Statute, as submitted to the National Assembly in 2008, did not foresee the death penalty.¹³⁰ What then are the principal factors occurring between 2008 and 2015 that has motivated the legislature to retain the death penalty?

At the outset it is worth noting that, beyond the reasons provided by military courts, the trend towards the abolition of the capital punishment in the DRC was founded on six arguments.¹³¹ First, it has been assumed that the dominant tendency around the world was towards abolition. Second, the death penalty contradicts the

¹²⁶ Article 2, *African Charter on the Rights and Welfare of the Child*, 1 July 1990.

¹²⁷ See *Institute for Human Rights and Development in Africa v Malawi*, ACERWC Comm. No. 004/Com/001/2014, Report on Consideration of an Amicable Settlement under the Auspices of the Committee (27 October 2016), paras. 6-7 <http://www.acerwc.org/download/decision-on-the-amicable-settlement-between-irhda-and-the-government-of-malawi/?wpdmdl=9845> on 24 November 2016. In this case, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has decided to adopt the Amicable Settlement on Communication No.004/Com/001/2014 opposing the Institute for Human Rights and Development in Africa (IHRDA) to the Republic of Malawi, in which the latter state commits itself to conform its Constitution (as amended in 2010), Article 23(5) of which defines children as persons under 16 years old, to the African Charter on the Rights and Welfare of the Child by 31 December 2018.

¹²⁸ See African Union, ‘List of Countries which Have Signed, Ratified/Accessed to the African Charter on the Rights and Welfare of the Child’, 1 April 2016 http://au.int/en/sites/default/files/treaties/7773-sl-welfare_of_the_child_0.pdf on 23 November 2016.

¹²⁹ Article 2(1), (Law 09/001), 10 January 2009 Relating to the Protection of the Child. This Article defines a child as ‘any person below 18 years old.’

¹³⁰ Nyabirungu, ‘L’impact du rejet par l’Assemblée nationale’, 769.

¹³¹ Nyabirungu, ‘L’impact du rejet par l’Assemblée nationale’, 770-776.

Constitution, which enshrines absolute respect for the right to life. In this respect, Article 61(1) of the Constitution prescribes that the right to life is not subject to derogation in any circumstances, even in the event of the state of siege or emergency.¹³² Third, courts are prone to judicial errors to the detriment of innocent people. Fourth, it is a cruel and inhuman penalty. Fifth, the Sovereign National Conference, held under President Mobutu's administration between 1990 and 1992, had already recommended its abolition. Sixth, since 2000, the Government has adopted a moratorium on the imposition of the death penalty.

In light on the above, all that seemed to remain was the formal removal of the death penalty as a sentencing option under different national penal laws. For this reason, André Mbata, a former parliamentarian (2006-2011), submitted a proposal for the formal abolition of the death penalty to the National Assembly. However, the proposal was rejected on 25 November 2010 on the ground that the gravity of criminality in the country (notably mass atrocities due to persistent armed conflicts) meant such a proposal would be inadequate.¹³³ However, it may have been that the reigning regime of President Joseph Kabila was reluctant to accept the proposal to abolish because it could benefit persons who had been held responsible for the assassination of his father, President Laurent-Désiré Kabila, on 16 January 2001. Otherwise, the retention of the death penalty was based not on legalistic arguments, but on the state's criminal policy. The legislature apparently believed it might be a better deterrent than the less invasive alternative of life imprisonment.

However, this position is disputable. The analysis of opposing arguments goes beyond the scope of this study. But, there is a perception that it might be the absence of sanction, the reign of impunity as such, which can increase the level of criminality in a country and not just the abolition of the death penalty. In the case of *S v Makwanyane and Another*, the Constitutional Court of South Africa, deciding on whether or not the death penalty was consistent with the Interim Constitution of 1993, found that it violated the right not to be subjected to cruel, inhuman or degrading treatment or punishment and the right to life,¹³⁴ for which the framers of

¹³² This Article provides: 'Under no circumstances, and even when the state of siege or emergency has been proclaimed, pursuant to articles 85 and 86 of this Constitution, there shall be no derogation to the following rights and fundamental principles: 1.the right to life [...].' The original version reads: 'En aucun cas, et même lorsque l'état de siège ou l'état d'urgence aura été proclamé conformément aux articles 85 et 86 de la présente Constitution, il ne peut être dérogé aux droits et principes fondamentaux énumérés ci-après: 1. le droit à la vie [...].' (author's translation)

¹³³ See Mbata B. Mangu A, *Abolition de la peine de mort et constitutionnalisme en Afrique*, L'Harmattan, 2011, 67-105.

¹³⁴ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; 6 June 1995), para. 392.

this Constitution paid ‘a deep respect, amounting to veneration.’¹³⁵ Importantly, the Constitutional Court invoked a serious democratic concern over the fact that the death penalty could be diverted by a government ‘to solve grave social and political problems by means of executing opponents’ as part of its reasoning.¹³⁶

In contrast, the Constitutional Court of the DRC, in *Mukonkole* case, found that the death penalty was consistent with the Constitution of 18 February 2006.¹³⁷ In this case, the applicant, in his capacity as a member of the National Assembly, together with his co-accused, were prosecuted before the Supreme Court of Justice for criminal conspiracy, theft, reception and concealment of stolen goods. The Penal Code provides that conspiracy is punishable by the death penalty.¹³⁸ The applicant claimed that this violated Article 61(1) of the Constitution and was therefore unconstitutional.¹³⁹ The Constitutional Court rejected this argument and held that, contrary to what has been contended, point 1 of article 61 of the Constitution does not abolish the death penalty, but that the prohibition to depart from the right to life simply meant that, outside those situations provided for in law, the right to life is protected in all circumstances and cannot be violated arbitrarily.¹⁴⁰

However, the Court did not clarify the meaning of ‘arbitrary attempt on the life of other people.’ The African Commission on Human and Peoples’ Rights (ACmHPR), which seems to share the interpretation provided for by the Congolese Constitutional Court in relation to its proper interpretation of Article 4 of the African Charter on Human and Peoples’ Rights,¹⁴¹ has held that such arbitrariness exists if the sentence is imposed in denial of fair trial guarantees,¹⁴² particularly the right to appeal.¹⁴³ The ACmHPR has further declared that the legal attempt on the right to

¹³⁵ *S v Makwanyane*, para 388.

¹³⁶ *S v Makwanyane*, para 388.

¹³⁷ CSJ, 28 January 2011, R.CONST.128/TSR, *Motion of unconstitutionality submitted at the public hearing of 26 May 2010 by the accused Honorable Martin Mukonkole and Mr Norbert Muteba in the Case opposing them to the Public Prosecutor under RP.003/CR* (unpublished).

¹³⁸ Articles 157 and 158, Penal Code of the Democratic Republic of Congo.

¹³⁹ CSJ (n 136), 9.

¹⁴⁰ CSJ (n 136), 9. This original version of this ruling reads as follows: ‘[...] contrairement à ce qui y est affirmé, le point 1 de l’article 61 de la Constitution n’abroge pas la peine de mort, l’interdiction de déroger au droit à la vie signifiant simplement qu’en dehors des cas prévus par la loi, le droit à la vie est protégé en toutes circonstances et qu’il ne peut être mis fin à la vie d’autrui de manière arbitraire.’

¹⁴¹ This Article provides: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.’

¹⁴² *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, ACmHPR Comm. 259/2002, 35 Activity Report (2014), paras 65 and 69.

¹⁴³ *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, ACmHPR, Comm. 274/03 and 282/03, 35 Activity Report (2014), Para 67.

life through imposition of the capital punishment is not absolute.¹⁴⁴ There are other ‘specific exceptions provided for on this matter by international standards.’¹⁴⁵ This is the case when, in a particular case, the death penalty – which is not mentioned in the African Charter on Human and Peoples’ Rights – is precluded by another treaty to which the state in question is a party.¹⁴⁶ It is also the case if its imposition does not abide the prohibition of discrimination¹⁴⁷ or the principle of proportionality.¹⁴⁸ As for the latter exception, it means that the death penalty should be used only for the most serious crimes.¹⁴⁹

To sum up, the Congolese Legislature maintained the death penalty in the DRC Implementation Act as a matter of state policy towards crime. This is supported by the National Assembly’s rejection of the proposal to abolish capital punishment in 2010 and, more importantly, by the verdict of the Constitutional Court in *Mukonkole* in 2011. Perhaps these developments foreshadow the abandonment of the moratorium on the imposition of the death penalty, including towards persons sentenced for ordinary offences. Calls to this effect have already started to emerge.¹⁵⁰

¹⁴⁴ *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, para 70.

¹⁴⁵ *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, para 70.

¹⁴⁶ *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, para 71.

In the paragraph, the ACmHPR states: ‘We cannot refer to this subject without mentioning the fundamental standard on this matter which is Article 6(5) of the International Covenant on Civil and Political Rights expressed in the following terms “a death sentence *cannot* be imposed for crimes committed by individuals who are below 18 years”. Even if it were to be assumed that the concept of arbitrariness would maintain an open window on the limitation of the right to life protected by Article 4 of the Charter, one actually realizes that the provisions of Article 6 of the Covenant, among others, exclude persons who are less than 18 years from the limitation of the right to life, even legally, from the imposition of the death penalty. A similar protection is guaranteed by Article 37(9) of the United Nations Convention on the Rights of the Child which stipulates that “Neither capital punishment nor life imprisonment without the possibility of release shall be handed down for offences committed by persons below 18 years.” *Needless to strive for the interpretation in order to observe that the very act of imposing such sentences against juveniles constitutes an arbitrary interference in the right to life and the integrity of these persons, an act which is prohibited by Article 4 of the African Charter.*’ (author’s emphasis)

¹⁴⁷ In this respect, Article 2 of the African Charter on Human and Peoples’ Rights stipulates: ‘Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.’

¹⁴⁸ *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, ACmHPR (n141), para. 66.

¹⁴⁹ See also ACmHPR, ‘General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)’, 57th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul (Gambia), 4-18 November 2015, para 24.

¹⁵⁰ Radio Okapi, ‘RDC: Julien Paluku propose la suspension du moratoire à l’exécution de la peine de mort’, 14 September 2016 <http://www.radiookapi.net/2016/09/14/actualite/justice/rdc-julien-paluku-propose-la-suspension-du-moratoire-lexecution-de-la> on 24 November 2016.

5 Conclusion

The DRC Implementation Act has enriched the Congolese legislation applicable to international crimes. Insofar as it implements the Rome Statute, it complements and modifies the Penal Code of 1940. The Legislature intended for the Act to be applied by both civilian courts and military tribunals in the DRC. In this respect, the DRC Implementation Act constitutes the so-called *droit commun*. Despite the fact that courts in the DRC were already directly applying the Rome Statute, the adoption of the DRC Implementation Act was driven by three main reasons. First, the DRC had to give effect to the Rome Statute in that the latter treaty obligates each state party to extend its criminal laws penalising offences against the integrity of its own investigative or judicial process to offences against the administration of justice listed under its Article 70(1). Second, the Congolese Legislature has found it necessary to incorporate genocide, crimes against humanity and war crimes as well as the ICC's Elements of Crimes into the Penal Code, thereby providing civilian courts, notably the courts of appeal, with the substantive national legislation which is consequential to the abolition of the exclusive jurisdiction of military courts over these crimes. Third, the DRC Implementation Act has come to solve the issue of the death penalty, for which the Legislature has now opted as a matter of criminal policy, while military tribunals had systematically excluded it on the basis of their application of the Rome Statute for more than a decade.

The survey on the content of this new legislation as a whole has yielded two principal conclusions. First, the drafting methodology of the Legislature, which was to re-write the definitions of international crimes in the Penal Code, has led to a number of deficiencies in the Act. On the one hand, it omits certain provisions of the Rome Statute. This applies to the rule enshrined in Article 27(2) on personal immunity, the plea for self-defence as a ground for excluding criminal responsibility and the requisite mental element in order to hold a person responsible for such crimes. On the other hand, the DRC Implementation Act contradicts the Rome Statute on modes of criminal responsibility.

The Legislature has duplicated part of these in a separate provision on modes of complicity confusing this with modes of co-perpetration. Moreover, while the Rome Statute provides that the plea of mistake of fact or mistake of law as grounds for excluding criminal responsibility might be relevant only if they remove the mental element of the crime at stake, the DRC Implementation Act requires that such mistake be 'invincible.' However, criteria for determining the invincible

character of a mistake are not provided. This gives too much leeway to the courts and may lead to divergent judgments on the subject.

Finally, the Legislature has created a discrepancy regarding the protection of children against conscription or enlistment into armed forces or groups or their active participation in hostilities by fixing the critical age to 15 years in the event of international armed conflicts and 18 years in the context of non-international armed conflicts. This differentiation of protection has not been justified. As such, The Legislature has not only contradicted the Rome Statute, but also missed the opportunity to correct the inherent contradiction contained therein, namely, the failure to prohibit the recruitment of child-soldiers over the age of 15 years, while excluding them from the Court's jurisdiction if they are under 18 years.

The second conclusion concerns the failure to develop the law in relation to a number of specific issues. This applies to the exclusion of political groups as a protected group for the purposes of genocide. In this regard, the Legislature has copied the Rome Statute, which is based on the Genocide Convention (1948). Yet, these treaties are not the exclusive legal references on this subject. It has been argued that there is no reason today not to include political groups as a protected group in an effort to protect human rights. Comparative law has shown that some states have already taken the lead in expanding the list of protected groups.

The DRC should have followed this approach, as political groups had already been included in the definition of genocide under the repealed Title V of the Military Criminal Code. Likewise, the Legislature has failed to recognise the criminal liability of corporations, despite the fact that the legal environment in the DRC and the development of international law are now conducive to it. The Legislature has further failed to redefine the conditions for the exercise of universal jurisdiction by Congolese courts. Considerations on the Penal Code as it stands today has led to the conclusion that the DRC could tolerate and leave unpunished foreign perpetrators of core international crimes committed against non-nationals outside its territory on the ground that no victim has lodged a complaint with the public prosecution or the competent authority of the said foreign state has not officially denounced them. This perception of universal jurisdiction can lead the country to violate its obligation to prosecute or extradite persons suspected of having committed such crimes under conventional international law. Ultimately, in the context of the Rome Statute, this legal flaw constitutes inability on the part of a state to discharge its primary responsibility to prosecute, thereby activating the ICC's complementary jurisdiction.

In light of the above, the DRC Implementation Act is unlikely to be of practical value to courts in the DRC. Where it contradicts the Rome Statute or omits certain of its provisions, it is likely that competent courts will continue to apply the Rome Statute directly pursuant to the Constitution. Likewise, Congolese courts will continue to apply the Rome Statute directly in respect of crimes committed before 30 March 2016, which is the date of the entry into force of the DRC Implementation Act.

CHAPTER 8

THE TORTURE CHAMBER: AFRICAN PARTICIPATION IN ENHANCED INTERROGATION TECHNIQUES

JEANNE-MARI RETIEF

Abstract

The prevalence of torture in cases of extraordinary rendition has earned it the ominous alternative labels of 'outsourcing torture' and 'torture by proxy.' This chapter examines the extent of torture techniques used in cases of extraordinary rendition with specific focus on African governments and African nationals subjected to this treatment. Even though some governments only assisted in extraordinary rendition they still contributed to the torture or cruel and inhuman treatment of many African citizens. This chapter provides case studies of African nationals subjected to extraordinary rendition and enhanced interrogation techniques (torture). It also examines the legal regimes applicable to torture and other forms of cruel, inhuman and degrading treatment or punishment, and emphasises the need for African governments to provide recourse to its citizens.

LA CHAMBRE DE TORTURE : PARTICIPATION AFRICAINE AUX TECHNIQUES D'INTERROGATION RENFORCEE

Résumé

Le caractère généralisé de la torture en cas d'extraditions extraordinaires a acquis d'autres étiquettes inquiétantes telles que « sous-traitance de la torture » et « la torture par procuration ». Ce chapitre analyse l'ampleur des techniques de la torture employées en cas d'extraditions extraordinaires avec un intérêt particulier sur les gouvernements africains et les ressortissants africains qui font l'objet de ce traitement. Même si certains gouvernements n'ont fait que jouer leurs rôles en matière d'extradition extraordinaire, ils ont quand même contribué à la torture ou au traitement cruel et inhumain de beaucoup de citoyens africains. Le présent chapitre examine les exemples des ressortissants africains qui ont fait l'objet d'extradition extraordinaire et de technique d'interrogation renforcée (la torture). Il examine également les régimes juridiques applicables à la torture et à d'autres formes de traitement ou peine cruel, inhumain et dégradant et met un accent sur le besoin des gouvernements africains de donner un recours à leurs citoyens.

1 Introduction

This chapter is based on the author's doctoral thesis, which focused on the United States' use of extraordinary rendition, the consequences thereof, and arguments pertaining to the criminalisation of the practice. The thesis dealt with an in-depth discussion of the practice and all issues related to it, but for purposes of this chapter the focus will be placed on a single issue created by extraordinary rendition, namely, torture and other forms of cruel and inhuman punishment. Although the US is the main perpetrator of extraordinary rendition and torture in that context, this chapter sheds light on African participation in US torture techniques, whether by direct or indirect aid, and will explore case studies of African nationals subjected to

this treatment as a direct consequence of being extraordinarily rendered. The legal regimes pertaining to the use of torture and other forms of inhuman or degrading treatment (TCID) are explored and arguments towards justice for African citizens by African governments made.

