International Criminal Justice in Africa, 2017

HJ van der Merwe
Gerhard Kemp
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Strathmore University Press

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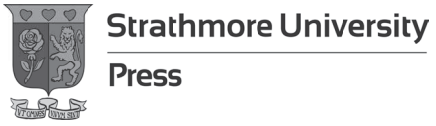

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LIST OF ABBREVIATIONS

ACDEG	African Charter on Democracy, Election and Governance
ACJHR	African Court of Justice and Human Rights
AfCHPR	African Court of Human and Peoples' Rights
AICHR	ASEAN Inter-governmental Commission on Human Rights
AMU	Arab Maghreb Union
ASEAN	Association of South East Asian Nations
ASP	ICC Assembly of State Parties
ASPA	American Service-Members Protection Act
ATS	US Alien Tort Statute
AU	African Union
AU Criminal Court	African Court of Justice and Human and Peoples' Rights
AU Model Law	African Union Model Law on Universal Jurisdiction
Bamako Protocol	Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes within Africa.
BIA	Bilateral Immunity Agreement
CARICOM	Caribbean Community
CAT	UN Committee against Torture
CCJ	Caribbean Court of Justice
CCJ Agreement	Agreement establishing the Caribbean Court of Justice
CCPR	UN Human Rights Committee

CEN-SAD	Community of Sahen-Saharan States
CIPEV	Commission of Inquiry into Post-Election Violence
COMESA	Common Market for Eastern and Southern Africa
CPI	*Cour penale internationale*
DCA	Defence Cooperation Agreement
DRC	Democratic Republic of Congo
EAC	East African Community
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECCC	Extraordinary Chambers in the courts of Cambodia
ECOWAS	Economic Community of West African States
EMCA	Environmental Management and Coordination Act
EU	European Union
HCSS	Hybrid Court of South Sudan
ICA	International Crimes Act
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC Act	International Criminal Court Act 27 of 2002
ICD	International Crimes Division
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
IGAD	Intergovernmental Authority for Development
IMFTE	International Military Tribunal for the Far East
IMT	International Military Tribunal
LRA	Lord's Resistance Army

Malabo Protocol	Protocol on Amendments to the Protocol on the Statute on the African Court of Justice and Human Rights
MNCs	Multi-National Corporations
NATO	North Atlantic Treaty Organisation
NEMA	National Environmental Management Authority
Nuremberg Tribunal	International Military Tribunal at Nuremberg
OAS	Organisation of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OTP	Office of the Prosecutor
PEV	Post-election violence
POEA	Public Officers Ethics Act
PSC	Peace and Security Council
PTC	Pre-Trial Chamber
RECs	Regional Economic Communities
Rome Statute	Rome Statute of the International Criminal Court
SACC	South Africa's Constitutional Court
SADC	Southern African Development Community
SALC	Southern African Litigation Center
SCA	Supreme Court of Appeal
SCSL	Special Court for Sierra Leone
SGBV	Sexual and gender-based violence
SOFA	Status of Forces Agreements
STL	Special Tribunal for Lebanon
TCID	Torture and other forms of cruel, inhuman and Degrading Treatment or Punishment
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption

UNODC	United Nations Office on Drugs and Crime
UNGA	United Nations General Assembly
UNSC	Security Council of the United Nations
UNTAET	United Nations Transitional Administration in East Timor
US	United States of America
VCLT	Vienna Convention on the Laws of Treaties
WW I	First World War
WW II	Second World War

LIST OF CASES

International Court of Justice

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002.

Certain Criminal Proceedings in France (Republic of the Congo v France), Order of 11 July 2003, ICJ Reports 2003.

International criminal cases

International Criminal Court

Prosecutor v Al-Bashir (Decision convening a public hearing for purposes of a determination under Article 87(7) of the Rome Statute with respect to the Republic of South Africa) ICC-02/05-01/09, 8 December 2016.

Prosecutor v Al Bashir (Decision on the prosecutions application for a warrant of arrest against Omar Hassan Al Bashir) Pre-Trial Chamber, ICC-02/05-01/09, 14 March 2009.

Prosecutor v Al-Bashir (Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09, 6 July 2017.

The *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta* and *Mohammed Hussein Ali* (Decision on the confirmation of charges) ICC-01/09-02/11-382-Red, 23 Jan 2012.

The Prosecutor v Germain Katanga, ICC-01/04-01/07, 27 March 2017.

Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) Pre-Trial Chamber I, ICC-01/11-01/11-466-Red, 11 October 2013.

Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and *Joshua Arap Sang* (Decision on the confirmation of charges) ICC-01/09-01/11-373, 23 Jan 2012.

Situation in Libya in the case of the Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 OA 4, 21 May 2014.

Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntaganda (Recommendation to the presidency on holding part of the trial in the State concerned) Trial Chamber IV, ICC-01/04-02/06, 19 March 2015.

International Criminal Tribunal for Rwanda

Prosecutor v Seromba (Judgment), ICTR-2001-66-A, 12 March 2008.

Prosecutor v Akayesu (Judgment), ICTR-96-4-T, 2 September 1998.

International Tribunal for the Former Yugoslavia

Prosecutor v Tadič, ICTY Appeals Chamber, Decision of 2 October 1995.

Prosecutor v Karadzic and Mladic, ICTY Trial Chamber, Decision of 11 July 1996.

National cases

South Africa

Democratic Alliance v Minister of International Relations and Co-operation and others (Council for the Advancement of the South African Constitution as Intervening Party), [2017] 2 All SA 123 (GP).

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre, [2013] ZASCA 168.

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another, [2014] ZACC 30.

Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others, 2015 (9) BCLR 1108 (GP).

South African Police Service v Southern African Human Rights Litigation Centre and Another 2015 (1) SA 315 (CC).

Kenya

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others, [2015] eKLR.

Geoffrey Andare v Attorney General and Others, [2016] eKLR.

Katiba Institute & 3 others v AG & 2 Others, [2018] eKLR.

Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others, [2017] eKLR, Petition 1 of 2017.

United Kingdom

R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3), 2 All E.R. 97 (H L 1999).