1.1 Brief background to extraordinary rendition

Extraordinary rendition¹ can be described as the wilful taking of suspected terrorists into custody through illegal means such as abduction, followed by forcible detention and transportation under the induced influence of drugs,² to facilities that are well-nigh untraceable at undisclosed destinations³ where torture will be used as an interrogation technique.⁴ Public scrutiny and the oversight of the law cannot reach them and no assurances are required from the receiving state.⁵

The suspected terrorists are captured by state agents, or agents acting under the guise of pseudo-legality (i.e. hailing from a variety of countries

¹ This is the writer's detailed description of extraordinary rendition for the purposes of this article and the arguments and statements it contains. The writer acknowledges that there are various descriptions, definitions and interpretations of it.

² 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 processes could not provide grounds for arrest, let alone detention, which is why torture is used as an aid to interrogation.

³ 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 has led to the detainees being dubbed 'ghost prisoners.' See Grey S, *Ghost plane: The true story of the CIA rendition and torture program*, Saint Martin's Griffin, New York, 2007; Sepper E, 'The ties that bind: How the constitution limits the CIA's actions in the war on terror' 81 *New York University Law Review*, 2006, 1807; Sadat L, 'Extraordinary rendition, torture, and other nightmares from the war on terror', 75 *George Washington Law Review*, 2007, 1200 and 1215; Weissbrodt D and Bergquist A 'Extraordinary rendition and the torture convention' *Summer Virginia Journal of International Law*, 2006, 588; Sadat LN, 'Ghost prisoners and black sites: Extraordinary rendition under international law' 37 *Case Western Reserve Journal of International Law*, 2006, 315; Priest D, 'CIA hold terror suspects in secret prisons' *The Washington Post* A01, 2 November 2005 <http://www.washingtonpost.com/wpdyn/content/article/2005/11/01/AR2005110101644_pf.html> on 21 January 2016.

⁴ Extraordinary rendition is also referred to as 'torture by proxy' because torture seems to go hand-in-hand with extraordinary rendition. See in general Huckerby J and Satterthwaite M 'Torture by proxy: International law applicable to "extraordinary renditions"' *The Center for Human Rights and Global Justice New York University School of Law*, 2004; Hasbargen A 'Appropriately rendering disappearances: The despair between extraordinary renditions and forced disappearances' 34 *Hamline Journal of Public Law and Policy*, 2012, 89-90.

⁵ Marty D 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report' *Report Committee on Legal Affairs and Human Rights Parliamentary Assembly Council of Europe*, 2007, Doc 11302, 22-23 and 47.

whose governments have invested them with powers of dubious legality to capture, detain, hold for questioning,⁶ transfer and/or torture the suspects (thus detained)⁷ without following due legal process (e.g. allowing suspects to access legal counsel).⁸ After transfer, the suspects are detained indefinitely without trial, and the governments involved deny their involvement and any knowledge of the state of well-being of the detainees.⁹ No access to humanitarian aid groups or legal representation is allowed throughout and after such detention.¹⁰

Extraordinary rendition presents a real and present threat to upholding international laws and human rights. However, a clear consensual definition of the practice has yet to materialise, particularly since divergent misconceptions about the nature of extraordinary rendition are patent among sources.¹¹

⁶ Marty D, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report', 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 off and he is photographed naked. Tranquilisers 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 P 'Leaving the invisible universe: Why all victims of extraordinary rendition need a cause of action against the United States' 16 *Journal of Law and Policy*, 2007, 357-360.

⁷ Johnston P 'Leaving the invisible universe: Why all victims of extraordinary rendition need a cause of action against the United States', 357-359; Singh A 'Globalizing torture: CIA secret detention and extraordinary rendition' *Open Society Justice Initiative*, 2013, 6.

⁸ Wolf S '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' 59 *The State University of New Jersey Rutgers Law Review*, 2007, 917.

⁹ These detainees are naked when placed in cells that are temperature controlled to produce 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 P 'Leaving the invisible universe: Why all victims of extraordinary rendition need a cause of action against the United States', 358-362; Ross J 'Black letter abuse: the US legal response to torture since 9/11' 89 *International Review of the Red Cross*, 2007, 562.

¹⁰ Sepper E, 'The ties that bind: How the constitution limits the CIA's actions in the war on terror', 1807; Satterthwaite M 'Extraordinary rendition and disappearances in 'the war on terror'' 10 *Gonzaga Journal of International Law*, 2006-2007, 72.

¹¹ The case of Rabbi Berland refers. Rabbi Berland's legal team attempted to argue that he was a victim of extraordinary rendition, even though he was arrested after an arrest warrant was issued and he has not been transferred to any other jurisdiction. His whereabouts are also not unknown. All of these are key elements to extraordinary rendition. This is a blatant example of the misconceptions regarding extraordinary rendition and what exactly it entails. Gordin J, 'Rabbi fleeing sex crimes allegations says Israel after him because of Palestinian ties' *Haaretz Online*, 19 April 2016-<<http://www.haaretz.com/jewish/news/premium-1.715366>> on 25 May 2016.

Similarly, the clandestine nature of the practice prevents reliable identification of the countries and agencies involved, which suits the perpetrating entities concerned very well since the object is to render the victims untraceable. The dense fog of obscurity surrounding the practice takes a heavy toll on efforts to substantiate charges, with the result that despite an increase in the number of cases that have reached the courts over the past decade, most have run into an impasse with no prospects of further progress.

In light of the above, the issues created by extraordinary rendition can be summarised as follows:

- (a) There is no clear, formal definition;
- (b) The practice creates a host of international and domestic legal issues including torture and other forms of cruel, inhuman and degrading treatment or punishment;
- (c) There is no consensus on the legal regimes applicable to it;
- (d) The various legal arguments in defense of extraordinary rendition have taken a toll on respect for the rule of law, international customs and rules and human rights; and
- (e) Prosecution of extraordinary rendition is complicated at best.

2 Torture and other forms of cruel, inhuman and degrading treatment or punishment

Various arguments have been made in an attempt to justify the use of TCID as part of extraordinary rendition and the Global War on Terror (GWOT). In order to fully understand how these relate to African case studies, a brief discussion of the US torture practices related to extraordinary rendition will follow.

2.1 US torture practices as part of extraordinary rendition

The prevalence of torture¹² in cases of extraordinary rendition¹³ has earned it

¹² 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.

¹³ This will be proven by the content of this article.

the ominous alternative labels of ‘outsourcing torture’¹⁴ and ‘torture by proxy’.¹⁵ On 6 September 2006, President George Bush admitted that ‘enemy combatants’¹⁶ were being sent to secret detention facilities as part of the GWOT but specifically denied torture allegations by stating that the US does not torture.¹⁷ However, witness accounts stated that detainees had been shackled, held captive, beaten, tortured, and sometimes even killed.¹⁸

It is important to note that the US does not refer to interrogation techniques practised by its operatives as torture, ill-treatment or even TCID, but euphemistically as ‘enhanced interrogation techniques’ (EIT).¹⁹ The Bush Administration argued that interrogators’ actions would only constitute torture if the interrogator acted with ‘specific intent’. However, if the intent was merely to interrogate the detainee and ill-treatment eventuated as a corollary in the course of questioning, then such severe questioning would not constitute torture.²⁰

Furthermore, it was contended that EITs are not unconstitutional because such measures are only applied in cases where detainees are deemed to be in possession

¹⁴ Mayer J, ‘Outsourcing torture: The secret history of America’s “extraordinary rendition” program,’ *The New Yorker* 106, 14 February 2005-<<http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture>> on 3 March 2016; Weissbrodt *et al* ‘Extraordinary rendition and the Torture Convention’, 46 *Virginia Journal of International Law*, 593.

¹⁵ Satterthwaite, ‘Torture by proxy: International law applicable to ‘extraordinary renditions’, 15; Hasbargen, ‘Appropriately rendering disappearances: The despair between extraordinary renditions and forced disappearances’, 90.

¹⁶ The special issue of ‘enemy combatants’ and the reference to detainees in the GWOT as such is discussed in full in the LLD thesis.

¹⁷ International Committee of the Red Cross Regional Delegation for United States and Canada Regional Delegation for United States and Canada, ‘ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, 2007,<<https://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>> on 3 March 2016. Hereafter referred to as ‘ICRC Report 2007’. In January 2003, the ICRC requested access to these detainees but access was only granted in October 2006; Sadat, ‘Extraordinary rendition, torture, and other nightmares from the war on terror’, 1200. Also see ‘Fact sheet: Extraordinary rendition’ American Civil Liberties Union, 6 December 2005-<<https://www.aclu.org/national-security/fact-sheet-extraordinary-rendition>> on 3 March 2016 in which former CIA agent Robert Baer stated: ‘If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.’

¹⁸ Sadat, ‘Extraordinary rendition, torture, and other nightmares from the war on terror’, 1201.

¹⁹ This is merely an attempted euphemism for what is in fact torture. Through the course of this chapter it will become apparent that EITs are nothing less than torture and/or cruel, inhumane and degrading treatment. Alexander J, ‘The law-free zone and back again’ *University of Illinois Law Review*, 2013, 559; Jaffer J, ‘Known unknowns’ 48 *Harvard Civil Rights-Civil Liberties Law Review*, 2013, 458.

²⁰ Eppinger M, ‘Reality check: Detention in the war on terror’ 62 *Catholic University Law Review*, 2013, 345. This view was repudiated by the Obama administration. Cf. Eppinger, ‘Reality check: Detention in the war on terror’, 346.

of information of the most critical importance,²¹ in which case the methods of interrogation are designed to cause the least possible mental and physical suffering and the detainees are monitored by a medical team during the interrogation.²²

A further contention is that EITs do not ‘shock the conscience’ since the same techniques are applied to US troops in training.²³ Moreover, certain conditions are prerequisites: For example, detainees must be verifiably in possession of highly classified information as key members of an organised terrorist group; the Central Intelligence Agency (CIA) must have verifiable intelligence that an attack emanating from that organisation is imminent; and approval for each case must be gained from CIA headquarters on the advice of the on-site team. An overriding condition must be met that there would be no physical or mental risk attached to the detainee’s exposure to EITs.²⁴ This condition is sharply gainsaid, however, by the fact that the US makes use of waterboarding, albeit purportedly as an extreme exception, particularly if an attack is reliably known to be imminent and the high value detainee (HVD) under interrogation is reliably deemed to possess information that could be used to delay or prevent the attack.²⁵

During the initial interrogation of HVDs, non-threatening techniques are used, but the detainee has to provide high-level information and if the on-site team feels they are withholding this information and only providing low-level information, EITs can be used in an escalating fashion.²⁶ However, the International Committee of the Red Cross (ICRC)²⁷ reported that the initial periods of detention (the first few

²¹ Such detainees are referred to as ‘high value detainees’ (HVDs). Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency *US Department of Justice Office of the Legal Counsel*, 2005, Doc 20530 (hereafter referred to as ‘John Rizzo Memo’), 3.

²² John Rizzo Memo, 2005, 3.

²³ John Rizzo Memo, 2005, 3. Cf. Garcia M, ‘Interrogation of detainees: Requirements of the Detainee Treatment Act’ *Congressional Research Report for Congress*, 2009, 1-2.

²⁴ John Rizzo Memo, 2005, 5.

²⁵ John Rizzo Memo, 2005, 5-6. Waterboarding is the CIA’s most invasive interrogation technique. According to the CIA waterboarding has only been used three times and never again since 2003. The very fact of the admission to this practice tends to set at naught the caution purportedly exercised in using EITs, particularly since the US prosecuted Japanese interrogators for using this technique on US soldiers during the war between Japan and the US; Singh, ‘Globalizing torture’, 2013, 16.

²⁶ John Rizzo Memo, 2005, 7. The approval for the use of EIT is usually granted for a period of thirty days although it is alleged that EITs were never employed for more than seven days in succession.

²⁷ The ICRC is a humanitarian aid organisation with the goal of ensuring humanitarian protection and assistance for victims of war and other situations of violence. In terms of extraordinary rendition, they played a large role in identifying, and attempting to consult with victims. A report to speak to the latter was drafted by the ICRC and it highlighted some of the most crucial human rights violations in this regard.

days or months) were the harshest.²⁸ The detainees were subjected to various forms of physical and mental ill-treatment followed by a reward-based programme entailing gradual improvement in conditions and treatment for the detainees. However, this reward system was also coupled with threats that a reversion would occur to punish uncooperative behaviour.²⁹

The US claims that Muslims believe that Allah permits them to provide information if the level of pain and suffering has become too high. This putative belief³⁰ serves as a pretext and incentive employed by the US to use EITs to extract critical information from HVDs.³¹ However, there is no conclusive evidence that the results sought by resorting to EITs have been achieved, especially given the sporadic nature of their application.³² The US has nevertheless claimed advances in information gained about Al Qaeda,³³ thus casting further doubt on its *bona fides*.

Interrogations are conducted in the presence of an on-site medical team³⁴ who have to establish in advance whether detainees have the capacity to withstand the mental and physical rigours of EITs, and have to monitor the proceedings to determine at intervals whether detainees can withstand the treatment.³⁵

The ICRC reported the presence of an on-site medical service (OMS) at detention facilities³⁶ who were tasked to monitor ill-treatment of detainees and at times participate in the practices, for example, in the sense of ordering interrogation to continue, change or stop (in one instance a detainee reported that the OMS participated in waterboarding by measuring his oxygen saturation). Health checks were reportedly done before and after transfer, and likewise, injuries suffered in the course of interrogative procedures were treated.³⁷

²⁸ ICRC Report, 2007, 8. No basic items were provided to the detainees. They received no toothbrush, toothpaste, soap, towels, blankets, clothes, toilet paper or underwear. Access to toilets and showers was also denied.

²⁹ ICRC Report, 2007, 8.

³⁰ John Rizzo Memo, 2005, 9.

³¹ John Rizzo Memo, 2005, 9.

³² John Rizzo Memo, 2005, 10.

³³ John Rizzo Memo, 2005, 8.

³⁴ John Rizzo Memo, 2005, 8.

³⁵ John Rizzo Memo, 2005, 8.

³⁶ ICRC Report, 2007, 21.

³⁷ ICRC Report, 2007, 21.

2.2 *Enhanced interrogation techniques explained*

In the absence of medical contra-indications, the interrogation team is permitted to use the following techniques on the detainee: walling, facial hold, facial slap, attention grasp, wall standing, stress positions and sleep deprivation.³⁸ These techniques can be divided into three main categories, namely, conditioning, corrective and coercive techniques.³⁹

2.2.1 Conditioning techniques

These techniques are devised to ensure that detainees' awareness of just how important their basic needs are to them are heightened dramatically, and to proceed from there to persuade them that in fact their basic needs are more important than the information they are protecting.⁴⁰ Conditioning techniques are not used to provide immediate results but rather to be used for an extended period of time in conjunction with other techniques to create a cumulative effect.⁴¹ Specific conditioning techniques are nudity, dietary manipulation, and sleep deprivation.⁴²

Nudity is used to embarrass the detainee and, according to the John Rizzo Memo, to create only mild physical discomfort.⁴³ The detainee can also earn an immediate reward of clothes by being cooperative. The Memo clearly stipulates there is no sexual abuse or threat of sexual abuse. There is also no health risk as room temperature is kept above 68°F.⁴⁴

Dietary manipulation is a diet formulated to provide the detainee with 1000 calories per day.⁴⁵ The detainee can drink as much water as they want. This regimen is considered harmless to the detainee's health as most weight loss programmes in the US prescribe a 1000 calorie diet without even taking the person's body weight into account.⁴⁶ The detainee cannot lose more than ten kilogrammes of their initial body weight.⁴⁷

³⁸ John Rizzo Memo, 2005, 7; Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 16.

³⁹ John Rizzo Memo, 2005, 12-14.

⁴⁰ John Rizzo Memo, 2005, 12.

⁴¹ John Rizzo Memo, 2005, 12.

⁴² John Rizzo Memo, 2005, 12.

⁴³ John Rizzo Memo, 2005, 12.

⁴⁴ John Rizzo Memo, 2005, 12.

⁴⁵ John Rizzo Memo, 2005, 12.

⁴⁶ John Rizzo Memo, 2005, 12.

⁴⁷ John Rizzo Memo, 2005, 12.

Sleep deprivation is used to break down the detainee's resistance. Prolonged periods of sleeplessness are allowed for 180 hours. However the report alleges that more than 96 hours of sleep deprivation was used only on three detainees.⁴⁸ Detainees are shackled in a standing position with one hand shackled beneath the chin or above the head, a practice that reportedly cannot be kept up for more than two hours without causing extreme discomfort.⁴⁹ The report further states that no lasting harm is suffered by the detainee except temporary cognitive impairment, hallucinations, nausea, blurred vision and impaired speech. In order to make sleep deprivation effective, detainees have to remain in a standing position for long periods of time and are therefore strapped with diapers that are changed daily, as well as regular monitoring of their skin condition.⁵⁰

2.2.2 Corrective techniques

Corrective techniques persuade the detainee to listen to the interrogator's questions and do away with the idea that they will be exempt from invasive physical contact.⁵¹ Corrective techniques used are facial or insult slaps, abdominal slaps and facial holds through which the interrogator uses his hands to immobilise the detainee's head.⁵²

2.2.3 Coercive techniques

Coercive techniques heighten the physical and psychological stress imposed on the detainee by other means.⁵³ Such techniques include: walling, water dousing, stress positions, wall standing, cramped confinement and waterboarding.⁵⁴

During walling, the detainee is shoved against a fake wall and harshly pulled back again.⁵⁵ He wears a C-collar (collar around the neck with a rod at the back) to avoid whiplash. Walling is effective because the detainee is gripped by fear of what might be done to them next. Detainees are typically walled 20-30 times.⁵⁶

⁴⁸ John Rizzo Memo, 2005, 12-13.

⁴⁹ John Rizzo Memo, 2005, 13.

⁵⁰ John Rizzo Memo, 2005, 13.

⁵¹ John Rizzo Memo, 2005, 14.

⁵² John Rizzo Memo, 2005, 14.

⁵³ John Rizzo Memo, 2005, 14.

⁵⁴ John Rizzo Memo, 2005, 14-15.

⁵⁵ John Rizzo Memo, 2005, 14.

⁵⁶ John Rizzo Memo, 2005, 14.

Water dousing involves pouring water over the detainee from a container or a hose without a nozzle.⁵⁷ There are no significant health risks as the room temperature is kept above 64°F and the water temperature is kept above 50°F (although the interrogators are permitted to reduce the water temperature to 40°F).⁵⁸ Treatment is limited to two thirds of the probable length of time that can be expected to pass until the treatment results in hypothermia.⁵⁹ However, the ICRC reported that two detainees were kept in an excessively cold cell for nine months in Afghanistan, and four detainees were subjected to water dousing while standing in stress positions (several detainees thought the dousing was intended to clean away the faeces running down their legs from prolonged stress standing).⁶⁰ Two detainees were placed on a sheet with the edges held up while cold water was poured over them to create an immersion bath.⁶¹

Stress positions are used to cause muscle fatigue and discomfort.⁶² The ICRC reported that one detainee was shackled in a stress position for a period of one month and that he was allowed to defecate in a bucket.⁶³

During cramped confinement, the detainees are placed in a container of uncomfortably cramped proportions.⁶⁴ They may remain in a larger container for up to 8 hours and up to 2 hours in a small container. However, the report states that the OMS advises against this technique because it creates a safe haven that offers relief from the pressure of interrogation and is therefore not effective.⁶⁵

Waterboarding is the most traumatic interrogation technique discussed here. Detainees are placed on a gurney, face-up with the head downward.⁶⁶ A cloth is placed over the face and water is poured over the cloth to create the sense of drowning. The face can be doused for periods of 40 seconds each. According to the report, this technique may only be used for one continuous period of 30 days at the rate of two sessions per 24-hour period.⁶⁷ The detainee may only be strapped to the

⁵⁷ John Rizzo Memo, 2005, 14-15.

⁵⁸ John Rizzo Memo, 2005, 14-15.

⁵⁹ John Rizzo Memo, 2005, 14-15.

⁶⁰ ICRC Report, 2007, 15.

⁶¹ ICRC Report, 2007, 15.

⁶² John Rizzo Memo, 2005, 15.

⁶³ ICRC Report, 2007, 11.

⁶⁴ John Rizzo Memo, 2005, 15.

⁶⁵ John Rizzo Memo, 2005, 15.

⁶⁶ John Rizzo Memo, 2005, 14.

⁶⁷ John Rizzo Memo, 2005, 14.

gurney for two hours at a time. The report states that the health risks are ‘medically acceptable’.⁶⁸

The detainees interviewed by the ICRC alleged that during interviews the following interrogation methods were used: waterboarding, stress positions, walling, beating and kicking, small confinement, prolonged forced nudity, sleep deprivation, exposure to cold temperatures, prolonged shackling, threats of ill-treatment, forced shaving, deprivation of solid food, restricted access to the Koran and long periods of deprivation of open air, exercise, hygiene facilities and basic items.⁶⁹

2.2.4 The role of medical personnel in EITs

The ICRC noted that international medical principles are based on three core values: First of all, the medical practitioner should act in the best interest of the patient. Critical elements falling under this rubric are that at the most basic level the practitioner’s attentions should at least do no harm to the patient, which implies a further essential condition, namely, that the practitioner’s ministrations should do justice in all things to the patient’s right to dignity.⁷⁰ Medical practitioners who work in detention facilities are critically burdened with the obligation to look after the detainee’s best interests. In fact, the obligation can hardly be overemphasised since the detainee is in a particularly vulnerable position at the mercy of his captors whose reasons for inducing his predicament are not peaceful in the first place.⁷¹ They cannot rule on the permissibility of any form of physical or psychological ill-treatment,⁷² and are specifically prohibited from using their medical skills in such a way. The fact is, however, that the conduct of the OMS violates international medical and ethical principles because during EITs, their mandate is at cross-purposes with their main purpose to patently serve the best interests of the patient by upholding the principles enunciated above.⁷³

Bruce Jessen and James Mitchell are the two psychologists who developed the CIA torture programme.⁷⁴ They were paid US\$81 million by the then US Gov-

⁶⁸ John Rizzo Memo, 2005, 14.

⁶⁹ ICRC Report, 2007, 9.

⁷⁰ ICRC Report, 2007, 22.

⁷¹ ICRC Report, 2007, 23. Medical practitioners are allowed to conduct initial health checks to assess any risks, can be asked if there is any medical concern that precludes the detainee from being questioned and can be called upon to give medical care that becomes necessary during questioning.

⁷² ICRC Report, 2007, 23.

⁷³ ICRC Report, 2007, 23.

⁷⁴ ‘Here the rain never finishes: Exclusive CIA torture report from the ACLU – video’ *The Guardian Online*, 13 October 2015-<<https://www.theguardian.com/us-news/video/2015/oct/13/exclusive-torture-report-from-aclu-cia-video> on 15 July 2016 (hereafter referred to as ‘ACLU torture report video’>.

ernment for the torture programme.⁷⁵ Steven Reisner explains that both Jessen and Mitchell believed that once a person is psychologically broken down they will be more compliant to interrogation methods. They used this opportunity to test the ‘Learned Helplessness Theory’ (LHT), which, according to Reisner, basically came down to human experimentation. Dogs were used in initial experimentation with LHT.⁷⁶ During these experimentations the dogs would be subjected to terrible experiences so severe and continuous that the subject lost the capacity to make healthy assessments and just learned to be in a perpetual state of helplessness.⁷⁷

3 Focus on Africa

Although extraordinary rendition was largely perpetrated by the US Government, the use of this tool and the TCID that associated with it, would not have been possible without the assistance of foreign governments. This assistance could be granted through direct and indirect means. A brief discussion of the participation of African countries in extraordinary rendition follows.

3.1 *African government participation in torture or cruel, inhuman or degrading treatment*

African countries have contributed to the TCID of many individuals, whether by direct or indirect contribution. Even though some countries did not physically partake in the US EITs, the assistance rendered to the US directly led to the ultimate mistreatment of many individuals. Some of these cases are discussed below.

3.1.1 Egypt⁷⁸

Egypt partook in the torture of Ahmed Agiza, an Egyptian national who was living in Sweden with his family at the time of his capture. He was waiting for the determination of his political asylum application when he was captured. Despite giving assurances to Sweden that he will not be tortured, he was subjected to electric shocks in Egyptian custody.⁷⁹ After complaining about the torture to Swedish

⁷⁵ ACLU torture report video, 2015.

⁷⁶ ACLU torture report video, 2015.

⁷⁷ ACLU torture report video, 2015.

⁷⁸ Singh, ‘Globalizing torture: CIA secret detention and extraordinary rendition’, 30.

⁷⁹ Hall J ‘Still at risk: Diplomatic assurances no safeguard against torture’ 17 *Human Rights Watch*, 2005, 57 -<<https://www.hrw.org/sites/default/files/reports/eca0405.pdf>>; Singh, ‘Globalizing torture: CIA secret detention and extraordinary rendition’, 30.

embassy officials, he was threatened with more torture.⁸⁰ To date Egypt denies any involvement in the capture, detention and torture of Ahmed.⁸¹

3.1.2 Tanzania and Djibouti⁸²

In 2003, Tanzania assisted in the capture of Mohammed al-Asad and his subsequent transfer to Djibouti.⁸³ He was held incommunicado in Djibouti for approximately two weeks before being transferred to various prisons and being subjected to EITs. He was only released in 2006, without being charged for any terrorism-related crimes. He sought justice for his treatment by approaching the African Commission on Human and Peoples' Rights and brought a case against Djibouti.⁸⁴ The case was eventually dismissed due to inadmissibility.⁸⁵

3.1.3 Malawi⁸⁶

In 2003, the Malawi National Intelligence Bureau assisted in the capture of Fahad al Bahli and his transfer to Zimbabwe, where he was held for a further two months.⁸⁷ Although US officials denied their involvement in this operation, Malawi confirmed that US authorities ran the operation.⁸⁸

3.1.4 Gambia⁸⁹

Jamil el-Banna and Bisher al-Rawi were arrested by Gambian authorities at Banjul Airport in 2002. El-Banna was transferred to other detention sites where he was held in leg shackles 24 hours a day, starved, beaten, kicked and dragged along

⁸⁰ Hall, 'Still at risk: Diplomatic assurances no safeguard against torture', 25.

⁸¹ Hall, 'Still at risk: Diplomatic assurances no safeguard against torture', 59.

⁸² Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 32.

⁸³ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 32.

⁸⁴ Djibouti also assisted in the capture of Gouled Hassan Dourad in 2004. Cf. Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 39.

⁸⁵ *Al-Asad v Djibouti*, ACmHPR Comm. 383/2010, Arguments for admissibility, 2011 -<<http://chrgj.org/wp-content/uploads/2013/01/Al-Asad-Arguments-on-Admissibility.pdf>>. More documents pertaining to the Al-Asad case can be accessed at <<http://chrgj.org/?s=al+asad>> on 3 March 2016.

⁸⁶ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 33-34.

⁸⁷ 'Malawi deports five suspected Al Qaeda members' *Fox News*, 23 June 2003 -<<http://www.foxnews.com/story/2003/06/23/malawi-deports-five-suspected-al-qaeda-members.html>> on 16 July 2016; Carroll R, 'How five Muslims in Malawi were spirited away in the night' *The Guardian Online*, 21 August 2011 -<<https://www.theguardian.com/world/2003/aug/21/terrorism.comment>> on 4 June 2016.

⁸⁸ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 33. Malawi also assisted in the capture of Khalifa Abdi Hassan and his subsequent transfer to Zimbabwe and finally Sudan. Cf. Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 42.

⁸⁹ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 34.

corridor floors while shackled. He also alleges that he was unable to sleep due to the screams of other detainees. Before his transfer to Bagram Air Force base, he was severely beaten. US soldiers later photographed his extensive injuries.⁹⁰ He was eventually released in 2007 without any formal charges having been brought against him.

3.1.5 Sudan

Masaad Behari, a Sudanese citizen, was arrested at Amman airport in Jordan and held in detention close to the airport for approximately four months. During his detention in Amman he was struck on the soles of his feet with batons while hanging upside down. He was also doused with cold water and forced to walk on a salt strewn floor.⁹¹

3.1.6 Somalia and Ethiopia

Mohammed Ali Issue was captured in Somalia and eventually transferred to Ethiopia where he was held for months and subjected to torture by the US and Ethiopian authorities.⁹²

3.2 Case studies: The use of EITs on African nationals

There are various case studies concerning EIT's from the African continent. This section explores these case studies and their outcomes.

3.2.1 Suleiman Abdullah Salim⁹³

Suleiman is a Tanzanian fisherman from Zanzibar. He was captured in 2003 by a Somali warlord and handed over to the CIA, in whose custody he remained

⁹⁰ 'Biography of plaintiff Bisher Al-Rawi', *Amnesty International Online* -<<https://www.aclu.org/biography-plaintiff-bisher-al-rawi?redirect=national-security/biography-plaintiff-bisher-al-rawi>> on 21 July 2016.

⁹¹ 'Jordan's spy agency: Holding cell for the CIA' *Washington Post Online*, 1 December 2007-<<http://www.washingtonpost.com/wp-dyn/content/article/2007/11/30/AR2007113002484.html>>on 16 July 2016.

⁹² Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 44.

⁹³ ACLU torture report video, 2015; Ackerman S, 'Torture by another name: CIA used water dousing on at least 12 detainees' *The Guardian Online*, 16 October 2015-<<https://www.theguardian.com/law/2015/oct/16/cia-torture-water-dousing-waterboard-like-technique>>on 16 July 2016; Timm T, 'Torture is a war crime the government treats like a policy debate' *The Guardian Online*, 17 June 2015-<<https://www.theguardian.com/commentisfree/2015/jun/17/torture-war-government-treats-policy-debate>>on 16 July 2016.

for five years. He describes his experiences in detail during an interview with *The Guardian*. He notes that he kept insisting that he was innocent and could not comprehend why he was being beaten so badly. He now suffers from severe flashbacks during which he cannot eat, sleep or function normally. During his video interview it is clear that he is too upset to speak about certain events he endured. He suffers from flashbacks relating to incredible pain, which are so upsetting that he struggles not to vomit. He describes how he was detained in a cold, very dark, small room and notes that he could not see anything. He was shackled and subjected to water dousing. For this purpose he was forced to lie on a plastic floor cover and then doused repeatedly with frigid water, while continuously being kicked in the stomach. Thereafter, he was completely covered in the same cold plastic sheet and left in a freezing room. After this he was taken to an interrogation room where a big, bright light was shone directly into his face, then a new round of water dousing would begin. He noted that he wished for his own death. He was also shackled in stress positions for prolonged periods of time. Clara Usiskin, the Director of Justice Forum, who interviewed Suleiman, confirmed that his treatment was the worst of all those interviewed. It has since been proven that he was innocent but no official apology or compensation for his wrongful detention and torture was ever made.

3.2.2 Binyam Mohamed⁹⁴

Binyam is an Ethiopian citizen and a British resident. He was arrested and detained at JFK Airport. The US officials claimed that he was suspected of being a member of the Al-Qaeda terrorist group. He was detained in a brightly lit cell for the evening and interrogated for approximately eight hours. Before being sent to Syria he only met with his lawyer once. He was detained for ten months in Syria during which time he lost 19 kilogrammes due to malnutrition. He was detained in a dark cell that he described as a 'grave'. It was six feet long, seven feet high and three feet wide. Rats could enter the cell through a hole in the ceiling and cats urinated on him. He was beaten with a 5cm thick electric cable on his palms, hips and lower back. His captors also beat him with their fists and threatened to place him in a 'spine breaking chair' if he did not give them the information they were

⁹⁴ Maher Arar's story - <<http://www.maherarar.ca/mahers%20story.php>>; see also *Arar v Ashcroft*, F. Supp.2d, 2006 WL 346439 (E.D.N.Y.) United States District Court, E.D. New York; See also Wolf S, 'An emerging paradigm for the enforcement of human rights: How the courts' recent refusal to prosecute US agents for extraordinary rendition may create a new reinforcement model' 59 *The State University of New Jersey Rutgers Law Review*, 2007, 920; see also Maher A, 'They put a bag over my head and flew me to Syria for torture and interrogation: This is what they did to me', 6 November 2003 - <<http://www.counterpunch.org/arar11062003.html>> on 20 June 2008.

seeking. He was also threatened with electric shocks. He was eventually released on 5 October 2003 with no formal charges against him.

3.2.3 Majid Mokhtar Sasy al-Maghrebi

Majid is a Libyan national arrested in Pakistan in 2003. During his secret detention he was forced to endure stress positions for prolonged periods, threatened with rape, beaten and dressed in a diaper without being permitted to use bathroom facilities.⁹⁵

3.2.4 Abu Bakr Muhammed Boulghiti

Abu, also known as Abu Yassir al-Jaza'iri, is an Algerian national captured in 2003 and held by the CIA.⁹⁶ He was allegedly held in a room where music was played constantly and he was so severely beaten that it caused permanent damage to his arm.⁹⁷ He allegedly confirmed that the guards at the prison were Russian but that the interrogators were American.⁹⁸

3.2.5 Ayoub ak-Libi (Mustafa al-Mahdi Jawda)

Ayoub is a Libyan national captured near Pakistan in 2004 and held in secret CIA detention. While detained he was placed in a continuously lit room with loud music, stripped naked and shackled for prolonged periods.⁹⁹

3.2.6 Fatima Bouchar¹⁰⁰

Fatima, a Libyan national, and her husband were captured in Kuala Lumpur and subjected to abuse and ill-treatment by the CIA. She reported that she was chained to the wall and not fed for five days even though she was four months pregnant at the time. She was eventually released, without charges being laid against her, shortly before the birth of her child.

⁹⁵ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 47.

⁹⁶ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 35.

⁹⁷ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 36, cf. 'Ghost prisoner: Two years in secret CIA detention' 19 *Human Rights Watch*, 2007, 23.

⁹⁸ 'Ghost prisoner: Two years in secret CIA detention', 23.

⁹⁹ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 46.

¹⁰⁰ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 36.