LIST OF LEGAL INSTRUMENTS

International treaties and agreements

African Charter on Democracy, Elections and Governance, 30 January 2007

Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003

Agreement Establishing the Caribbean Court of Justice, 14 February 2001

ASEAN Declaration (Bangkok Declaration)

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 30 January 1991, 2101 UNTS 177

Charter of the Association of Southeast Asian Nations, 20 November 2007

Charter of the International Military Tribunal, 8 August 1945

Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945

Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 85 UNTS 1465

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997,

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 227 UNTS 78

Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in The Great Lakes Region, 20 November 2004

European Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 30 October 2007, 1659 UNTS 28551

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31

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

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 287 UNTS 75

Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135

Hague Convention for the Suppression of Unlawful Services of Aircraft, 14 October1971, 860 UNTS 105

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 71

International Military Tribunal for the Far East Charter (IMTFE Charter), 19 January 1946

Organisation of African Unity Convention for the Elimination of Mercenarism in Africa, 3 July 1977, 1490 UNTS 25573

Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, 29 November 2006 (Great Lakes Protocol)

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, STC/Legal/Min/7 (1) Rev 1. (Malabo Protocol)

Protocol relating to the Establishment of the Peace and Security Council of the African Union, 9 June 2002

Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, 5 July 2001

Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 38544

Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990

Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994)

Statute of the International Criminal Tribunal for the Yugoslavia, UN. Doc. S/RES/827 (1993)

Statute of the Special Court for Sierra Leone UN Security Council, Resolution 1325(2000)

Treaty establishing the Caribbean Community (with annex relating to the Caribbean Common Market and Agreement establishing the Common External Tariff for the Caribbean Common Market). Concluded at Chaguramas on 4 July 1973

United Nations Convention against Corruption (UNCAC), 31 October 2003, 2349 UNTS 41

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 95

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

Bilateral agreements

Agreement between the Government of the United States of America and the Government of the Republic of Benin Regarding the Surrender of Persons to International Tribunals of 2005

Agreement between the Government of the United States of America and the Government of the Republic of Botswana Regarding the Surrender of Persons to International Tribunals of 2003

Agreement between the Government of the United States of America and the Government of Burkina Faso Regarding the Surrender of Persons to the International Criminal Court of 2003

Agreement between the Government of the United States of America and the Government of the CAR Regarding the Surrender of Persons to International Tribunals of 2004

UN Instruments

UNSC

Final report of the Monitoring Mechanism on Angola Sanctions, S/2000/1225

Final report of the Panel of Experts on the Illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, S/2002/1146

Peace and security in Libya, S/RES/1970 (2011)

Report of the Panel of Experts appointed pursuant to Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, S/2000/1195

The situation in Darfur, S/RES/1593 (2005)

The situation in Sierra Leone, S/RES/1306 (2000)

UNGA

Explanatory Memorandum: Scope and Application of the Principle of Universal Jurisdiction, 23 July 2009, (A/63/237/Rev.1) Annexe I

Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973, A/RES/3074/XXVIII

The scope and application of the principle of universal jurisdiction, 16 December 2009, A/64/452

Third report on the immunity of State officials from foreign criminal jurisdiction, 2 June 2014, A/CN.4/673*

UN Documents

Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, 1 February 2005,UN Doc S/2005/60

Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, U.N. Doc. A/Conf.183/9

Other instruments

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on 27 October 2004, NS/RKM/1004/006

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal

Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences within the District Court in Dili in East Timor, 6 June 2000, UNTAET/REG/2000/15

Rules of Procedure and Evidence of the Special Tribunal for Lebanon, STL-BD-2009-01-Rev.6-Corr.1

Terms of Reference of the ASEAN Inter-governmental Commission on Human Rights, 2009

African Union

OAU Assembly of Heads of State and Government

Declaration of the Assembly of Heads of State and Government on the establishment within the OAU of a mechanism for conflict prevention, management and resolution, AHG/Decl.3 (XXIX)

Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of Government, (AHG/Decl.5 (XXXVI)

AU Assembly

Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct.2013)

Decision on international jurisdiction, justice and the International Criminal Court (ICC), Assembly/AU/13(XXI)

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)

Decision on the Hissène Habré Case, Assembly/AU/9(XVI)

Decision on the Hissène Habré Case, Assembly/AU/12 (XIII) Rev.1

Decision on the Hissène Habré Case and the African Union, Assembly/AU/8 (VI) Add.9

Decision on the implementation of the Assembly decisions on the International Criminal Court – Doc. EX.CL/670(XIX), Assembly/AU/Dec. 366 (XVII)

Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction - Doc. Assembly/AU/3 (XII), Assembly/AU/Dec.213 (XII)

Decision on the meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC) - Doc. Assembly/AU/13 (XIII), Assembly/AU/Dec.245 (XIII) Rev. 1

Decision on the moratorium on the recognition of the Regional Economic Communities (REC), Assembly/ AU/DEC.112 (VII)

Decision on the progress report of the commission on the implementation of the Assembly decisions on the International Criminal Court (ICC) – Doc. EX.CL/710(XX), Assembly/AU/Dec.397 (XVIII)

Decision on the report of the Commission on the abuse of the principle of universal jurisdiction, Assembly/AU/Dec.199 (XI)

Decision on the report of the second meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), Assembly/AU/8(XIV)

Decision on the trial of Mr. Hissène Habré and the African Union, Assembly/AU/Dec.157 (VIII)

Executive Council

The common African position on the proposed reform of the United Nations: 'The Ezulwini Consensus', Ext/EX.CL/2 (VII)

Progress report of the Commission on the abuse of the principle of universal jurisdiction, EX.CL/540 (XVI)

African Union Model Law on Universal Jurisdiction over International Crimes, EX.CL/731 (XXI)

National legislation

Kenya

Constitution of Kenya (2010)

Anti-Corruption and Economic Crimes Act (No 3 of 2003)

Bribery Act (No 47 of 2016)

Counter-Trafficking in Persons Act (No 8 of 2010)

Election Laws (Amendment) Act (No 1 of 2017)

Environmental Management and Coordination Act (No 8 of 1999)

Geneva Conventions Act (Cap 198)

International Crimes Act (Act No 16 of 2008)

Interpretation and General Provisions Act (Cap 2)

Kenya's Merchant Shipping Act (No 4 of 2009)

Mining Act (No 12 of 2016)

Narcotic Drugs and Psychotropic Substances (Control) Act (No 4 of 1994)

Penal Code (Cap 63)

Prevention of Terrorism Act (No 30 of 2012)

Proceeds of Crime and Anti-Money Laundering Act (No 9 of 2009)

The International Crimes (Repeal) Bill (No 61)

The Public Officer Ethics Act (Cap 183)

Public Officers Ethics Act (No 4 of 2003)

Treaty Making and Ratification Act (No 45 of 2012)

Other countries

Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belgium)

Alien Tort Claims Act of 1789

Criminal Procedure Act 51 0f 1977 (South Africa)

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946)

Courts Act 1993 (Ghana)

Extradition Act Cap 8.03 of 1972 (Malawi)

Extradition Act Cap 368 REV 2002 (Tanzania)

Extradition Act 67 of 1962 (South Africa)

Extradition Act 2005 (Botswana)

Geneva Conventions Act 1957 (UK) (Tanzania)

Geneva Conventions Act (Colonial Territories Act) Order 1959 (UK) (Tanzania)

Geneva Conventions Act 1960 (Nigeria)

Geneva Conventions Act 1964 (Uganda)

Geneva Convention Acts 1967 (Malawi)

Geneva Conventions Act 1968 (Kenya)

Geneva Conventions Act 1970 (Botswana)

Geneva Conventions Act 1981 (Zimbabwe)

Geneva Conventions Act 1996 (Mauritius)

Geneva Conventions Act 2003 (Namibia)

Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (South Africa)

The International Criminal Court Act 27 of 2011 (Mauritius)

International Criminal Court Act, Acts Supplement No. 6, Uganda Gazette, No 39, Vol CIII, June 25, 2010

Law No 2003-025 of 13 June 2003 (Niger)

Organic Law N° 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990

Organic Law N° 01/2012 instituting the Penal Code

Penal Code Book (Law N° 8-98 of 31 October 1998)

Penal Code (Ethiopia)

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, resulting 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, Ottilia 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. Henceforth, the group has met annually and produced three more reports namely, the *International criminal justice in Africa: Challenges and opportunities* in 2014; the *International criminal justice in Africa: Issues, challenges and prospects* in 2015 and *International criminal justice in Africa, 2016.*

This publication is the fifth edition following the meeting that was held in August 2017 in Lilongwe, Malawi. We are delighted 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

Konrad Adenauer Stiftung

RULE OF LAW PROGRAMME FOR SUB SAHARAN AFRICA

African Group of Experts on International Criminal Justice

About the group:

The group was formed in 2010 under the auspices of the Multinational Development Policy Dialogue of the Konrad-Adenauer-Stiftung (KAS) based in Brussels, Belgium. In 2012, the group's activities were transferred to the Rule of Law Programme for Sub Saharan Africa based in Nairobi, Kenya. The group meets annually to discuss matters related to international criminal justice on the African continent. The members of the group are drawn from various parts of Sub-Saharan Africa and consist of academics and legal practitioners holding expertise in the field of international criminal law.

Mission statement:

The group's primary focus is to produce a regular edited publication to serve as *an annual compendium of international criminal justice on the African continent.* The publication is created *by Africans for a global readership* and aims to provide contemporaneous, diverse and critical perspectives from within Africa regarding important developments and issues relating to the prosecution of international and transnational crimes on the continent. The publication aims to reflect the character of the modern, complementarity-centred international criminal justice system in that its focus falls not only on supranational (continental and regional) developments, but also on developments at state level within Sub-Saharan Africa. Furthermore, the publication aims to reflect both legal and extra-legal developments in order to provide a holistic understanding of the project of international criminal justice as it affects Africa and Africans as well as the challenges facing this project.

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 fifth 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.

A Snapshot of international criminal justice in Africa in 2017

An overall assessment of events relevant to international criminal justice in Africa reveals that the African region continues to display a strange dichotomy in its dealings with the international criminal law regime. This is confirmed through the actions of its regional political body, the African Union (AU), and also by developments within individual African countries. On the one side of the equation one may refer to, for example: (1) the conviction of former Chadian dictator, Hissène Habré (which was confirmed on appeal in 2017); (2) the ambition to achieve regional accountability for international crimes displayed by the expansive list of substantive crimes included in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights *(*Malabo Protocol); and (3) the expansive view on universal jurisdiction endorsed in the AU Model Law on Universal Jurisdiction. On the flip-side of the equation, one finds seemingly contradictory evidence, for example: (1) the enduring AU opposition towards the

International Criminal Court (ICC) on the issue of immunity for heads of state and government, which is evidenced by the immunity clause in the Malabo Protocol as well as the immunity clause in the AU Model Law on Universal Jurisdiction; (2) the failure of African states to ratify the Malabo Protocol; and (3) the general reticence of African states to utilise universal jurisdiction to bring perpetrators of international crime to book.

As far as international criminal justice is concerned, the most momentous and controversial events of 2017 were directly linked to the two interrelated issues of immunity for sitting heads of state and government and state withdrawal from the Rome Statute of the International Criminal Court (Rome Statute): First, the ICC's finding of non-cooperation against South Africa and South Africa's subsequent efforts to withdraw from the Rome Statute. Second, Burundi's historical withdrawal from the Rome Statute and the ICC Pre-Trial Chamber's subsequent ruling that, despite the withdrawal, the Court retains jurisdiction in relation to international crimes committed in Burundi during the period of its membership to the Court. How these issues will play out in 2018 and beyond remains to be seen. One thing is certain - there is an increasingly urgent need for constructive engagement between the ICC, Assembly of States Parties to the Rome Statute (ASP), United Nations Security Council (UNSC), and the AU, especially regarding the issue of immunity for sitting heads of state and government. It is submitted that such engagement would have to include serious consideration of possible amendments to the Rome Statute in order to be fruitful.

B The International Criminal Court at 15

In 2017, the ICC celebrated 15 years of existence. This represents an opportunity to reflect briefly on the successes and failure of the Court to date, especially from an African perspective.

With the benefit of hindsight, it can be said that the ICC was always likely to be a contentious institution. Politically, the ICC is still far from attaining universal support. This political divisiveness, coupled especially with the UNSC's unchecked power of referral and deferral of cases involving non-state parties to the Court, has combined to cast a political shadow over the ICC's work.[1] This has led to a state of

[1] It has to be said, however, that the ICC's functioning does not always involve only legal work, but also sometimes some questionable political footwork, especially on the part of the Office of the Prosecutor. For example, in 2017, former ICC Chief Prosecutor, Luis Moreno Ocampo, found himself embroiled in a leaked document scandal involving allegations of attempted backroom deals and untoward interfer-

affairs where criticism of the ICC is too easily dismissed as mere political rhetoric from those threatened by the Court's work. That the Court has faced such political opposition is certainly beyond question. Still, in its first 15 years, there has been a tendency to protect the ICC at all costs and to overlook some of its shortcomings. The ICC – just like any other institution - is not beyond criticism and it has become increasingly clear that some of the Court's failings are underestimated, especially outside Africa.