3.2.7 Ali Muhammed Abdul Aziz al-Fakhiri (Ibn al-Sheikh al-Libi)

This Libyan national was arrested in Pakistan in 2001. During his detention and various transfers he was badly beaten, subjected to forced nakedness and other forms of abuse. He was found dead in his prison cell in 2009.¹⁰¹

3.2.8 Masaad Omer Behari

Masaad is Sudanese and an Austrian resident. He was captured in January 2013 at Amman Airport while travelling to Vienna.¹⁰² He was one of many victims detained at the Jordan General Intelligence Agency. While in custody he was struck on the soles of his feet, hung upside down, doused with ice water and forced to walk on a salt-strewn floor with wounds on his feet.¹⁰³ He was eventually released in April 2013 with no formal charges being laid against him.¹⁰⁴

3.2.9 Ahmed Agiza

Ahmed is an Egyptian national and was secretly captured in Sweden. Before being handed over to the CIA, he was stripped, dressed in overalls, chained and shackled before transportation.¹⁰⁵ He was severely beaten and tortured in a prison in Egypt. During his first weeks of detention, no family members or other officials were allowed to meet with him.¹⁰⁶ During his detention he was held in a cell measuring two square metres, with no light or windows. He was subjected to extensive stress positions and was beaten and tortured repeatedly.¹⁰⁷

¹⁰¹ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 39.

¹⁰² Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 35.

¹⁰³ Singh, 'Globalizing torture: CIA secret detention and extraordinary rendition', 35-36. Cf. European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, 2007, Doc A6-0020/2007, para.105-106-<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN>> on 20 July 2016 (hereafter referred to as 'European Parliament Report').

¹⁰⁴ 'European Parliament Report', 106.

¹⁰⁵ 'Biography of plaintiff Ahmed Agiza' *American Civil Liberties Union Online* -<<https://www.aclu.org/biography-plaintiff-ahmed-agiza?redirect=national-security/biography-plaintiff-ahmed-agiza>> on 20 July 2016, cf. Singh A 'Globalizing torture: CIA secret detention and extraordinary rendition', 30.

¹⁰⁶ 'Biography of plaintiff Ahmed Agiza' *American Civil Liberties Union Online* -<<https://www.aclu.org/biography-plaintiff-ahmed-agiza?redirect=national-security/biography-plaintiff-ahmed-agiza>> on 20 July 2016, cf. Singh A 'Globalizing torture: CIA secret detention and extraordinary rendition', 30.

¹⁰⁷ 'Biography of plaintiff Ahmed Agiza' *American Civil Liberties Union Online* -<<https://www.aclu.org/biography-plaintiff-ahmed-agiza?redirect=national-security/biography-plaintiff-ahmed-agiza>> on 20 July 2016.

4 Legal instruments applicable to TCID

Taking the above into account it is important to draw a clear distinction between acts constituting cruel, inhuman and degrading treatment and acts that rise to the level of torture. In this regard a brief account of the existing case law will be provided. It has become apparent from case law that acts amounting to torture may include severe beatings, death threats, threats of amputating extremities, inflicting burn wounds, administering electrical shocks to genitalia or threatening such shocks, rape, sexual assault and forcing detainees to watch the torture of others.¹⁰⁸ The latter certainly creates a wide range of acts that can be proven to amount to torture. The question that remains is whether acts of ill-treatment should be considered as a cumulative whole, or if each act of ill-treatment should be considered individually to ascertain if the ill-treatment has escalated from cruel, inhuman and degrading treatment to torture. The following cases provide a general guideline in this regard.

In the case of *Mehinovic v Vuckovic*,¹⁰⁹ brought before the US district court, the plaintiffs sued Mr Vuckovic for subjecting them to TCID. The applicants were beaten with blunt objects and subjected to kicking or stamping on parts of the body that Mr Vuckovic knew to be injured. They were hung against windows and beaten, they received beatings to their genitalia, they were made to run in a circle while men swung wooden planks at them and they were subjected to the game of 'Russian roulette'. Other plaintiffs were beaten to the point of unconsciousness, they were forced to watch the torture of others, and their teeth were forcibly extracted. The court held that all the beatings constituted torture. The plaintiffs suffered severe mental and physical trauma. The mental harm inflicted upon them was of such duration and extent that it amounted to torture. The threatened infliction of severe physical pain or imminent death was always present. Although not explicitly stated, this judgment seems to support the argument that acts of ill-treatment should not be judged on an individual basis, as the cumulative effect of these acts created such a form of physical and mental trauma that it escalated to torture.

¹⁰⁸ Smith R 'Gonzales defends transfer of detainees' *Washington Post* A03, 8 March 2005-<<http://www.washingtonpost.com/wp-dyn/articles/A15130-2005Mar7.html>>on 12 November 2015, 25, (hereafter referred to as 'the Gonzales memo').

¹⁰⁹ *Mehinovic v Vuckovic* (2002), 198.

In the *Öcalan*¹¹⁰ case decided by the European Court of Human Rights (ECtHR), on the other hand, the opposite was held during the judgment. *In casu*, the Court opted to consider the components¹¹¹ of the detainee's arrest separately, and concluded that individually not one of the acts committed against them constituted a violation of article 3 of the ECHR in itself¹¹² and therefore it did not amount to torture.

In *Selmouni v France*,¹¹³ however, the ECtHR came to a different conclusion after considering the components of arrest collectively.¹¹⁴ These components included: countless blows inflicted upon Mr Selmouni, being dragged along by his hair, being forced to run down a corridor with police officers stationed on either side ready to trip him, being made to witness the exposure of a police officer's genitals, being urinated on, and being threatened with syringes and blowlamps.¹¹⁵ The ECtHR concluded that, considered on the whole, these actions constituted torture and would have been heinous and humiliating for any person.¹¹⁶ By so doing, the ECtHR reaffirmed that acts should not be considered individually when ascertaining if they constitute torture but rather as a collective whole.

The International Covenant on Civil and Political Rights (ICCPR) also applies to and prohibits TCID.¹¹⁷ The UN Human Rights Committee (CCPR) states that this is an absolute right and that there can be no derogation from it in any circumstance.¹¹⁸ The CCPR also interpreted the torture prohibition in the ICCPR to include

¹¹⁰ *Öcalan v Turkey* (2003) ECtHR Application 46221/99. Please note pronouncement of further judgment by the Grand Chamber in 2005: *Öcalan v Turkey* ECtHR Judgment of 12 May 2005. The Grand Chamber asserted the same findings as the Chamber in its 2003 judgment.

¹¹¹ Including handcuffing, blindfolding and humiliation.

¹¹² Künzli A, 'Öcalan v Turkey: Some comments' 17 *Leiden Journal of International Law*, 2004, 148.

¹¹³ *Selmouni v France*, Application 25803/94, ECtHR Judgment of 28 July 1999.

¹¹⁴ *Selmouni v France*, 105. This seems to be more in line with the *Mehinovic* judgment discussed above.

¹¹⁵ *Selmouni v France*, 102-103.

¹¹⁶ *Selmouni v France*, 105: 'Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused 'severe' pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.'

¹¹⁷ Article 7, *International Covenant on Civil and Political Rights*, 19 December 1966 (ICCPR). This article also states that no one shall be subjected to medical or scientific experimentation without his consent.

¹¹⁸ 'General comment no. 20: Replaces general comment 7 concerning prohibition on torture and cruel treatment or punishment (Art. 7): 03/10/1992 CCPR general comment no. 20' *Office of the High Commissioner for Human Rights*, 1992- <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed-004c8ae5](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed-004c8ae5)>para. 3 (hereafter referred to as 'CCPR Comment 20') which states: 'The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed

the non-refoulement rule,¹¹⁹ citing the *Soering*¹²⁰ case as motivation:¹²¹

It would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to CID as prescribed by Article 3.¹²²

The Committee against Torture created by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹²³ concluded that the provisions of the CAT are absolute and apply globally, whether in times of peace or war.¹²⁴ Article 3(1) of CAT states:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Although norms prohibiting torture apply to extraordinary rendition, the non-refoulement rule is the most important as it prohibits the transfer of individuals to

and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.’

¹¹⁹ Paragraph 9 of the CCPR Comment 20 specifically calls upon states not to ‘expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.’ The following conventions also support the non-refoulement rule: Article 33(1) of the RC which states ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’, and article 3(1) of CAT. Cf. Sadat (2007) 1223, Sadat LN, ‘Ghost prisoners and black sites: Extraordinary rendition under international law’ 37 2006 *Case Western Reserve Journal of International Law*, 322.

¹²⁰ *Soering v the United Kingdom*, ECtHR Application 14038/88, ECtHR Judgment 7 July 1989.

¹²¹ *Soering v the United Kingdom*, in which the European Convention of Human Rights was interpreted. Cf. Satterthwaite, ‘Rendered meaningless: Extraordinary rendition and the rule of law’, 358.

¹²² *Soering v the United Kingdom*, 88.

¹²³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984.

¹²⁴ Committee against Torture Report on the US, 2006, para. 14 where the Committee stated: ‘The State party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction [...]’

countries where they face torture.¹²⁵ This rule is of specific importance to African involvement in extraordinary rendition and subsequently TCID. As detailed in preceding paragraphs, various African governments knowingly participated in the US EITs, by either transferring or assisting in the transfer of individuals to locations where they knew EITs were likely to be used.

The CAT provides that interrogation personnel need to be trained to act in accordance with CAT, and must therefore be educated and duly informed with regard to the universal prohibition of torture and the injunction imposed by international conventions to ensure that interrogation practices and guidelines are subjected to regular review.¹²⁶ EITs clearly violate this rule and all governments participating in the administering of EITs, whether through direct or indirect means, are also violating the rules as prescribed by CAT above.

Article 2(3) of the ICCPR further states that each state party to the ICCPR shall be obligated to ensure that any person whose rights have been infringed will have recourse to a proper remedy, regardless of whether the violation was committed by someone in official capacity or not. It further stipulates that each state party shall be obligated to ensure that the right of the said injured party to have recourse to a proper remedy, which remedy shall be decided and pronounced upon by a competent court or tribunal, and that such competent tribunal shall enforce the remedy decided upon. Furthermore, appropriate administrative measures are to be implemented by state parties to ensure full realisation and protection of the rights contained in the ICCPR within the national and domestic jurisdiction of the state party concerned.¹²⁷

Article 7 of the ICCPR lays down the anti-torture rule, and the right of each person not to be treated in any cruel, inhuman or degrading way. The CCPR broadened the scope of application for this article. It determined that in order to protect an individual from torture, the state should not only refrain from using torture methods, but should also apply due diligence to ensure that the individual is safe from any threats of torture by a third party.¹²⁸

There are numerous reported cases of extraordinary rendition associated with torture. The Special Rapporteur confirmed that condoning torture is a vio-

¹²⁵ Satterthwaite, 'Rendered meaningless: Extraordinary rendition and the rule of law', 1355.

¹²⁶ Article 10 and 11, *Convention against Torture (CAT)*.

¹²⁷ CCPR General comment No. 31 Nature of the general legal obligation imposed on states parties to the Covenant, 26 May 2005, para. 15.

¹²⁸ Weissbrodt *et al* 'Extraordinary rendition: A human rights analysis', 13.

lation of the international convention that protects the universal human right to be protected against the possibility of being subjected to torture; further that no domestic laws may be written to the effect that they can be regarded as condoning torture in any form whatsoever, nor may any such domestic law be wilfully interpreted to condone torture.¹²⁹ Therefore, anyone condoning or actively participating in torture under the aegis of a state party is deemed to be in violation of the prohibition that protects the right of persons to be free from the possibility of subjection to torture.

5 Potential strategies for dealing with EITs within the African framework

Considering the Malabo Protocol¹³⁰ and proposed creation of the African Court of Justice and Human and Peoples' Rights (ACJHPR), one can argue that this should at least offer some sort of recourse to African nationals. The ACJHPR will have jurisdiction over a host of international crimes under its proposed international crimes section. The court will have jurisdiction over the four core crimes in the Rome Statute of the International Criminal Court (Rome Statute),¹³¹ which include TCID, as well as other crimes specifically provided for in articles 28A through to 28N.¹³²

Article 28C of the Malabo Protocol also deals with crimes against humanity and includes the crime of torture, cruel, inhuman and degrading treatment or punishment.¹³³ The issue here would be the fact that the Malabo Protocol requires ratification from fifteen member states of the African Union (AU) to enter into force.¹³⁴ Therefore, the actual prosecution through the Malabo Protocol would have to wait until the court has been established. This could be problematic as the burden

¹²⁹ UN General Assembly session 59, *Report of the Special Rapporteur on torture and any other cruel, inhumane or degrading treatment*, 1 September 2004, UN Doc. A/59/324, para. 15; See also Weissbrodt *et al* 'Extraordinary rendition: A human rights analysis', 135.

¹³⁰ 23 Ordinary Session of the Assembly of the African Union Malabo *Press Release 18/23rd AU Summit* - [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) on 28 September 2015.

¹³¹ *Rome Statute of the International Criminal Court*, 1998.

¹³² Draft 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* - https://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf on 29 September 2015.

¹³³ Article 28C (1) (d), Malabo Protocol.

¹³⁴ Article 11(1), Malabo Protocol.

of proof will become more cumbersome with delay, nevertheless this could provide a possible recourse for victims.

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 TCID. The individuals responsible for assisting in US EITs could be held accountable by their governments through domestic judicial systems, even if courts have to rely on international custom. In doing this, African states would stay 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 within the proposed amended Statute of the ACJHR.

The citizens subjected to these harsh EITs deserve justice for all they have suffered at the hands of their own governments. It is the responsibility of the African governments to look after their own and to ensure that any and all assistance required is rendered to these individuals. Many of these victims will carry the psychological scars of their treatment for the rest of their lives. Being able to ensure justice for the wrong done only goes a little way toward assisting these individuals, and therefore this is the very least these governments can do.

The arguments above are all made with the intention of ensuring the victims receive due justice for the crimes committed against them. Due to the clandestine nature of extraordinary rendition it can, at this stage, not be proven whether extraordinary renditions are in fact continuing or not. This chapter does not propose to investigate the latter but rather to argue that the wrongs done cannot and should not be swept under the rug. The crimes committed cannot be forgotten and all victims need to have proper access to justice.

6 Conclusion

The ICCPR, CAT¹³⁵ and the Geneva Conventions require states to criminalise and investigate acts of torture committed by their officials or by persons acting at the instance of such officials.¹³⁶ As noted above, states are also obliged to adhere to the principle of non-refoulement.

¹³⁵ Article 4, *Convention against Torture (CAT)* provides that '1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

¹³⁶ Satterthwaite *et al* 'Torture by proxy: International law applicable to 'extraordinary renditions', 10.

African government participation in extraordinary rendition led to various cases of TCID committed against African nationals. It is incomprehensible that instead of safeguarding their nationals, African governments expose (or assist in exposing) their nationals to this heinous treatment. No respect is given to international custom, international legal instruments and national legal frameworks prohibiting such conduct on the part of governments. African governments are therefore equally responsible for the effects of extraordinary rendition as the US. Most African governments involved have made no effort to hold anyone accountable for the atrocities committed against its citizens, and in some cases even denied relief to citizens based on technicalities.¹³⁷

Considering the Malabo Protocol¹³⁸ and proposed creation of the ACJHPR, one can argue that this should at least offer some sort of recourse to African nationals. The ACJHPR will have jurisdiction over a host of international crimes under its proposed international crimes section. Therefore, the ACJHPR will have jurisdiction over the four core crimes in the Rome Statute,¹³⁹ which include TCID, as well as other crimes specifically provided for in Articles 28A through N of the Malabo Protocol.

Article 28C of the Malabo Protocol also deals with crimes against humanity and includes the crime of torture, cruel, inhuman and degrading treatment or punishment.¹⁴⁰ The difficulty here would be the fact that the Malabo Protocol requires ratification from fifteen member states of the AU to enter into force.¹⁴¹ Therefore, the actual prosecution through this means would have to wait until the ACJHPR has been established. This could be problematic, as the burden of proof will become more cumbersome with delay.

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 of TCID. The individuals responsible for assisting in US EITs could be held accountable by their governments through domestic judicial systems, even if courts have to rely on international custom. African states should hold true to their commitments to promote and enforce

¹³⁷ Refer to Suleiman's case above.

¹³⁸ 23 Ordinary Session of the Assembly of the African Union, Malabo, *Press Release 18/23 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)> on 28 September 2015.

¹³⁹ Rome Statute of the International Criminal Court, 1998.

¹⁴⁰ Article 28C (1) (d), Malabo Protocol.

¹⁴¹ Article 11(1), Malabo Protocol.

international laws by holding those within their jurisdiction accountable for their crimes, either through domestic enforcement or through exploring possible options within the Malabo Protocol. The citizens subjected to these harsh EITs deserve justice for all they have suffered at the hands of their own governments. It is the responsibility of the African governments to look after their own and to ensure that any and all assistance required is rendered to these individuals. Many of these victims will carry the psychological scars of their treatment for the rest of their lives. Being able to ensure justice for the wrong done only goes a little way toward assisting these individuals, and therefore this is the very least these governments can do.

CHAPTER 9

KENYA'S INTERNATIONAL LAW OBLIGATIONS TOWARDS VIOLENCE AGAINST WOMEN: MINDING THE IMPLEMENTATION GAP

ANNE-CHARLOTTE RECKER

Abstract

Sexual and gender-based violence (SGBV) is a gross violation of human rights. It is also an obstacle to gender equality, public health, and economic development. While men and boys can be victims of SGBV, this chapter focuses on violence against women and girls, as primary victims. In 2013, 45% of women in Kenya between the ages 15-49 years old experienced either physical or sexual violence. With an increase in violations and the acknowledged underreporting of such cases, impunity with respect to violence against women (VAW) remains prevalent in Kenya. Being party to most international legal instruments concerning VAW, Kenya has an obligation under international law to prevent, investigate, prosecute and punish perpetrators of sexual violence. The lack of guidelines concerning domestication and implementation of the principles under the international legal framework on VAW at a national level hinders the implementation process.