So what did the ICC get wrong in its first 15 years? The ICC is today somewhat more immune from accusations of bias towards Africa in terms of its selection of cases. A mere glance at the geographical spread of cases and situations before the Court provides an inaccurate reflection of the Court's prosecutorial focus. Many of the cases from Africa were referred to the Court by states themselves. Some were referred by the UNSC, a political body over which the ICC has no control and, it seems, also very little persuasive influence. Yet, even with this in mind, there is a notable absence of ICC involvement in the affairs of western states. The Court is starting to redeem itself on this front with the opening of investigations in Afghanistan, Iraq and Georgia, over the past few years. Importantly, the investigations in Afghanistan and Iraq allow the Prosecutor to focus on the role of nationals from the UK and the US, the latter being a non-party state. The potential indictment of nationals from permanent member states of the UNSC as well as nationals from western non-party states may be regarded as a very significant development, but also one that will likely present the ICC with new challenges. While this should be regarded as a step in the right direction, it is likely that some in Africa will remain sceptical of the Court until a non-African perpetrator is actually in the dock.[2]

The accusation that the ICC ignores the crimes of western states resonates with Africa's broader criticism of the Court. Often, this failing of the Court is used to support much larger political debates concerning imbalances of power in the international order. To quote one African commentator on this front:

> The purported human rights groups and the European Union (EU) are continuing to reaffirm the necessity of the ICC to take action against African governments and rebel organizations while the war crimes of genocidal proportions inflicted upon the peoples of Africa, the Middle East, Asia and Latin America by the western imperialist states, with a leading role

ence with the work of the ICC in Kenya and Libya.

2 Ahmed DM, 'Why African states should leave the ICC' paper presented at The Crisis of International Criminal Law in Africa Conference, University of Leicester, November 2017 (conference paper extract on file with author).

> played by the U.S., are routinely ignored by the ICC, EU and largely by the investigators of London's Amnesty International and the New York City Human Rights Watch.[3]

To support such arguments, the ICC's selectivity is often exaggerated and mostly mentioned without any reference to the legal perimeters of jurisdiction, admissibility, referrals, and prosecutorial discretion. Be that as it may, it is remarkable how often accusations of bias and selectivity have been repeated over the past few years. From this, one can only conclude that at least some part of the criticism rings true. From the viewpoint of the ICC and its supporters, the charge of selectivity necessitates a pro-active approach that speaks directly to the issue of bias through concrete steps rather than simply a strategy of trying to dodge and deflate any criticism of selectivity.

Alongside legitimate criticisms of the ICC, it must be acknowledged that the Court has also been successful on some fronts. After only 15 years of operation, shouldn't the ICC be given more time by its critics to prove its worth and to mature as a *sui generis* legal institution? Criticism of the *functioning* of the ICC is one thing, but it is something very different to question the idea of the Court as an institution. The *functioning* of the Court – meaning its day-to-day effectiveness and decisions made by its personnel - is something that can be corrected and streamlined over time by the organs of the Court and through the mechanisms of ASP debate and amendment. Criticism of the functioning of the Court cannot and should not be allowed to dominate our conversations about the Court. The real test is whether the Rome Statute is an appropriate instrument to end impunity. The Rome Statute represents the core values of the ICC and also hints at the massive, but as yet unrealised human rights potential of the Court. As such, our overall assessment of the ICC should be judged not on situational or human errors that impact negatively on the Court's functioning, but on the potential of the Rome Statute when properly interpreted and applied in conjunction with widespread state support. In a similar vein, it must be remembered that the Rome Statute is a legal instrument like any other. As such, arguments as to its proper interpretation are bound to arise. However, such disputes should be placed in context and should not be allowed to detract from the overall value and potential of the project.

Despite views to the contrary among some Africans, the ICC has not been an abject failure. The ICC has pioneered the establishment of a system of reparations

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3 'Azikiwe A: Africa in review 2017 - Reinforced neo-colonialism and the imperative of continental unity' *Global Research,* 27 December 2017 https://www.globalresearch.ca/africa-in-review-2017-reinforced-neo-colonialism-and-the-imperative-of-continental-unity/5624108 on 5 July 2018.

for victims and has provided a voice for victims where previously there was none. The ICC's complementarity regime has had a wide-ranging catalytic impact on domestic legislation, while the Court must also be commended on its efforts towards capacity building. Otherwise, the ICC is increasingly starting to assert its influence (or at least making its presence felt) within situations of conflict and mass violence. It appears that prospect of ICC prosecution is not something that can be entirely ignored by those most responsible for the commission of international crimes.

It should be remembered that the ICC is in many ways part of a larger experiment, namely, the international community's experiment with international criminal law as a response to mass criminality. While international criminal law is now in the post-ontological phase of its development, the jury is still out as regards the ability of the international criminal law regime to achieve its stated objectives. At this stage, it is prudent to view the project from a broader historical context. International criminal law is a relatively new body of law. It is, in all likelihood, still developing. This may take an especially long time on the international level, where legal regimes tend to accrue and mature slowly and painstakingly over long periods. As a body of criminal law rules, international criminal law has been dissected, criticised, and pulled-apart from its inception and from every angle. Despite this, there still appears to be more support for the project than opposition. The ICC is both a symbol and the flag-bearer of modern, complementarity-centred international criminal law. Nearly two-thirds of states in the United Nations (UN) are members of the ICC. To date, only one state has officially withdrawn from the Rome Statute. As far as the ICC is concerned, it is not a question of 'should we have it?' but rather of '*how* should we have it?' The ICC needs and - if only for the sake of the noble objectives underpinning the Rome Statute - deserves more time to mature and develop. African states would do well not to allow the current tensions between the AU and the ICC to blind them to the Court's potential. This is not a call for ICC to be viewed uncritically, but rather for the development of a proper understanding of where the project is and where it should be headed. Even after 15 years, this is likely still only the beginning of the ICC story. But there will be no success story without support from African states. Overall, proponents of the Court may have to curb their enthusiasm, while critics who deem the Court a failure may be speaking too soon.

C Topics addressed in this edition

As in previous years, this book offers a *capita selecta* of topics relevant to international criminal justice in Africa. This year's edition engages with the following topics:

- The relationship between the global system of international criminal justice and the proposed criminal chamber within the African Court of Justice and Human Rights;
- African regional and sub-regional instruments on ending impunity for international crimes;
- The ICC, Africa and universal jurisdiction;
- Burundi's withdrawal from the Rome Statute;
- Corporate criminal liability in the Malabo Protocol;
- Options for the incorporation of the Malabo Protocol in Kenya;
- Article 98 agreements (bilateral immunity agreements) and African states; and
- Peacekeeping forces as perpetrators of international crimes.

II

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

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ANNUAL REPORT 2017[1]

BURUNDI

In April 2015, widespread electoral violence erupted in Burundi following an announcement by President Pierre Nkurunziza that he was going to run for a third term in office. The ensuing violence resulted in hundreds of killings and forced hundreds of thousands of people to flee and/or seek refuge in neighbouring countries. The The International Criminal Court's (ICC's) investigations in Burundi are focused on alleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi between 26 April 2015 and 26 October 2017, especially against persons who opposed or were perceived to oppose the ruling party.

- On 28 October 2017, Burundi became the first state party to officially withdraw from the Rome Statute of the International Criminal Court (Rome Statute), despite an on-going preliminary investigation by the ICC Prosecutor launched in April 2016. Burundi gave notice of its intention to withdraw from the Court on 27 October 2016, which withdrawal came into effect exactly one year later. The Burundian Government cited political bias as the reason for its withdrawal and accused the Court of being a western tool targeted at African governments.
- On 9 November 2017, the Pre-Trial Chamber (PTC) III of the ICC authorised the Prosecutor to open an investigation regarding crimes within the jurisdiction of the Court allegedly committed in Burundi or by nationals of Burundi outside Burundi between 26 April 2015

[1] Note that sections of this report are based on extracts taken directly from the 'Situations and Cases' section of the ICC website as at 23 February 2018, https://www.icc-cpi.int/Pages/Home.aspx# as well as from the *International Criminal Justice in Africa* blog as at 23 February 2018, https://www.icjafrica.com/.

and 26 October 2017 (the day before Burundi's withdrawal became effective).[2] The decision was first issued under seal on 25 October 2017. The PTC found a reasonable basis to believe that state agents and groups implementing state policies, together with members of the 'Imbonerakure' launched a widespread and systematic attack against the Burundian civilian population. The PTC ruled that the ICC could exercise jurisdiction over crimes allegedly committed in Burundi during the time that Burundi was a state party to the Rome Statute. Moreover, it ruled that Burundi has an obligation to cooperate with the Court for purposes of the investigation as authorised.

DEMOCRATIC REPUBLIC OF CONGO

The ICC investigations in the Democratic Republic of the Congo (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 DRC Government referred the situation to the ICC in 2004.

- On 25 February 2017, the South Kivu Military Court acknowledged that crimes against humanity had been committed during the so-called Mutarule Massacre in 2014, and that victims are entitled to receive financial compensation. However, the Court did not convict any of the three defendants for crimes against humanity.[3]
- On 24 March 2017, the ICC Trial Chamber issued an order awarding individual and collective reparations to the victims of the crimes committed by Germain Katanga in 2003, during an attack on the village of Bogoro in the Ituri district of the DRC.[4] A total of 297 victims were awarded with a symbolic compensation of $250.00 each, as well as collective reparations in the form of support for housing, income-generating activities, education aid and psychological support. Because of Mr Katanga's indigence, the Trust Fund for Victims was invited to consider using its resources for the reparations and present an implementation plan by the end of June 2017.

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2 *Situation in the Republic of Burundi,* Public redacted version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi' ICC-01/17-X-9-US-Exp, 25 October 2017.

3 Two defendants were convicted for other offences and one defendant was acquitted.

4 *The Prosecutor v Germain Katanga* ICC-01/04-01/07, 27 March 2017.

EXTRAORDINARY AFRICAN CHAMBERS IN SENEGAL

The Extraordinary African Chambers was established within the existing Senegalese court structure pursuant to an agreement between the African Union (AU) and Senegal. The tribunal had jurisdiction to prosecute the 'person or persons' most responsible for international crimes committed in Chad between 7 June 1982 to 1 December 1990, the period during which former dictator, Hissène Habré, was President.

- On 27 April 2017, the Appeals Chamber of the Extraordinary African Chambers confirmed the conviction of the former Chadian President Habré (acquitting him on a charge of rape) as well as his sentence to life imprisonment. Habré had been convicted on 30 May 2016 for the commission of war crimes, crimes against humanity and torture, including sexual violence and rape. The decision marked the end of a 17-year long battle by human rights groups and victims to bring Habré to justice.

LIBYA

The conflict in Libya arose from clashes between anti-Government protestors and Government forces that erupted in Benghazi in February 2011 and subsequently spread throughout the eastern part of the country. The situation in Libya (a non-state party) was referred to the ICC by the United Nations Security Council (UNSC) on 26 February 2011 and was the second UNSC referral to the Court.[5] The referral noted that the widespread and systematic attacks against the civilian population may amount to crimes against humanity.

- On 24 April 2017, PTC I granted the prosecution's application for an order to unseal the arrest warrant for Al-Tuhamy Mohamed Khaled allegedly responsible for war crimes and crimes against humanity. PTC I had issued the warrant of arrest under seal on 18 April 2013. Al-Tuhamy is currently at large.
- On 15 August 2017, the ICC issued a warrant of arrest for Mahmoud Mustafa Busayf Al-Werfalli. He is allegedly responsible for murder as a war crime committed in the context of the non-international armed conflict in Libya.

[5] UNSC Resolution 1970 (2011).

SOUTH AFRICA

South Africa was among the first African states to ratify the Rome Statute. The country also swiftly adopted national legislation to implement the Rome Statute into its domestic law. However, South Africa's failure to arrest President Omar Al-Bashir when he visited South Africa in 2015 has created an on-going conflict with the ICC.