This chapter argues that Kenya fails to a large extent to discharge its international law obligations on VAW. It aims to discuss the gaps between the international legal framework on VAW and its domestic implementation. It will seek to understand the challenges in the fight against impunity, especially those related to the investigation, prosecution and adjudication of VAW and those arising from cultural perceptions. It also attempts to propose strategies to overcome these challenges.

OBLIGATIONS KENYANES EN VERTU DU DROIT INTERNATIONAL VERS LA VIOLENCE CONTRE LES FEMMES: PRENDRE CONSCIENCE DES LACUNES DE LA MISE EN OEUVRE

Résumé

Les violences sexuelles et sexistes constituent une violation grave et généralisée des droits de l'homme. C'est également un obstacle à l'égalité entre les sexes, à la santé publique et à la croissance économique. Alors que les hommes et les garçons peuvent être victimes de la violence sexuelle et sexiste, ce chapitre se concentre sur la violence à l'égard des femmes et des filles, en tant que principales victimes. En 2013, 45% des femmes kenyanes âgées de 15 à 49 ans ont subi des violences contre les femmes ou physiques. Compte tenu des niveaux croissants des violences sexuelles et sous-reportage reconnu en la matière, l'impunité dans les cas de violences contre les femmes demeure endémique au Kenya. En tant que signataire de la plupart des instruments juridiques internationaux portant sur les violences sexuelles et sexistes, le Kenya est tenu en vertu du droit international de prévenir les violences sexuelles, mettre en oeuvre les enquêtes nécessaires et réprimer les auteurs de tels actes. Cependant, l'absence de directives concernant la domestication et la mise en oeuvre des principes dans le cadre juridique international sur les violence contre les femmes au niveau national présente un obstacle majeur à la lutte contre les violences sexuelles et sexistes au Kenya.

Il est soutenu que le Kenya échoue, dans une large mesure, à remplir ses obligations de droit international en matière de violences scontre les femmes. Cet article vise à aborder la lacune entre le cadre juridique international sur les violences contre les femmes et sa mise en oeuvre au niveau national. Il cherchera à comprendre les défis dans la lutte contre l'impunité, en particulier ceux relatifs à l'enquête, à la poursuite et au jugement de tels crimes ainsi qu'aux défis issus de perceptions culturelles. Il contient également des recommandations pour surmonter ces défis.

1 Introduction

Sexual and gender-based violence (SGBV) constitutes a gross violation of human rights.¹ While men and boys can be victims of SGBV, this chapter focuses on violence against women and girls as primary victims.

Violence against women (VAW) takes many forms and is understood as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm, or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'² VAW is a global issue.³ 35% of women in the world and 45% of women in Africa have experienced VAW in their lifetime.⁴ In Kenya, 39% of women have experienced some form of VAW after the age of 15,⁵ and 51% of women visiting antenatal clinics in Nairobi reported having been victims of violence (65% of these women were reportedly victimised by their husbands).⁶ VAW affects not only the physical and mental health of victims, but it also hinders gender equality and economic development.⁷

States have an obligation under international law to prevent, investigate, prosecute and punish perpetrators of sexual violence.⁸ Unlike other areas regulated by

¹ UNGA, *Secretary-General's study on violence against women*, Background documentation for 61st session of the General Assembly Item 60(a) on advancement of women, 30 April 2006, UN Doc A/61/122/Add. 1, para 1.

² UNGA, *Declaration on the elimination of violence against women*, A/RES/48/104 23 February 1994, Article 1.

³ Aura R, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya: challenges and opportunities' *Kenya Law Reporting*, 2014, 2 <http://kenyalaw.org/kl/index.php?id=4512> on 16 December 2016; 61st session of the General Assembly Item 60(a) on advancement of women, Background documentation, 2006, para 1; Crahan M (ed), *Human rights and basic needs in the Americas*, Georgetown University Press, Washington DC, 1982, ix, stating that 'No human problem transcends national boundaries to the degree that violations of human rights do, not only in terms of the causes, but also in the search for solutions.'

⁴ <http://www.afro.who.int/en/uganda/press-materials/item/6659-east-african-experts-deliberate-on-gender-based-violence.html> on 13 November 2016.

⁵ Kenya National Bureau of Statistics, *The demographic and health survey 2008-2009*, 2010, 248.

⁶ East African Community, *Report on the HIV - Sexual and gender-based violence symposium*, Kigali, 28 March 2013.

⁷ United Nations Children's Fund, *Domestic violence against women and girls, Innocenti Digest*, No. 6, 2000, 9.

⁸ See, for example, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13; UNGA, *Declaration on the elimination of violence against women*; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3; *African Charter on the Rights and Welfare of the Child*, 11 July 1990; Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, 15 September 1995;

international law,⁹ the international legal framework on VAW has so far produced little guidance on the challenges surrounding its implementation on the domestic level.¹⁰

Kenya is party to most international legal instruments seeking to prevent gender inequality and discrimination (both major causes of VAW in Kenya) and to protect women and children from violence, including sexual violence. In spite of having committed to the prescriptions under international law on the fight against VAW, Kenya fails to a large extent to abide by its international legal obligations. Indeed, despite recent strides, there remains room for improvement. The legislative framework remains insufficient, investigations remain poor, prosecutions yield insufficient success, and stakeholders lack coordination. More sensitisation is required within the judiciary, the needs of survivors are not addressed sufficiently and socio-cultural barriers to gender equality and to reducing sexual violence remain.¹¹

African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217; and *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003.

⁹ See, for example, The Basel Committee on Banking Supervision (BCBS) <https://www.bis.org/bcbs/> on 16 December 2016.

¹⁰ It should be noted that guidelines on the investigation and prosecution of sexual violence exist, for conflict settings. However, these are only partly relevant to peacetime investigations and prosecutions, given the difference in context and the different legal framework applicable. Moreover, they do not cover a broad range of sexual violence occurring in Kenya, such as marital rape, domestic violence, trafficking in women and forced prostitution, female genital mutilation (FGM) and gang rape. The very few guidelines and recommendations on investigations and prosecutions of sexual violence in peacetime setting and applicable to Kenya that could be found are not sponsored by the international fora, and are limited in dissemination. See, for example, University of California School of Law Human Rights Center, *The long road: Accountability for sexual violence in conflict and post-conflict setting*, 2015.

¹¹ Amongst others: Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 3, 15, 19, 20, 21; East African Community, *Report on the HIV - Sexual and gender-based violence symposium*, 4, 11; Lichuma W, 'Kenyan's experience legislating the Sexual Offences Act' 17th Pre-Summit Consultative Meeting on Gender Mainstreaming in the African Union, Addis Ababa, 24-26 January 2011, slide 10 <http://www.fasngo.org/assets/files/17%20GIMAC%20Pre-Summit/The%20Experince%20of%20legislating%20the%20Kenya's%20Sexual%20Offences%20Act.pdf> on 12 November 2016; Tobiko K, 'Responses to Sexual and Gender based Violence (SGBV) in Kenya,' University of California School of Law Human Rights Center, *The long road*, 2011, 2,3; Stefiszyn K, 'The African regional response to gender-based violence,' in Delpont E (ed) *Gender based violence in Africa: Perspectives from the continent*, Pretoria University Law Press, Pretoria, 2007, 30; A speech by the Kenya Director of Public prosecutions during the national consultations leading to the International Conference on the Great Lakes Region (ICGLR) special session on SGBV, October 2011, 25-26 in ICTJ, *The accountability gap on sexual violence in Kenya: Reforms and initiatives since the post-election crisis*, April 2014, 10; Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 12, 31, 54; Mutunga W, 'The launch of the national sexual offenders register and presentation of the draft rules under the Sexual Offences Act 2006' Naivasha, 2011, 5;

Faced with rising cases of VAW,¹² coupled with widespread underreporting,¹³ and impunity in respect of VAW, Kenya seems to be in breach of its international law obligations as regards VAW.

This chapter aims to discuss the gap between the international legal framework on VAW and its domestic implementation in Kenya. Following a short overview of international and domestic legal frameworks addressing VAW, the chapter explores current challenges in the fight against impunity with respect to the investigation, prosecution and adjudication of VAW cases as well as challenges arising due to cultural perceptions regarding VAW in Kenya. The chapter concludes by offering a number of reflections for overcoming hurdles to the implementation of international legislation against VAW in Kenya.

2 Legal framework on VAW relating to Kenya

This section will seek to examine the gap between the international legal framework on VAW and its domestic implementation in Kenya. It will do so by focusing on the international and domestic legal frameworks concerning VAW. It will then successively discuss the investigation, prosecution and adjudication phases for cases of VAW, before moving on to socio-cultural barriers to reducing VAW.

Comprehensive legislation is fundamental for an effective response to violence against women. Kenya has obligations under international law to enact, implement and monitor legislation addressing violence against women, and has adopted or improved legislation to prevent and respond to violence against women. However, significant gaps remain.

This section will give an overview of the international and Kenyan legal frameworks addressing VAW.

¹² Monitoring and Evaluation Directorate of the Kenyan Ministry of Planning and National Development, *The third annual progress report (2005-2006)*, 124, Kenya Economic Survey 2008 and Kenya Police Service.

¹³ Consider, for example, the following passage from the speech of Chief Justice Dr Willy Mutunga (as he was then) at the launch of the national sexual offenders register and presentation of the draft rules under the Sexual Offences Act, 2006: 'Both official police and health statistics here in Kenya reflect a high incidence rate of such offences, rating sexual offences only second to common assault. Yet we know that due to stigma, cultural taboos and inadequate information, there are many more cases that do not reach formal institutions in the criminal justice system.' Mutunga W, 'The launch of the national sexual offenders register and presentation of the draft rules under the Sexual Offences Act 2006,' Naivasha, 2011, 5.

2.1 *The legal framework on VAW under international law*

Kenya has ratified the major international human rights instruments¹⁴ under which State parties are obliged to respect, protect, promote and fulfil human rights as follows:

The duty to respect requires the state not to do anything that infringes on the rights of the individual. The duty to protect requires the state to ensure that third parties such as other individuals do not infringe on the rights of the individual. Finally, the duty to fulfil requires the state to take positive measures to ensure that the individual enjoys all rights in practice.

[...] the duty to promote requires the state to ensure people are aware or educated of their rights.¹⁵

With the advent of the new Constitution of Kenya (2010 Constitution),¹⁶ it remains debatable whether international law has become directly applicable in Kenyan courts without the need for implementing legislation. Nonetheless, as a signatory to all major international instruments in the fight against VAW, Kenya has shown exemplary commitment to the prohibition of VAW, at least in terms of the letter of the law.

The international and regional legal framework on human and women's rights include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Declaration on the Elimination of Violence against Women (DEVAW), the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the Beijing Platform for Action (BPFA), the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). These offer a tapestry of the existing framework supporting the prohibition of violence against women in Kenya.

The above mentioned legal instruments give states wide discretion in enacting domestic laws to discharge their international legal obligations towards violence against women. For instance, the Resolution on the Right to a Remedy and Repara-

¹⁴ Kenya acceded, for example, to the *International Covenant on Civil and Political Rights* on 1 May 1972.

¹⁵ Biegon J, 'The inclusion of socio-economic rights in the 2010 Constitution: Conceptual and practical issues' in Biegon J and Musila G (eds), *Judicial enforcement of socio-economic rights under the new Constitution: Challenges and opportunities for Kenya*, Konrad Adenauer Stiftung, Nairobi, 2012, 22.

¹⁶ Article 3(4) and Article 2(5) and (6), *Constitution of Kenya* (2010).

tion for Women and Girls Victims of Sexual Violence urges states to 'criminalise all forms of sexual violence [and] ensure that the perpetrators and accomplices of such crimes are held accountable by the relevant justice system.'¹⁷ CEDAW affirms the obligation on state parties to legislate and take all appropriate measures to end violence against women and to ensure full development and advancement of women.¹⁸ CEDAW also enjoins states to ensure that effective legal measures, including penal sanctions and civil remedies are taken to protect women against all kinds of violence.¹⁹ Further, CEDAW calls on States parties to 'pursue by all appropriate means and without delay a policy of eliminating violence against women' and to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.'²⁰

Moreover, during the Fourth World Conference on Women held in 1995 (Beijing Conference), states committed to adopting laws that would punish police, security forces or any other agents of the state engaging in acts of violence against women in the course of performance of their duties.²¹ The African Women's Protocol also affirms that

'States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity, and protection of women from all forms of violence, particularly sexual and verbal violence.'²²

It also enjoins states parties to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or public, and to 'adopt legislative, administrative, social and economic measures to ensure the prevention, punishment and eradication of all forms of violence against women.'²³

By ratifying or supporting these international instruments, successive governments in Kenya have recognised VAW as a violation of human rights, acknowl-

¹⁷ African Commission on Human and Peoples' Rights (ACmHPR), *Resolution on the right to a remedy and reparation for women and girls victims of sexual violence*, 42nd Ordinary Session (15-28 November 2007), Article 2.

¹⁸ Article 2, *Convention on the Elimination of All Forms of Discrimination against Women*.

¹⁹ Article 4(d), *Convention on the Elimination of All Forms of Discrimination against Women*.

²⁰ Article 4(c), *Convention on the Elimination of All Forms of Discrimination against Women*.

²¹ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.o.

²² Article 3(4), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

²³ Articles 4(2)(a) and (b), *African Women's Protocol*.

edged its magnitude and gravity and pledged to fight against it. Despite these efforts, violence against women and girls in Kenya is still rampant.

2.2 *The Kenyan legislative framework on VAW*

The recognition of VAW as a human rights violation represents a major achievement in international law. While in many patriarchal societies sexual violence was previously considered to be a private matter; it is now a public matter, at least in the letter of the law.²⁴ In the recent past, Kenya has endeavoured to enact more adequate laws concerning VAW and the 2010 Constitution is a step forward for the respect and protection of human and women's rights. However, in spite of the improvements in the law, their implementation remains unsatisfactory.

We will start by examining the 2010 Constitution, before moving on to the Sexual Offences Act, the Penal Code, the Protection against Domestic Violence Act as well as the Children's Act.

2.1.1 2010 Constitution

The 2010 Constitution brought about important changes in the country's legal landscape, particularly in relation to fundamental human rights. It emphasises the Government's responsibilities towards its citizens, and it gives an opportunity to victims of human rights violations to enforce their constitutional rights.

The Bill of Rights under Chapter 4 provides for human rights with an important bearing on gender equality, VAW and the rights of women and children.

Article 10(2) of the 2010 Constitution lists national values and principles of governance to include human rights, non-discrimination, equality, protection of marginalised persons and social justice. Article 10(1) binds all state organs and public officers to act according to these rules and, under Article 20(1), to respect the Bill of Rights.

At the outset, the Bill of Rights states that 'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of

²⁴ Oyoo OW, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya: The need to enact the protection against Domestic Violence Bill', 2012, 2 https://www.academia.edu/8428010/ASSESSING_THE_ADEQUACY_OF_THE_LAWS_DEALING_WITH_DOMESTIC_VIOLENCE_IN_KENYA_THE_NEED_TO_ENACT_THE_PROTECTION_AGAINST_DOMESTIC_VIOLENCE_BILL_2012 on 6 November 2016.

the potential of all human beings.²⁵ The rights protected under Chapter 4 include dignity,²⁶ freedom and security of the person²⁷ and, also included under the latter, the right not to be subjected to any form of violence from either public or private sources and the prohibition of torture or cruel, inhuman or degrading treatment.

Of particular significance to gender equality is the right to equality and freedom from discrimination. Article 27 of the 2010 Constitution explicitly states that men and women have the right to equal treatment and 'equal opportunities in the political, economic, cultural and social sphere.'²⁸ Moreover, the grounds on which the State and individuals are not to discriminate are broader than in the Repealed Constitution²⁹ and include sex, pregnancy, marital status and dress.³⁰ It is also noticeable that the 2010 Constitution provides for affirmative action, in order to 'give full effect to the realisation of the rights guaranteed under this Article.'³¹

Children are also protected from all forms of violence (including abuse, neglect, harmful cultural practices, inhuman treatment and punishment and hazardous or exploitative labour).³²

Further, the 2010 Constitution provides for specific protection of 'vulnerable groups,' including women and children³³ from any violation of the rights and fundamental freedoms recognised in the Bill of Rights. This also includes protection from sexual violence.

Article 21(4) of the 2010 Constitution, imposing on the State the obligation to enact and implement legislation to fulfil its international obligations, and Article 2(5) and (6), which state that international law can be applied directly by Kenyan courts, are also noteworthy in light of the numerous international and regional instruments on VAW to which Kenya is party.

2.2.2 The Sexual Offences Act, 2006

The Sexual Offences Act (SOA) was passed in 2006 to address gaps in the existing Penal Code with respect to sexual offences (for example, the Penal Code

²⁵ Article 19(2), *Constitution of Kenya* (2010).

²⁶ Article 28, *Constitution of Kenya* (2010).

²⁷ Article 29, *Constitution of Kenya* (2010).