- On 22 February 2017, the North Gauteng High Court in Pretoria ruled that the South African Government's decision to give notice to withdraw from the ICC was unconstitutional and invalid.[6] In October 2016, South Africa decided to withdraw from the Rome Statute. The South African Minister of International Relations thereafter signed a notice of withdrawal, which was later deposited with the Secretary-General of the United Nations (UN). This triggered the process for South Africa's withdrawal, which, in terms of Article 127(1) of the Rome Statute, would take effect 12 months after the depositing of a notice to that effect. The High Court held that the national executive does not have the power to give notice of withdrawal from international treaties without prior parliamentary approval. A short time later, South Africa formally revoked its notice of withdrawal from the ICC.
- On 6 July 2017, PTC II of the ICC found that South Africa failed to comply with its obligations of cooperation under the Rome Statute by failing to arrest and surrender Sudanese President Al-Bashir to the Court while he was attending the AU Summit in South Africa in June 2015.[7] However, the PTC decided not to refer the matter of South Africa's non-compliance to the Assembly of States Parties to the Rome Statute (ASP) or the UNSC for further action.
- In December, the International Crimes Bill was tabled before the South African Parliament. The Bill's purpose is to repeal the *Implementation of the Rome Statute of the International Criminal Court Act*[8] and to fill the void that will be left if South Africa's withdrawal from the ICC becomes

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6 *Democratic Alliance v Minister of International Relations and Co-operation and others (Council for the Advancement of the South African Constitution as Intervening Party)* [2017] 2 All SA 123 (GP).

7 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09, 6 July 2017.

8 No 27 of 2003.

effective. Although South Africa would then no longer be bound by the Rome Statute, the new Bill provides for the surrender of those suspected of the commission of international crimes to listed 'entities', including the ICC.

THE ICC-AFRICA CONFLICT

- On 2 February 2017, leaders from multiple African countries announced their support, with unspecified reservations, for a strategy of collective withdrawal from the ICC.[9]

Update: In February 2018, at the 30th African Union Summit of Heads of State and Government, the AU decided to pursue a request for an advisory opinion from the International Court of Justice (ICJ) on the question of immunities of heads of state and government and other senior officials. In particular, the AU is seeking clarity on the relationship between Article 27 of the Rome Statute (irrelevance of official capacity); Article 98 (cooperation with respect to waiver of immunity and consent to surrender); and the obligations of ICC states parties under customary international law.

OTHER DEVELOPMENTS

- **16th Session of the Assembly of State Parties to the ICC**: In December, the ASP adopted a resolution activating the ICC's jurisdiction over the crime of aggression as of 17 July 2018. The ASP also appointed two new African judges and adopted three amendments to Article 8 of the Rome Statute.
- **Ivory Coast**: On 29 March 2017, Simone Gbagbo, wife of Laurent Gbagbo who is currently on trial before the ICC for crimes against humanity, was found not guilty of war crimes and crimes against humanity in a domestic court. To the surprise of many, the jury voted unanimously to acquit Gbagbo. The ICC issued a warrant of arrest against Simone Gbagbo on 29 February 2012 and unsealed it on 22 November 2012. She is not in the Court's custody.

[9] AU Assembly, Draft Decisions, Declarations, Resolution and Motion, 31 January 2017.

- **South Sudan**: In early 2017, consultations between the AU and the South Sudanese Justice Ministry led to the creation of a draft statute for the Hybrid Court of South Sudan (HCSS) as well as a memorandum of understanding between the AU and the South Sudanese Government on its establishment. The August 2015 Agreement on the Resolution of Conflict in South Sudan envisioned the establishment of a AU-South Sudan hybrid court to prosecute international crimes committed during the country's civil war, which started in December 2013. However, no further action has been taken to establish the hybrid court.
- **The Gambia**: In April, the Gambian Justice Minister announced plan for the establishment of a truth and reconciliation commission to investigate crimes committed by the outgoing regime of former President Jammeh Yahya.
- **Uganda**: In mid-November, Uganda hosted President Al-Bashir of Sudan, even after it was referred to the UNSC in July 2016 for its failure to arrest Al-Bashir during his visit to the country in May 2016.

INTRODUCTION

I

Ce livre contient une collection de documents rédigés par des membres du Groupe d'experts africains de Konrad Adenauer Stiftung sur la justice pénale internationale. C'est la cinquième publication annuelle du groupe sur la justice pénale internationale en Afrique. Le but de ce manuel est d'offrir un point de vue africain sur les problèmes, les défis et les perspectives concernant la justice pénale internationale en Afrique. Le contenu de cette publication couvre des situations et des cas à travers le continent ainsi que des débats plus larges et des questions contemporaines affectant et façonnant l'application du droit pénal international en Afrique.

A Aperçu de la justice pénale internationale en Afrique en 2017

Une évaluation globale des événements relatifs à la justice pénale internationale en Afrique révèle que la région africaine continue d'afficher une étrange dichotomie dans ses rapports avec le régime de droit pénal international. C'est ce que confirment les actions de son organe politique régional, l'Union africaine, ainsi que les développements au sein de différents pays africains. D'un côté de l'équation, on peut citer, par exemple : (1) la condamnation de l'ancien dictateur tchadien, Hissène Habré (confirmée en appel en 2017) ; (2) l'ambition d'atteindre une responsabilité régionale pour les crimes internationaux manifestée par la longue liste des crimes substantiels inclus dans le Protocole de Malabo ; et (3) la perspective plus vaste sur la compétence universelle entérinée dans la loi type de l'UA sur la compétence universelle. Au revers de l'équation, on trouve des preuves apparemment contradictoires, par exemple: (1) l'opposition persistante de l'UA à la CPI sur la question de l'immunité des chefs d'Etat et de gouvernement, attestée par la clause d'immunité du Protocole de Malabo ainsi que la clause d'immunité

de la loi type de l'UA sur la compétence universelle; (2) la défaillance des Etats africains à ratifier le Protocole de Malabo; et (3) la réticence générale des Etats africains à utiliser la compétence universelle pour traduire en justice les auteurs de crimes internationaux.

En ce qui concerne la justice pénale internationale, les événements les plus importants et les plus controversés de 2017 ont été directement liés aux deux questions interdépendantes de l'immunité des chefs d'État et de gouvernement et du retrait de l'État du Statut de Rome : premièrement, le constat par la CPI de la non-coopération de l'Afrique du Sud et ses efforts ultérieurs pour se retirer du Statut de Rome. Deuxièmement, le retrait historique du Burundi du Statut de Rome et la décision ultérieure de la Chambre préliminaire de la CPI selon laquelle, malgré le retrait, la Cour reste compétente à l'égard des crimes internationaux commis au Burundi durant sa période d'adhésion à la Cour. Reste à voir comment ces problèmes se développeront en 2018 et au-delà. Une chose est certaine : il y a un besoin de plus en plus urgent d'un engagement constructif entre la CPI, l'AEP, le CSNU et l'UA, en particulier en ce qui concerne la question de l'immunité pour les chefs d'Etat et de gouvernement en exercice. Pour qu'il soit fructueux, il est suggéré qu'un tel engagement devrait inclure un examen sérieux d'éventuels amendements au Statut de Rome.

B La Cour pénale internationale à 15 ans

La CPI a célébré ses 15 ans d'existence en 2017. Cet évènement constitue une opportunité de réfléchir brièvement sur les succès et l'échec de la Cour à ce jour, en particulier dans une perspective africaine.

Après 15 ans, et en rétrospective, on peut dire que la CPI était toujours susceptible d'être une institution contentieuse. Politiquement, la CPI est encore loin d'être universellement soutenue. Cette division politique, associée en particulier au pouvoir incontrôlé du CSNU de renvoi et d'ajournement des cas impliquant des parties non-étatiques à la Cour, a jeté une ombre politique sur le travail de la CPI.[1] Ce qui fait que la critique de la CPI est trop facilement rejetée comme une simple rhétorique politique de ceux qui se sentent menacés par le travail de la Cour. Il est

[1] Il faut dire, cependant, que le fonctionnement de la CPI n'implique pas toujours un travail juridique seulement, mais aussi parfois un jeu politique douteux, en particulier de la part du Bureau du Procureur. Par exemple, en 2017, l'ancien procureur en chef de la CPI, Luis Moreno Ocampo, s'est retrouvé mêlé à un scandale de fuites de documents impliquant des allégations de tentatives de tractations et une ingérence fâcheuse dans le travail de la CPI au Kenya et en Libye.

certainement incontestable que la Cour ait fait face à une telle opposition politique. Pourtant, au cours de ses 15 premières années, il y a eu une tendance à protéger à tout prix la CPI et à oublier certaines de ses faiblesses. La CPI - tout comme n'importe quelle autre institution - n'est pas au-dessus de toute critique et il est devenu de plus en plus clair que certaines des faiblesses de la Cour sont sous-estimées, en particulier en dehors de l'Afrique.

Alors quelles sont les lacunes de la CPI dans ses 15 premières années? La CPI est aujourd'hui un peu plus à l'abri des accusations de partialité envers l'Afrique en termes de sélection des cas. À l'heure actuelle, il est largement reconnu qu'un simple coup d'œil sur la répartition géographique des cas et des situations devant la Cour fournit un reflet inexact de l'attention de la Cour en matière de poursuites. De nombreux cas d'Afrique ont été référés à la Cour par les Etats eux-mêmes. Certains ont été référés par le CSNU, un organe politique sur lequel la CPI n'a aucun contrôle et, semble-t-il, a également une influence très faible. Pourtant, même dans cet état d'esprit, il y a une absence notable d'implication de la CPI dans les affaires des États occidentaux. La Cour commence à se racheter sur ce front avec l'ouverture d'enquêtes en Géorgie, en Irak et en Afghanistan au cours de dernières années. Fait important, l'enquête en Irak et en Afghanistan permet au Bureau du Procureur de se concentrer sur le rôle des ressortissants du Royaume-Uni et des États-Unis, ce dernier étant un État non-partie. L'inculpation potentielle de ressortissants d'États membres permanents du CSNU ainsi que de ressortissants d'États occidentaux non-parties peut être considérée comme un développement très important, mais aussi susceptible de présenter de nouveaux défis à la CPI. Alors que cela devrait être considéré comme un pas dans la bonne direction, il est probable que certains en Afrique resteront sceptiques vis-à-vis de la Cour jusqu'à ce qu'un contrevenant non-africain soit réellement sur le banc des accusés.[2]

L'accusation selon laquelle la CPI ignore les crimes des États occidentaux résonne avec la critique plus large de l'Afrique à l'égard de la Cour. Souvent, cet échec de la Cour est utilisé pour soutenir des débats politiques beaucoup plus larges concernant les déséquilibres de pouvoir dans l'ordre international. Pour citer un commentateur africain sur ce point:

> Les prétendus groupes des droits de l'homme et l'Union européenne (UE) continuent de réaffirmer la nécessité pour la CPI d'agir contre les gouvernements africains et les organisations rebelles alors que les crimes de guerre de proportions génocidaires infligés

[2] Ahmed DM, 'Pourquoi les Etats africains devraient-ils quitter la CPI', document présenté à « la Conférence sur la crise du droit pénal international en Afrique », Université de Leicester, novembre 2017 (extrait du document de conférence avec l'auteur).

> aux peuples d'Afrique, du Moyen-Orient, d'Asie et de l'Amérique latine par les États impérialistes occidentaux, avec un rôle de premier plan joué par les États-Unis, sont couramment ignorés par la CPI, l'UE et en grande partie par les enquêteurs d'Amnesty International de Londres et de l'organisation Human Rights Watch de New York City.[3]

Pour appuyer de tels arguments, la sélectivité de la CPI est souvent exagérée et surtout mentionnée sans aucune référence aux portées juridiques de juridiction, d'admissibilité, de renvois et de pouvoir discrétionnaire en matière de poursuites. Quoi qu'il en soit, il est remarquable le nombre de fois que les accusations de partialité et de sélectivité ont été répétées au cours de dernières années. De ceci, on peut seulement conclure qu'au moins une partie de la critique sonne juste. Selon la CPI et ses partisans, l'accusation de sélectivité nécessite une approche proactive qui aborde directement la question de partialité à travers des mesures concrètes plutôt qu'une simple stratégie visant à esquiver et à dégonfler toute critique de sélectivité.