²⁸ Article 27(3), *Constitution of Kenya* (2010).

²⁹ Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 14.

³⁰ Article 27(4), *Constitution of Kenya* (2010).

³¹ Article 27(6), *Constitution of Kenya* (2010).

³² Article 53(1)(d), *Constitution of Kenya* (2010).

³³ Article 21(3), *Constitution of Kenya* (2010).

contemplated that only girls and women could be raped). The SOA is a comprehensive law on sexual offences.³⁴ It expanded the definition of sexual offences in the Penal Code (for example, rape and defilement were amended to include both sexes); introduced 14 new sexual offences (including gang rape, incest by females, trafficking in children, child pornography, child sex tourism, prostitution and sexual offences against mentally impaired persons). SOA also created minimum and maximum mandatory sentences (for example, 10 years imprisonment is the minimum sentence for rape, and it can be increased to life imprisonment,³⁵ while under the Penal Code there was no minimum sentence); enhanced penalties for sexual offences; and limited the requirements concerning the burden of proof for victims.³⁶ It also provides for victims support in court.³⁷

The SOA makes it difficult for a complainant to withdraw a case without the leave of the court. This represents an attempt to prevent undue influence (bribery by the perpetrator, for instance) towards the complainant, which may cause her/him to withdraw the case.³⁸ New definitions such as ‘genital organs,’ ‘penetration’ and ‘indecent assault’³⁹ have also been introduced.

However, the SOA included a retrogressive provision that criminalised the making of false allegations leading to prosecution of an accused person. A person found guilty of this offence faces a sentence as severe as the accused person would have faced if found guilty.⁴⁰ This led to concerns that survivors of sexual violence would be reluctant to prosecute their cases for fears that they would be punished if the cases brought by them failed.⁴¹ This provision was however repealed.

Another gap in the SOA is the failure to criminalise marital rape,⁴² particularly as domestic and intimate partner violence are the first causes of violence against

³⁴ Oyoo, ‘Assessing the adequacy of the laws dealing with domestic violence in Kenya’, 22; University of California School of Law Human Rights Center, *The long road*, 24; Lichuma W, ‘Kenya’s experience legislating the Sexual Offences Act’ 17th Pre-Summit Consultative Meeting on Gender Mainstreaming in the African Union, Addis Ababa, 24-26 January 2011, slide 10 <http://www.fasngo.org/assets/files/17%20GIMAC%20Pre-Summit/The%20Experience%20of%20legislating%20the%20Kenya's%20Sexual%20Offences%20Act.pdf> on 12 November 2016.

³⁵ Section 3, *Sexual Offences Act* (Act No. 3 of 2006).

³⁶ Lichuma, ‘Kenyan’s experience legislating the Sexual Offences Act’.

³⁷ Section 31, *Sexual Offences Act* (Act No. 3 of 2006).

³⁸ Section 2, *Sexual Offences Act* (Act No. 3 of 2006).

³⁹ Section 2, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁰ Repealed Section 38, *Sexual Offences Act* (Act No. 3 of 2006).

⁴¹ Oyoo, ‘Assessing the adequacy of the laws dealing with domestic violence in Kenya’, 24; Lichuma W, ‘Kenyan’s experience legislating the Sexual Offences Act.’

⁴² Section 43(5), *Sexual Offences Act* (Act No. 3 of 2006);

women.⁴³ Further, in spite of being a progressive law, the SOA does not provide for concrete means to overcome cultural factors hindering access to justice for women.⁴⁴

The enactment of the SOA was not matched with adequate capacity building and sensitisation of law enforcement officers, prosecutors and members of the judiciary. Indeed, in addition to bias towards, and bad management of citizens reporting sexual offences, police prosecutors⁴⁵ often continued to charge offenders under the old law.⁴⁶ It is noticeable that this goes against provisions of the UNGA Declaration on the elimination of violence against women (DEVAW). Article 4(i) of DEVAW expressly requires states 'to ensure that law enforcement officers receive training to sensitise them to the needs of women.'⁴⁷

2.2.3 The Penal Code⁴⁸

The Penal Code prohibits a broad range of violent acts. However, it does not sufficiently address sexual violence, which is only inferred by virtue of interpreting the vice as an assault as provided for under Sections 250⁴⁹ and 251.⁵⁰ Moreover, while the offences under the Penal Code attract prison sentences, no remedies or reparations are provided for victims. The sentences imposed are aimed at punishing the accused, but the victim has no reparation at a personal level.⁵¹ This explicitly goes against both Kenya's obligations under international law to provide reparation and rehabilitation for survivors of VAW⁵² and thus needs to be addressed.

⁴³ Joint United Nations Programme on HIV/AIDS, *Violence against women and children in the era of HIV and AIDS: A situation and response analysis in Kenya*, 2006, 13; Kenya National Bureau of Statistics, *The demographic and health survey 2008-2009*, 2010, 250; East African Community, *Report on the HIV - Sexual and gender-based violence symposium*.

⁴⁴ Lichuma, 'Kenya's experience legislating the Sexual Offences Act', slide 10.

⁴⁵ As explained above, until 2010 in most VAW cases prosecutors were police officers and not trained legal staff of the ODPP.

⁴⁶ Lichuma, 'Kenya's experience legislating the Sexual Offences Act', slide 20.

⁴⁷ UNGA, *Declaration on the elimination of violence against women*, Article 4(i).

⁴⁸ Chapter 63, Laws of Kenya.

⁴⁹ 'Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided for in this code, is liable for imprisonment for one year'.

⁵⁰ 'Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable for imprisonment for five years.'

⁵¹ Oyoo, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya', 21.

⁵² *CEDAW Committee General Recommendation No. 19: Violence against women*, 1992, states that effective legal measures, including penal sanctions, civil remedies and compensatory provisions should be taken to protect women against all kinds of violence.

2.2.4 The Protection against Domestic Violence Act

The Protection against Domestic Violence Act, 2015 (PADVA) is an updated version of the various bills that have been mooted to curb domestic violence such as the Family Protection Bill, 2007.⁵³ PADVA gives a broad definition of the term domestic violence, which includes *inter alia* sexual abuse, physical abuse, harassment, psychological abuse, economic abuse and abuse derived from customary practices (such as female genital mutilation, forced marriage, virginity testing and widow cleansing).⁵⁴ It also introduces protection orders (the final order issued by a court in a domestic violence case).⁵⁵ The order can take various forms, including *inter alia* ordering the respondent to compensate the applicant for both monetary and non-monetary loss (arising from the domestic violence), separating the parties and offering medical care and shelter to the abused party.⁵⁶ It is notable that the procedure for applying for the order is victim-friendly. For instance, it makes provisions for the exclusion of parties not authorised by the court to attend the proceedings⁵⁷ and prohibits the publication of the victim's image in a newspaper⁵⁸ in order to protect the victim. The proceedings can also be held in private if the court so directs.⁵⁹

Moreover, PADVA is also clear that conduct constituting domestic violence under it does not by that reason alone preclude it from constituting an offence under any other law.⁶⁰ Thus, a person may still be liable in terms of separate legislation for an act of domestic violence.

The role of police officers in domestic violence matters has also been increased. Police officers are required to help an applicant under a protection order to obtain shelter and medical treatment and to assist the applicant in any suitable way.⁶¹ These provisions, if implemented correctly, would be in accordance with Kenya's obligations under international law. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) recommends civil remedies and compensatory provisions to be available to victims,⁶² while the African

⁵³ Oyoo, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya', 64.

⁵⁴ Section 3, *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁵⁵ Section 8, *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁵⁶ Section 19(5)(1), *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁵⁷ Section 35, *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁵⁸ Section 40, *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁵⁹ Section 35(3), *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁶⁰ Section 3(6), *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁶¹ Section 6 (1), *Protection against Domestic Violence Act* (Act No. 2 of 2015).

⁶² CEDAW General Recommendation 19.

Women's Protocol directs states to 'implement programmes for the rehabilitation of survivors; and establish [...] accessible services for [...] rehabilitation and reparation for victims').⁶³

However, in spite of being the only legislation in Kenya dealing exclusively with domestic violence, PADVA does not recognise marital rape as a form of domestic violence. It is argued here that this situation proceeds from societal perceptions grounded in traditional conceptions of women as property of the men who paid dowry and the customary law notion that marriage provides express consent to sexual intercourse,⁶⁴ marital rape is considered as conceptually impossible. It is distressing to note that in spite of domestic and intimate partner violence being the first causes of violence against women,⁶⁵ marital rape is not criminalised under Kenyan law. This leaves married women discriminated against and with little legal means to protect themselves. This goes against the principles contained in the international legal instruments on VAW that Kenya has ratified.⁶⁶ For instance, the African Women's Protocol specifically directs states parties to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public.⁶⁷ As stated by the CEDAW Committee, 'States may also be held responsible for private acts if they fail to prevent, investigate and punish acts of violence against women.'⁶⁸

2.2.5 Children's Act

The Children's Act⁶⁹ provides for the rights and welfare of children. It states that in all actions concerning children, the first consideration should be the best interest of the child,⁷⁰ thereby condemning violence against children. The provi-

⁶³ Articles 4(e) and (f), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

⁶⁴ Combrink H, 'Rape law reform in Africa: 'More of the same' or new opportunities' in McGlynn C and Munro VE (eds), *Rethinking rape law: International and comparative perspectives*, Routledge, New York, 2010, 123.

⁶⁵ Joint United Nations Programme on HIV/AIDS, *Violence against women and children in the era of HIV and AIDS*, 13; Kenya National Bureau of Statistics, *The demographic and health survey 2008-2009*, 250; East African Community, *Report on the HIV - Sexual and gender-based violence symposium*.

⁶⁶ Articles 1 and 2, *Universal Declaration of Human Rights*; Articles 2 and 6, *International Covenant on Civil and Political Rights*; Article 2, *Convention on the Elimination of All Forms of Discrimination against Women*.

⁶⁷ Articles 4(2)(a) and (b), African Women's Protocol.

⁶⁸ *CEDAW General Recommendation 19*.

⁶⁹ Act No. 8 of 2001.

⁷⁰ Section 4(2), *Children Act* (Act No. 8 of 2001).

sions under the Children's Act are very similar to those under the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. It protects children from all types of violence, including sexual exploitation,⁷¹ abuse and torture⁷² and harmful social and cultural practices.⁷³

It is noticeable that the National Child Protection Policy, intended to enhance the enforcement of the Children's Act, was only recently developed.⁷⁴ Research shows that insufficient resources have been allocated to the implementation of the Children's Act and that very few school-going boys and girls are aware of the existence of the Children's Department.⁷⁵ Kenya pledged to allocate sufficient resources to carry out the implementation of the Act.⁷⁶

Awareness of their rights is the basic requirement for the beneficiaries of these rights to claim and enjoy them. Via several international instruments, Kenya has committed itself to conduct information campaigns to this effect.⁷⁷ However, legal illiteracy remains a fundamental issue⁷⁸ that prevents many survivors from accessing the legal justice system.

2.2.6 Government policies

The Kenya Government has developed several policy documents aimed at facilitating the implementation of VAW-related laws. These efforts include the National Framework on Gender-Based Violence,⁷⁹ published in 2009. Applying a multi-sectoral approach, this Policy provides the essential procedures and services for management of survivors of sexual violence. Nevertheless, it lacks proper public dissemination.⁸⁰ The 2014 National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in

⁷¹ Section 15, *Children Act* (Act No. 8 of 2001).

⁷² Sections 13 and 18, *Children Act* (Act No. 8 of 2001).

⁷³ Section 14, *Children Act* (Act No. 8 of 2001).

⁷⁴ Kenya Girl Guide Association, *Combating gender based violence in Kenya*, Policy Brief, 2015, 2.

⁷⁵ Kenya Girl Guide Association, *Combating gender based violence in Kenya*, Policy Brief, 2015, 2.

⁷⁶ National Council for Children's Services, *The national children policy Kenya 2010*, 7.

⁷⁷ Including Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, 13.d; Articles 4(e) and (f), African Women's Protocol.

⁷⁸ Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 94; University of California School of Law Human Rights Centre, *The long road*, 32; Oyoo, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya', 66; Kenya Girl Guide Association, *Combating gender based violence in Kenya*, 4.

⁷⁹ Republic of Kenya, *National guidelines on the management of sexual violence in Kenya*, 2ed, 2009.

⁸⁰ Kenya Girl Guide Association, *Combating gender based violence in Kenya*, 3.

Kenya aims to create monitoring and evaluation framework and data management system for VAW.

Another policy document is the Multi-sectoral Standard Operating Procedures (SOPs) for Prevention of and Response to Sexual Violence in Kenya (2013), developed by the Task Force on the Implementation of the Sexual Offences Act (TFSOA). It documents a range of support services spanning healthcare, legal and psychosocial support to be accorded to survivors and outlines referral mechanisms. However, like the National Framework on Gender-Based Violence, the public lacks awareness of it.⁸¹ Without public awareness, policy documents have little impact and may not reach their objectives.

Kenya has taken legislative steps to combat VAW. However, the practical implementation remains fraught with challenges. The Kenya Government has recognised that, despite the inclusion of provisions concerning gender equality in the 2010 Constitution, discrimination towards women remains grounded in many different factors.⁸²

3 Investigation of VAW crimes

Investigation, just after the reporting stage, is the first phase in the criminal justice process and is primarily concerned with the collection of evidence, which is critical for the prosecution phase. The way in which police officers initially respond to victims reporting gender based violence is critical in determining whether a victim chooses to participate in further legal action, or abandons it (for example because she has experienced secondary victimisation or harsh treatment by representatives of the formal criminal justice system). It is therefore fundamental to the entire case. The police, healthcare providers and prosecutors are the main actors in this process.

3.1 Investigation of VAW under international law standards

The provisions regarding investigations and law enforcement officers under international law are very general in nature. For instance, DEVAW only stipulates that states should 'take measures to ensure that law enforcement officers and public

⁸¹ Kenya Girl Guide Association, *Combating gender based violence in Kenya*, 4.

⁸² Republic of Kenya, *The 7th periodic report of the Government of the Republic of Kenya on implementation of the international Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, para. 254.

officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women.⁸³

The African Women's Protocol directs states to ensure that 'appropriate measures are taken to ensure that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.'⁸⁴ Under the BPFA, states undertake to provide training on gender-sensitive human rights for police, military and correction officers, including training to sensitise personnel on the nature of gender-based acts and threats of violence so that fair treatment of female victims can be assured.⁸⁵ States also undertake to implement measures and programmes to increase knowledge of violence against women amongst law enforcement officers and police personnel and develop strategies to avoid re-victimisation of women victims of violence because of gender-insensitive laws or judicial or enforcement practices.⁸⁶ Further, states promise to create or strengthen institutional mechanisms to allow women and girls to report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation and case file charges.⁸⁷ The African Commission on Human and Peoples' Rights also urged states parties to the ACHPR to '[e]nsure that police and military forces as well as all the members of the judiciary receive adequate training on the principles of international humanitarian law, women's rights and the children's rights.'⁸⁸ There are thus no clear guidelines or recommendations on how the principles under international law should be implemented at a national level.

3.2 Investigation of VAW in Kenya

The Kenya Police as well as healthcare providers are crucial actors in the investigation phase. This section will first focus on the challenges faced by the Kenya Police, before developing on the hurdles faced in the healthcare sector. Lastly, we will discuss the coordination challenges between these two actors.

⁸³ UNGA, *Declaration on the elimination of violence against women*, A/RES/48(104) 20 December 1998, article 4(i).

⁸⁴ Article 8, African Women's Protocol.

⁸⁵ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.n; E5.o; I2.I; section D.121.

⁸⁶ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.g.

⁸⁷ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.l.

⁸⁸ African Commission on Human and Peoples' Rights, *Resolution on the right to a remedy and reparation for women and girls victims of sexual violence*, Article 2.

3.2.1 The Kenya Police

3.2.1.1 Lack of confidence in the police and underreporting of VAW

The reporting of sexual violence constitutes the first step towards the formal criminal justice system. It is the first phase in the survivor's search for accountability, and it should therefore be made as accessible as possible. Survivors should be able to disclose the criminal acts of VAW in appropriate conditions when reporting to the police.

However, a number of obstacles lead to underreporting of VAW. These include lack of confidence in law enforcement officers, practical hurdles⁸⁹ as well as social factors, which will be examined at a later stage.

The general lack of confidence by citizens in the police, and their perceived incompetence, prevents more widespread reporting of incidents involving VAW.⁹⁰ The laxity of law enforcement agents, who have been cited as unwilling to act upon complaints of violence and susceptible to bribery, is also frequently raised as a concern.⁹¹ The Kenyan Police Service has been trying to improve its image and its uneasy relationship with Kenyan citizens over the last years. However, repeated use of brutality in protests⁹² and accusation of extrajudicial killings have not helped their cause.⁹³ Following the recent brutal murder, allegedly by police officers, of a human rights lawyer, Willie Kimani (as well as the murder of his client and his taxi driver), who was representing a client making a complaint against the police for abuse of power, the National Police Service spokesman noted that 'there is pervading fear among the public as they believe that law enforcers are working with criminals.'⁹⁴ This situation goes against the prescriptions of international law, which provide that women and girls should be able to report acts of violence against them in a safe and confidential environment, without fear.⁹⁵

⁸⁹ University of California School of Law Human Rights Centre, *The long road*, 27.

⁹⁰ University of California School of Law Human Rights Centre, *The long road*, 37; Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 5; United Nations Children's Fund, *Domestic violence against women and girls*, 7.

⁹¹ Oyoo, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya', 4.

⁹² <https://www.hrw.org/news/2016/06/20/kenya-police-killings-during-protests> and <http://edition.cnn.com/2016/05/17/africa/kenya-police-violence/> on 11 November 2016.

⁹³ Kenya National Commission on Human Rights claims that the police carried out 25 extrajudicial killing between 2013 and 2015. The NGO Independent Medico-Legal Unit (IMLU) also reported that the police killed 97 people in 2015 alone. See http://www.lrwc.org/kenya-enforced-disappearance-and-extra-judicial-killing-of-lawyer-willie-kimani-letter/#_ftn3 on 16 December 2016.

⁹⁴ BBC, 'Willie Kimani: Missing Kenyan lawyer found dead' available at <http://www.bbc.com/news/world-africa-36682639> on 10 November 2016.

⁹⁵ Amongst others, Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.1.

In addition, practical considerations like transportation challenges, the cost of services (for instance, police officers often request a file fee for copying the relevant forms to be filled in or for fuel to allow them to visit the crime scene)⁹⁶ and the absence of nearby healthcare and police services (particularly in rural areas) are other hurdles to access health and legal services.

3.2.1.2 Poor investigation skills

The poor quality of investigations conducted by the police has repeatedly been cited as a major concern in the fight against impunity in respect of VAW.⁹⁷ Poor investigation weakens prosecution cases and thereby contributes to lower conviction rates in VAW cases.

One of the reasons highlighted for the poor gathering of evidence by police is insufficient resources. As alluded to earlier, lack of fuel for transport (limiting the ability of police officers to reach a crime scene); lack of P3 or Post Rape Care Form (reportedly only available in Nairobi);⁹⁸ and a lack of separate space in which to interview survivors have been cited as affecting the police's ability to investigate properly.⁹⁹

The other cause, unanimously pointed out by both civil society and the Office of the Director of Public Prosecutions (ODPP), for the poor investigation of SBGV cases is the lack of training in the handling of VAW cases amongst police officers.¹⁰⁰ Although law enforcement agencies receive capacity-building training, this is not enough to guarantee sufficient investigatory capacity. Research showed that training was often provided as a brief, one-time course that was never repeated or updated, nor provided across all ranks within the police force.¹⁰¹ The lack of skills in recording of statements, handling of vulnerable witnesses (including children) and an inability to see signs of sexual abuse when they might have an evidentiary impact, have been pointed out as problem areas.¹⁰² Very little information on the

⁹⁶ Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts: Exchanging experiences and expertise*, Nairobi, 4-5 August 2016, 10.

⁹⁷ University of California School of Law Human Rights Centre, *The long road*, 2.

⁹⁸ Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 11.

⁹⁹ University of California School of Law Human Rights Centre, *The long road*, 44.

¹⁰⁰ Republic of Kenya, *Report of the multi-agency task force on the 2007/2008 post-election violence cases*, 2012, 26-27; Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 31, 55.

¹⁰¹ University of California School of Law Human Rights Centre, *The long road*, 44.

¹⁰² Interview with CSOs, Strathmore Institute for Advanced Studies in International Criminal Justice, *Con-*

nature, content and frequency of the training provided to police and prosecutors in respect of the investigation and prosecution of cases involving VAW can be found.

'Gender imbalance, frequent relocation of officers, and a lack of prioritisation of sexual violence as a crime'¹⁰³ were also pointed out as challenges to effective investigation in VAW cases.

The generally distant relationship and lack of cooperation between the police and the ODPP does not help to improve investigations, as experience has shown that when guided on which elements to look for on a crime scene by a prosecutor, investigators produce better results.¹⁰⁴

The need for sensitisation of police agents has also been highlighted. Officers have been reported to have strong gender biases, and for giving insensitive responses to victims or witnesses of VAW.¹⁰⁵ They have, for example, been reported to frequently blame female victims when they come forward for provoking the sexual violence by, for instance, wearing short skirts.¹⁰⁶ The Commission of Inquiry into Post-Election Violence (CIPEV) stated in its report that '[the Kenyan] Police Service has a fundamental problem with its investigative capability and capacity. The Commission's own investigations found that there was an inability or reluctance to effectively investigate.'¹⁰⁷ The multi-agency task force on post-election violence in 2007/2008 corroborated this allegation.¹⁰⁸

This is a clear breach of Kenya's obligation under international law to provide its law enforcement officers with adequate training, to sensitise them to the nature and impact of VAW and ensure they treat survivors of VAW fairly while respecting their rights.¹⁰⁹

ference on prosecuting sexual and gender based violence in national and international contexts, 51.

¹⁰³ University of California School of Law Human Rights Centre, *The long road*, 44.

¹⁰⁴ Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 47.

¹⁰⁵ Republic of Kenya, *Report of the Commission of inquiry into the post-election violence*, 2008, 399; Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 8; Oyoo, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya', 4.

¹⁰⁶ Interview with CSOs.

¹⁰⁷ Republic of Kenya, *Report of the Commission of inquiry into the post-election violence*, 420.

¹⁰⁸ Republic of Kenya, *Report of the multi-agency task force on the 2007/2008 post-election violence cases*, 2012, 26-27.

¹⁰⁹ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.n; E5.o; I2.I; section D.121; and Article 8, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

3.2.2 The healthcare sector

As the first responders to survivors of VAW in many cases, the health sector plays an important role in the collection of evidence, and thus in the investigation phase. Moreover, medical reports are often important pieces of evidence during the court process. However, healthcare providers, just as investigators, face challenges in documenting sexual violence for accountability purposes.

Indeed, healthcare facilities often lack the adequate resources, both in terms of equipment and human resources, for conducting examinations that can be used in court.¹¹⁰ This is particularly difficult when survivors report to the healthcare facility days, weeks or even months after the sexual offence was committed. It is then too late to treat the victim with certain medications, such as emergency contraception or post-exposure prophylaxis (PEP) for HIV. It is also too late to collect evidence of physical injury such as blood, semen or hair (which are typically washed away once the victim has bathed or showered), while bruises or scratches may have already healed.¹¹¹ The absence of a DNA analysis facility and the long delay resulting are additional limitations.¹¹²

Healthcare providers, particularly outside of the urban centres and referral hospitals, also often lack knowledge on how to collect and manage medico-legal evidence. Knowledge about post-rape examinations, documentation and forensic collection of evidence is reportedly limited:

Doctors simply do not know what to collect and how to handle evidence. The survivor may require treatment, but also [needs] justice [...] There are medical guidelines on evidence collection since 2009, but they have not trickled down. The provider sees the person as a patient and not as a crime scene, which means that evidence is not identified and collected.¹¹³

Healthcare workers thus often lack knowledge on how to document the results of an examination, which can result in incomplete or erroneous medical certifications.¹¹⁴ It is worth noting that, while medical evidence may constitute important corroborative documentation, prosecutors should be careful not to consistently make them central to the success of their case, as this could be limiting in other

¹¹⁰ University of California School of Law Human Rights Centre, *The long road*, 40, 41.

¹¹¹ University of California School of Law Human Rights Centre, *The long road*, 41.

¹¹² Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 40.

¹¹³ University of California School of Law Human Rights Centre, *The long road*, 41.

¹¹⁴ University of California School of Law Human Rights Centre, *The long road*, 41.

cases where there is no medical evidence.¹¹⁵ The insufficient resources allocated to equipping healthcare and forensic centres, as well as the insufficient training provided to medical workers, hamper the fight against VAW and go against Kenya's international obligations to allocate adequate resources and provide training to officials involved in the investigation of VAW.¹¹⁶

3.2.3 Coordination between healthcare providers and the police

The coordination between healthcare providers and the police in the transfer of information and evidence poses a further challenge. In order to maintain a good chain of custody (the uncontaminated transmission of evidence), evidence from healthcare professionals must be transmitted for analysis, without any contamination, through the police, to the prosecutor. Police officers are however not always sufficiently trained in the management of evidence in sexual offence cases (they may not know what to collect at a crime scene or how to handle a post-rape examination specimen being held at a healthcare facility).

Poor coordination between these two actors can compromise the proper transfer of files or evidence, which can in turn weaken the prosecution's case.¹¹⁷ The same remarks as above in relation to the insufficient training and equipment of law enforcement officers are applicable.

4 Prosecution of VAW crimes

Prosecutors play a critical role in the criminal justice response to violence against women and girls. They generally represent the authority of the State in bringing a criminal case against the accused perpetrator, ensuring the application of the law during the criminal proceedings and aims to protect the victims while holding perpetrators accountable for their actions.¹¹⁸

¹¹⁵ Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 22.

¹¹⁶ UNGA, *Declaration on the elimination of violence against women*, Article 4(h); Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, D1.n; E5.o; I2.I; section D.121; and Article 8, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

¹¹⁷ University of California School of Law Human Rights Centre, *The long road*, 49; Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 46.

¹¹⁸ United Nations Office on Drugs and Crime, *Handbook on effective prosecution responses to violence against women and girls*, Criminal Justice handbook series, 2014, 1.

4.1 Prosecution of VAW – the applicability of international law standards

Just as for investigations, there are very few indications in international law on how prosecutions of VAW should be conducted. With the exception of the BPFA, none of the instruments listed above features the word ‘prosecution’ or ‘prosecutor.’

Also, the BPFA does not provide any guidelines as to how prosecution should be conducted. For instance, it recommends that governments should ‘[a]dopt [...] legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders.’¹¹⁹ Similarly, they should ‘review and amend criminal laws [...] to eliminate any discrimination against women in order to ensure that criminal law and procedures guarantee women effective protection against, and prosecution of crimes.’¹²⁰

4.2 Prosecution of VAW in Kenya

The prosecution phase depends largely on the evidence gathered in the case file, transmitted by the police to the prosecutor. As previously mentioned, poor evidence gathering will hamper prosecution. Another difficulty for the prosecutor lies in the withdrawal by the victim of his/her statements (this could result from family or community pressure, forgiveness of the perpetrator by the victim or frustration with the flaws of the formal legal system).¹²¹

Before the 2010 Constitution, the majority of sexual violence cases heard in the lower level courts (magistrates’ courts), particularly in rural areas, were handled by police prosecutors (senior police officers who receive some training in court procedure and trial advocacy, but who are not lawyers).¹²² No publicly available information could be found on any training of these police prosecutors.¹²³ However, with the advent of the 2010 Constitution, exclusivity of prosecutorial powers has been assigned to the ODPP.¹²⁴ A progressive phasing out process of police prosecu-

¹¹⁹ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, Strategic objective D.1.124.d.

¹²⁰ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, Strategic objective I.2.1.

¹²¹ University of California School of Law Human Rights Centre, *The long road*, 58; Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 56.

¹²² University of California School of Law Human Rights Centre, *The long road*, 57.

¹²³ University of California School of Law Human Rights Centre, *The long road*, 57.

¹²⁴ Article 157, *Constitution of Kenya* (2010); Section 5, *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

tors was initiated. In theory, all VAW cases in Kenya are thus prosecuted by ODPP prosecutors, and no longer by police officers. The ODPP can however delegate prosecutorial powers to a 'prosecution assistant,' including a police officer.¹²⁵ No statistics are available on the percentage of VAW cases in courts dealt with either by prosecutors or police officers. A specialised VAW unit within the ODPP was created, in which prosecutors handle VAW cases in addition to other cases. It has a limited reach, as it operates only in the capital city, Nairobi.

Prosecutors from the ODPP have highlighted concerns over a lack of capacity in respect of trial advocacy and legal knowledge (including insufficient familiarity with the laws; interviewing, drafting and case management skills; and correct usage of terminology).¹²⁶ The Director of Public Prosecutions (DPP) openly recognised that prosecuting VAW is hampered by poor investigations (due to a lack of tools and facilities to collect and preserve evidence) and that prosecutors lack training and skills to effectively prosecute VAW (which exacerbates other challenges, such as, delayed reporting of cases and lack of medical records).¹²⁷ The multi-agency task force on the post-election violence in 2007/2008 noted the same lack of skills.¹²⁸

5 Adjudication of VAW

Judges and magistrates play a crucial role in the criminal justice system, especially when it comes to sentencing. It is therefore important that they have an excellent understanding of the laws and dynamics surrounding VAW, allowing them to render equitable verdicts.

5.1 Adjudication of VAW under international law

The lack of guidelines for domestic implementation within the international legal framework can also be observed in respect of the domestic process for the adjudication of sexual violence crimes. The African Women Protocol states that 'remedies are determined by competent judicial, administrative or legislative

¹²⁵ Section 20(2)(c), *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

¹²⁶ Interview with CSOs, Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*.

¹²⁷ Tobiko K, 'Responses to Sexual and Gender based Violence (VAW) in Kenya' 2011, Speech by the Kenya Director of Public Prosecutions during the National Consultations leading to the International Conference on the Great Lakes Region (ICGLR) special session on VAW, October 2011, 25-26.

¹²⁸ Republic of Kenya, *Report of the multi-agency task force on the 2007/2008 post-election violence cases*, 26-27.

authorities,¹²⁹ while DEVAW affirms that ‘women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies.’¹³⁰ The BPFA direct states to ensure ‘access to just and effective remedies, including compensation and indemnification.’¹³¹

5.2 Adjudication of VAW in Kenya

Magistrates and judges also need to be trained more on laws dealing with VAW and sensitised on the nature and impact of VAW on survivors. Indeed, judges and magistrates make decisions that have a critical impact on the lives of victims and it is therefore crucial for them to have a strong understanding of the dynamics, nature and impact of VAW in order to render equitable verdicts. Insensitive treatment of women and girls by the Judiciary could cause survivors to turn away from courts, thereby also contributing to the lack of accountability for VAW.¹³² It was reported that:

There is a perception: If you’re sexually active, no one can rape you. And I’ve heard magistrates in the court of law saying, ‘Did you scream when this man was raping you? Who heard her scream? If no one heard her scream, then there isn’t a problem. There was no crime committed.’¹³³

It can also be noted that VAW cases in Kenya are heard at the general magistrate courts (the lower court level) and appealed through regular judicial channels, and not in specialised courts like in other African countries.¹³⁴

The lack of familiarity with laws among some magistrates and judges is a further concern. Magistrates were reported to use the SOA only for sentencing and there have been inconsistencies in rulings.¹³⁵ It is worth noting that this violates Article 25(b) of the African Women Protocol, which expressly enjoins states to ensure that judicial officers are competent and adequately trained. Responding to demands

¹²⁹ Article 25(b), *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*.

¹³⁰ UNGA, *Declaration on the elimination of violence against women*, Article 4(d); Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, strategic objective D.1.h.

¹³¹ Fourth World Conference on Women, *Beijing Declaration and Platform for Action* Strategic objective D.1.d.

¹³² United Nations Children’s Fund, *Domestic violence against women and girls*, 7.

¹³³ University of California School of Law Human Rights Centre, *The long road*, 58.

¹³⁴ See, for example, Liberia’s ‘Court E.’

¹³⁵ Aura, ‘Situational analysis and the legal framework on sexual and gender-based violence in Kenya’, 21.

from civil society and even members of the Judiciary, the Chief Justice launched the guidelines on the implementation of the SOA in July 2014.

It is worth mentioning the landmark '160 girls' case (*CK (A Child) & 11 others v The Commissioner of Police & 2 others*).¹³⁶ The High Court recognised that the petitioners' constitutional right to freedom from violence (sexual violence in this case), right to dignity, non-discrimination and to enjoy equal protection of the law were violated on account of the failure by police to carry out proper, timely and effective investigation and prosecution of the petitioners' complaints of defilement and other acts of sexual violence.¹³⁷ It is hoped that this case will be a path followed in the protection of women and children against sexual violence.

6 Socio-cultural factors

Sexual and gender-based violence and VAW cannot be understood in isolation from the gender norms and social structures that influence women's vulnerability to violence. Indeed, VAW is often a result of historically unequal power relationships, strongly influenced by entrenched gender stereotypes and cultural factors, between men and women¹³⁸. Some traditional beliefs, norms and social institutions legitimise and, therefore, perpetuate violence against women.¹³⁹

6.1 Socio-cultural factors under international law

International legal instruments recognise the importance of socio-cultural barriers to gender equality and to reducing VAW. No guidelines are available regarding the concrete measures to be taken by states in removing these barriers. DEVAW, for instance, upholds that states should 'not invoke any custom, tradition or religious consideration to avoid their obligations' with respect to the elimination of violence against women.¹⁴⁰ CEDAW and the African Women's Protocol also requires par-

¹³⁶ High Court of Kenya at Meru, Petition No. 8 of 2012.

¹³⁷ Rawal K, 'The immediate realisation of women and children's rights: Lessons from the Kenyan case of *C.K & 11 Others v Commissioner of Police/Inspector General of Police & 2 Others Petition No. 8 of 2012*', 4, available at <http://kenyalaw.org/kl/index.php?id=4516> on 16 December 2016.

¹³⁸ United Nations Children's Fund, 'Domestic violence against women and girls,' *Innocenti Digest*, No. 6, 2000, 7; Capelon R, 'Intimate terror: Understanding domestic violence as torture' in Cook RJ (ed), *Human rights of women: National and international perspectives*, University of Pennsylvania Press, Philadelphia, 1994, 116-152.

¹³⁹ Kalra G and Bhugra D, 'Sexual violence against women: Understanding cross-cultural intersections,' 55(3) *Indian Journal of Psychiatry*, (2013), 244-249.

¹⁴⁰ UNGA, *Declaration on the elimination of violence against women*, Article 4.

ties to take measures to eliminate prejudices and stereotyped roles for men and women.¹⁴¹

6.2 Socio-cultural factors in Kenya

Socio-cultural biases, which favour men over women and girls, have consistently frustrated the implementation of the legal framework in Kenya.¹⁴² Indeed, socio-cultural behaviours condoning and legitimising VAW and allowing perpetrators to go unpunished constitute major impediments to reporting and accountability.

Research shows that the negative perception often attached to victims of VAW causes them to remain silent about the crimes, in many cases, constituting one of the main reasons for underreporting.¹⁴³ The value attached to female chastity is so high that sexually assaulted women, particularly in rural areas, tend to be perceived as ‘damaged goods’ and are likely to be rejected by their husbands and community.¹⁴⁴ Moreover, adult women tend to be blamed by their communities for the sexual violence they experienced. The globally widespread and deeply rooted misconception that sexual violence is a matter of honour and dignity, rather than a violent crime, is one of the main causes for low conviction rates in cases of sexual violence.¹⁴⁵ This misconception also deters victims from reporting, and thereby undermines the fight for accountability. When approached for help, police officers have been reported to quote President Uhuru Kenyatta, who, in his 2014 address, stated that ‘Security starts with you,’¹⁴⁶ to blame the victims of sexual violence for, say, exposing themselves by walking in the evenings while dressed in skirts.¹⁴⁷ Research also shows that men and women in East Africa still justify violence towards women, to a certain extent.¹⁴⁸

¹⁴¹ Article 5, *Convention on the Elimination of All Forms of Discrimination against Women; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*.

¹⁴² Aura, ‘Situational analysis and the legal framework on sexual and gender-based violence in Kenya’, 20.

¹⁴³ University of California School of Law Human Rights Centre, *The long road*, 27.

¹⁴⁴ Agency for Cooperation and Research in Development, *Pursuing Justice for sexual and gender based violence in Kenya: Options for protecting and compensating survivors of sexual and gender-based violence*, 2010, 16.

¹⁴⁵ Jarvis M and Vigneswaran K, ‘Challenges to successful outcomes in sexual violence cases’ in Brammertz S and Jarvis M (eds), *Prosecuting conflict-related sexual violence at the ICTY*, Oxford University Press, Oxford, 2016, 35-36.

¹⁴⁶ <http://www.nation.co.ke/news/politics/President-Uhuru-Kenyatta-on-security/1064-2535970-h5efpiz/index.html> accessed on 10 November 2016.

¹⁴⁷ Interview with CSOs, Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*.

¹⁴⁸ East African Community, *Report on the HIV - Sexual and gender-based violence symposium*, 11.

These socio-cultural behaviours condoning VAW are particularly observed in patriarchal and gender-stereotyped societies.¹⁴⁹ Harmful gender roles are further reinforced by traditional practices like FGM, child marriage, widow cleansing¹⁵⁰ and inheritance,¹⁵¹ as well as bride price.¹⁵²

Despite Kenya's pledge under international law to eliminate prejudices and stereotyped roles for men and women,¹⁵³ traditional conceptions and practices harmful to gender equality remain widespread. The Committee on the Elimination of Discrimination against Women expressed concern that the 'State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and practices.'¹⁵⁴

The Government recognises that social and cultural customs create gender-related obstacles that hinder women's realisation of human rights and their participation in socio-economic activities.¹⁵⁵ The Ministry of Gender, Children and Social Development listed actions taken to address social-cultural factors fuelling the occurrence of SGBV in Kenya in a 2009 report, these include: the 'establishment of community structures responsive to sexual and gender-based violence at

¹⁴⁹ Research shows that VAW against women is systematic and structural, a mechanism of patriarchal control of women that is built on male superiority, sex stereotype and expectations, and economic, social and political dominance of men and dependency of women. Capelon R, 'Intimate terror: Understanding domestic violence as torture' in Cook RJ (ed), *Human rights of women: National and international perspectives*, University of Pennsylvania Press, Philadelphia, 1994, 116-152.

¹⁵⁰ Referring to the custom by which a 'cleanser,' often a male relative of a deceased husband has sexual intercourse (mostly unprotected, thereby increasing risks of HIV transmission) with a widow to 'cleanses' her from her deceased husband's spirit. See Shu-Acquaye F, 'The legal implications of living with HIV/AIDS in a developing country: The African story' 32 *Syracuse Journal of International Law and Commerce*, (1)2004, 55.

¹⁵¹ The practice of passing a widow, and her property, to her dead husband's brother, is fairly widespread in Eastern and Southern Africa.

¹⁵² A contract where material items (often cattle or other animals) or money are paid by the groom to the brides' family in exchange for the bride, her labour and her capacity to produce children. This is a common cultural practice in many African countries. See Muthegheki B, Crispus KS and Abrahams N, 'An exploratory study of bride price and domestic violence in Bundibugyo District, Uganda' Centre for Human Rights Advancement and South African Medical Research Council Gender and Health Research Unit (2012).

¹⁵³ Including in Article 2, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, and Article 5, *Convention on the Elimination of All Forms of Discrimination Against Women*.

¹⁵⁴ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya, UN Doc. CEDAW/C/KEN/CO/6, para. 21, in OMCT, *Violence against women and children in Kenya*, 2008, 9.

¹⁵⁵ Republic of Kenya, *The 7th periodic report of the Government of the Republic of Kenya on implementation of the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, para. 74.

grass-root levels'; increased 'awareness on prevention within communities and community-based institutions'; strengthened behaviour change programmes addressing SGBV; increased 'male participation in measures for prevention of sexual and gender-based violence at community levels'; training and equipping of law enforcement agencies (including the police) 'to respond adequately to cases of sexual and gender based violence'; and 'outlawing customary practices that promote gender-based violence'¹⁵⁶. It is hoped that, with time, these measures will substantially reduce gender-related obstacles for women, and that these same measures will not be called for anymore.

7 Recommendations for addressing Kenya's international obligations towards the prevention and punishment of VAW

7.1 Capacity building and sensitisation for police officers, healthcare providers, prosecutors and members of the Judiciary

Training and information on VAW should be incorporated into curricula at police academies to improve police capacity and sensitisation for all officer ranks, as well as administrative and support staff who are likely to interact with victims, survivors and/or witnesses during the criminal justice process. The training should explicitly identify VAW as a violation of human rights and a violent crime, rather than an offence against honour. Monitoring should be conducted and refresher courses should be provided. Specific skill sets emphasised in training should include; interviewing, statement taking, collection and management of physical evidence (including chain-of-custody issues), and knowledge of laws on VAW and any other relevant legislation. Such training should also develop the officers' familiarity with the relevant referral pathways for survivors of VAW who seek support services - particularly in view of the enhanced role of police officers under the PADVA discussed earlier. More female police officers should also be integrated.¹⁵⁷

Guidance tools on sensitive investigation of VAW crimes should be developed. For example, new police officers could be provided with a simplified, pocket version of sexual offence laws and investigation procedures.

¹⁵⁶ Republic of Kenya, *The 7th periodic report of the Government of the Republic of Kenya on implementation of the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, para. 83.

¹⁵⁷ University of California School of Law Human Rights Centre, *The long road*, 6.

Prosecutors should be trained on the laws pertaining to VAW, as well as on trial advocacy (including interviewing, drafting pleadings, case management and use of terminology).¹⁵⁸

Cross-sectoral training on the collection of evidence required to prove VAW crimes as well as referral mechanisms should be provided for healthcare providers, law enforcement officers and prosecution units.

Healthcare providers should be trained in the provision of comprehensive clinical care for sexual violence. Training should be based on national guidance, where available, and should cover the following topics: conducting forensic examination in sensitive ways, completing relevant health or police forms, collecting and storing evidence, preparing to testify in court and procedures for working with law enforcement to facilitate transfers of documents and physical evidence. Training on management of VAW should be integrated into regular curricula at medical schools and throughout other health education mechanisms.¹⁵⁹

Magistrates and judges should be trained on the laws pertaining to VAW. The Judiciary should fast-track the implementation of the rights of women and girls by retaining supervisory jurisdiction over proceedings in the lower courts (where appropriate). This will ensure that the courts go beyond acknowledging the violation of rights by recommending a particular path to be followed by the state to restore or protect the proclaimed right.¹⁶⁰

Investigators, healthcare providers, prosecutors and members of the judiciary should also be sensitised on the nature and impact of VAW on survivors, to ensure they handle complainants appropriately.

7.2 *Better coordination between stakeholders for a multi-sectoral approach*

To effectively deal with the crosscutting issues related to VAW, coordinated approaches and harmonised strategies by all stakeholders are required. Government and civil society organisations should engage one another and work together in the fight against VAW. Their weak relationship so far has repeatedly been pinpointed

¹⁵⁸ Interview with CSOs, Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*.

¹⁵⁹ University of California School of Law Human Rights Centre, *The long road*, 5.

¹⁶⁰ Tlachinollan Mountain Human Rights Centre, *Otorga Juez Federal Amparo a la Comunidad de Mini Numa que Exige su Derecho a la Salud (Federal Judge Grants Writ of Amparo to Mini Numa Community Demanding its Right to Health)*, (2008); Rawal, 'The immediate realisation of women and children's rights,' 17.

as a hurdle in this regard.¹⁶¹ This has also been recognised publicly by the Government.¹⁶² Dialogue among all stakeholders (including decision makers, prosecutors, law enforcement officers, health policymakers and healthcare providers) should be facilitated to create and reinforce networks and to identify best ways of collaborating efficiently. It should be noted that there is at present no comprehensive database available for government agencies or civil society organisations working on VAW in Kenya.¹⁶³

Referral mechanisms should be made clear and available within communities, and should identify clear referral pathways for medical care, psychosocial support, police, legal aid, safe shelter and other support services. This information should be widely disseminated to stakeholders and the public.¹⁶⁴

In an attempt to improve the quality of evidence of VAW submitted by the police, prosecutors should work closely together with investigators from the outset of the investigation, and should plan VAW investigations according to evidentiary requirements. This method has shown successful results.¹⁶⁵ Prosecutors should also provide feedback on the quality of witness statements and reporting forms to help police officers and healthcare providers to improve their skills regarding the taking of witness statements and case documentation.¹⁶⁶

7.3 Allocation of more resources

The national government and county governments should provide more human, financial and technical resources for effective implementation of the relevant VAW]

¹⁶¹ East African Community, *Report on the HIV - Sexual and gender-based violence symposium*, 11; Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 19; Rawal, 'The immediate realisation of women and children's rights', 3; Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 46.

¹⁶² Republic of Kenya, *Report of the multi-agency task force on the 2007/2008 post-election violence cases*, 26.

¹⁶³ Research in this regard is currently being conducted at the Strathmore Institute for Advanced Studies in International Criminal Justice (SIASIC) - Nairobi, to provide essential information of each stakeholder in VAW in Kenya, in an effort to reinforce synergies amongst actors in this field and avoid duplicative work. This was also one of the recommendations under the report of the Human Rights Centre, see University of California School of Law Human Rights Centre, *The long road*, 8.

¹⁶⁴ University of California School of Law Human Rights Centre, *The long road*, 6.

¹⁶⁵ Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 47.

¹⁶⁶ University of California School of Law Human Rights Centre, *The long road*, 7.

laws and policies.¹⁶⁷ Enough funds should be allocated to reduce donor dependence and to ensure sustainability of programmes.

Safe houses for VAW survivors should also be created. The limited number of safe houses, which are mostly run by NGOs and located almost exclusively in Nairobi,¹⁶⁸ increase complications for victims as they may be forced to remain in an unsafe location for lack of any temporary refuge.

Sufficient resources should be allocated for legal aid programs to increase access to justice, particularly for marginalised groups and in rural areas with limited services.

Funds for materials and equipment required for investigation of VAW (for example, paper, pens, photocopiers, vehicles with fuel, phone credit, computers, separate rooms for recording statements of complainants and internet access) should be allocated as a matter of urgency.¹⁶⁹

Healthcare facilities should be equipped as required with at least post-rape care medications and proper facilities and supplies for collecting and storing evidence. Lower-level health facilities should be provided with access to comprehensive post-rape care, particularly in rural areas.¹⁷⁰

7.4 *Development of a victim-centred approach*

The current criminal law system in Kenya¹⁷¹ is mainly aimed at punishing the perpetrator and generally makes little provision for support, rehabilitation or reparation to victims, as is provided for in international law.¹⁷² Support services should include free medical, legal and psychological care.

7.5 *Public awareness and legal literacy*

Knowledge of the law is the basic condition under which survivors will take initiatives to access the justice system and claim the benefit of their rights. Legal literacy programmes are essential in helping women to understand the link between

¹⁶⁷ Kenya Girl Guide Association, *Combating gender based violence in Kenya*, 4.

¹⁶⁸ National Commission on Gender and Development, *A baseline survey on gender based violence in Kenya*, 2010, 21.

¹⁶⁹ University of California School of Law Human Rights Centre, *The long road*, 69.

¹⁷⁰ University of California School of Law Human Rights Centre, *The long road*, 67.

¹⁷¹ With the notable exception of the recent *Protection against Domestic Violence Act*, for which there is no available data on concrete support provided to victims.

¹⁷² Including Article 8, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2003 and CEDAW General Recommendation 19.

their rights and other aspects of their lives. When citizens are not aware of their rights, a breeding ground for injustice is created.¹⁷³ Legal illiteracy remains a major barrier to respect for women's rights. This is exacerbated in rural areas where women are often unable to read or write and may be beyond the reach of awareness campaigns.¹⁷⁴

Information about laws on VAW, survivors' rights and available services should be widely disseminated amongst rural and non-rural communities, through workshops, training programmes, courses in schools at all levels, diverse media such as community radio programming, drama, billboards, and informational materials. Investment in long-term prevention strategies should be made throughout all sectors of society.¹⁷⁵

7.6 *Socio-cultural barriers to gender equality and to reducing VAW*

There is an urgent need to sensitise society on broader issues linked to VAW and the empowerment of women. All communities should be made aware of the fact that VAW is a violation of human rights as well as an obstacle to public health, development and the reduction of poverty.

Efforts to empower women must thus address traditional customs that legitimise gender-based violence as well as legislations, law enforcement practices and attitudes within the Judiciary that discriminate against women. In education programs, the issue of domestic or intimate partner violence, amongst others, must be highlighted, as 'women will never be equal in their public lives until they are equal at home.'¹⁷⁶ As stated in a very striking manner by the High Court in a ruling about widow inheritance, 'women, in whatever community, are no longer commercial objects and it is time customary diehards woke up to that reality.'¹⁷⁷

7.7 *Reinforce research, monitoring and evaluation programmes*

Law and policy implementation programmes must be monitored and evaluated to assess their efficiency. There is no proper mechanism in place to follow up on the

¹⁷³ Aura, 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya', 25.

¹⁷⁴ Republic of Kenya, *The 7th periodic report of the Government of the Republic of Kenya on implementation of the international Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, para. 249.

¹⁷⁵ University of California School of Law Human Rights Centre, *The long road*, 71.

¹⁷⁶ Oyoo, 'Assessing the adequacy of the laws dealing with domestic violence in Kenya', 11.

¹⁷⁷ *Ngoka v Madzomba* (2002) KLR 698-702, 702.

implementation processes.¹⁷⁸ More investment in data collection and research (to better inform policies addressing VAW) is also needed.¹⁷⁹

8 Conclusion

As discussed in this chapter, the international legal framework on VAW provides little guidance to states as regards its domestic implementation. As such, it is up to states themselves to ensure effective investigation, prosecution and adjudication of VAW. It is also up to states to counteract any domestic socio-cultural barriers concerning the fight against VAW.

This chapter has further highlighted the gaps in the domestic implementation of Kenya's commitments towards VAW under international law. State signatories to human rights instruments, including the ones protecting fundamental rights of women, are under an obligation of due diligence to effectively ensure that these rights are promoted and respected.¹⁸⁰

In spite of having a Constitution that champions human and women's rights, VAW and impunity remain widespread in Kenya. The challenge will be to translate the normative commitments into concrete strategies and actions to effectively investigate, prosecute and punish perpetrators of sexual violence. This can be done subject to sufficient political will, and by embracing a multi-sectoral approach whereby stakeholders perform their roles effectively and in line with the spirit of the 2010 Constitution.

The Kenya Government has recognised the need for more political will to address the issue of gender inequality and VAW.¹⁸¹ Despite the many challenges facing implementation of Kenya's international obligations law, it is hoped that all stakeholders, civil society included, will gather enough political momentum to position sexual and gender based violence as a priority on the political agenda, as it ought to be.

¹⁷⁸ Kenya Girl Guide Association, *Combating gender based violence in Kenya*, 4.

¹⁷⁹ Strathmore Institute for Advanced Studies in International Criminal Justice, *Conference on prosecuting sexual and gender based violence in national and international contexts*, 4.

¹⁸⁰ See, for example, UNGA, *Declaration on the elimination of violence against women*, Article 4(c), requiring States to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons,' or the Committee on the Elimination of Discrimination Against Women General Recommendation 19 stating 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'

¹⁸¹ Republic of Kenya, *The 7th periodic report of the Government of the Republic of Kenya on implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 39.

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