À côté des critiques légitimes de la CPI, il faut reconnaître que la Cour a également réussi sur certains fronts. Après seulement 15 ans de fonctionnement, ne devrait-il pas que les critiques donnent plus du temps à la CPI pour prouver sa valeur et mûrir en tant qu›institution juridique *sui generis* ? La critique sur le *fonctionnement* de la CPI est une chose, mais c›est quelque chose de très différent de remettre en question l›idée de la Cour en tant qu›institution. Le *fonctionnement* de la Cour, c›est-à-dire son efficacité au jour le jour et les décisions prises par son personnel, peut être corrigé et rationalisé au fil du temps par les organes de la Cour et par les mécanismes du débat et de l›amendement du groupe consultatif (ASP). La critique sur le fonctionnement de la Cour ne peut et ne doit pas dominer nos conversations sur la Cour. Le vrai test est de savoir si le Statut de Rome est à la hauteur comme un instrument pour mettre fin à l›impunité. Le Statut représente les valeurs fondamentales de la CPI et fait également allusion au potentiel énorme, mais encore non réalisé, des droits de l›homme de la Cour. Ainsi, notre évaluation générale de la CPI devrait être jugée non pas sur des erreurs situationnelles ou humaines qui ont un impact négatif sur le fonctionnement de la Cour, mais sur le potentiel du Statut lorsqu›il est correctement interprété et appliqué conjointement avec un large soutien étatique. Dans le même esprit, il ne faut pas oublier que le Statut de Rome est un instrument juridique comme les autres. En tant que tel, des arguments quant à sa propre interprétation sont inévitables. Cependant, ces

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[3] Azikiwe A, 'Africa in Review 2017: Reinforced neo-colonialism and the imperative of continental unity' *(le néo-colonialisme renforcé et l'impératif de l'unité continentale)*https://www.globalresearch.ca/africa-in-review-2017-reinforced-neo-colonialism-and-the-imperative-of-continental-unity/5624108.

différends devraient être placés dans leur contexte et ne devraient pas avoir pour effet de porter atteinte à la valeur intégrale et au potentiel du projet.

Malgré des avis contraires de certains Africains, la CPI n'a pas été un échec ignominieux. La CPI a été la première à mettre en place un système de réparation pour les victimes et a donné une voix aux victimes là où il n'y en avait pas auparavant. Le régime de complémentarité de la CPI a eu un large impact catalytique sur la législation nationale ; ainsi la Cour doit être également félicitée pour ses efforts en matière de renforcement des capacités. À part cela, la CPI commence de plus en plus à affirmer son influence (ou du moins à faire sentir sa présence) dans des situations de conflit et de violence de masse. Il semble que les poursuites contre la CPI ne sont pas totalement ignorées par les principaux responsables de la commission de crimes internationaux.

Il ne faut pas oublier que la CPI s'inscrit, à bien des égards, dans une expérience plus vaste, à savoir l'expérience de la communauté internationale en matière de droit pénal international en réponse à la criminalité de masse. Alors que le droit pénal international est maintenant dans la phase post-ontologique de son développement, le jury ne s'est pas encore prononcé sur la capacité du régime de droit pénal international à atteindre ses objectifs déclarés. À ce stade, il est prudent de voir le projet dans un contexte historique plus étendu. Le droit pénal international est un ensemble de lois relativement nouveau. Il est très probablement en train de se développer. Cela peut prendre un temps particulièrement long au niveau international, où les régimes juridiques ont tendance à s'accumuler et à mûrir lentement et laborieusement sur de longues périodes. En tant que corpus de règles de droit pénal, le droit pénal international a été disséqué, critiqué et mis en morceaux depuis sa mise en place et sous tous les angles. Malgré cela, il semble qu'il y a plus de soutien pour le projet que d'opposition. La CPI est à la fois un symbole et le porte-drapeau du droit pénal international moderne et centré sur la complémentarité. Près des deux tiers des États membres des Nations Unies sont membres de la CPI. Jusqu'à présent, un seul État s'est officiellement retiré du Statut. En ce qui concerne la CPI, il ne s'agit pas de 'devrions-nous l'avoir'? Mais plutôt de '*comment* devrions-nous l'avoir'? La CPI a besoin et - ne serait-ce que pour les nobles objectifs qui sous-tendent le Statut de Rome - mérite plus de temps pour atteindre la maturité et se développer. Les Etats africains feraient mieux de ne pas laisser les tensions actuelles entre l'UA et la CPI les aveugler sur le potentiel de la Cour. Ce n'est pas un appel à ne pas critiquer la CPI, mais plutôt au développement d'une bonne compréhension du niveau où se trouve le projet et où il devrait être orienté. Même après 15 ans, ce n'est probablement que le début de l'histoire de la

CPI. Mais il n'y aura pas de succès sans le soutien des Etats africains. En général, les partisans de la Cour devront peut-être freiner leur enthousiasme, tandis que ceux qui considèrent la Cour comme un échec papotent peut-être prématurément.

C Sujets abordés dans cette édition

Comme les années précédentes, ce livre offre une sélection de sujets pertinents à la justice pénale internationale en Afrique. L'édition de cette année aborde les sujets suivants :

- La relation entre le système mondial de justice pénale internationale et la chambre criminelle proposée au sein de la Cour africaine de justice et des droits de l'homme ;
- Les instruments régionaux et sous-régionaux africains pour mettre fin à l'impunité des crimes internationaux ;
- La CPI, l'Afrique et la juridiction universelle ;
- Le retrait du Burundi du Statut de Rome ;
- La responsabilité pénale des personnes morales dans le Protocole de Malabo ;
- Les options pour l'incorporation du Protocole de Malabo au Kenya ;
- Les accords en vertu de l'article 98 (accords bilatéraux d'immunité) et les États africains ; et
- Les forces de maintien de la paix en tant que responsables du crime international.

II

Je tiens tout d'abord à remercier la Fondation Konrad-Adenauer-Stiftung pour son généreux soutien au Groupe africain d'experts de la justice pénale internationale et, plus généralement, pour la cause de la paix et de la justice en Afrique.

Mes remerciements vont à tous les membres de notre groupe et en particulier à ceux qui ont contribué à cet ouvrage pour leur travail acharné, leur dévouement et leur patience.

Je tiens également à savoir gré au professeur Gerhard Kemp, qui a agi en tant que conseiller externe pour la publication et a également, très aimablement, accepté de revoir le dernier manuscrit. Ses orientations et ses conseils étaient, comme toujours, très cohérents et utiles. Je voudrais également remercier notre rédacteur français, Prof. Hartmut Hamann, pour son assistance dans l'édition et les traductions.

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Enfin, je présente ma gratitude à nos éditeurs, Strathmore University Press, pour les efforts qu'ils ont déployés à l'égard de cet ouvrage. Je tiens à remercier notamment J Osogo Ambani et Humphrey Sipalla de leur aide et leurs conseils dans le processus de publication.

Bloemfontein, février 2018

RAPPORT ANNUEL 2017[4]

LE BURUNDI

En avril 2015, des violences électorales généralisées ont éclaté au Burundi suite à l'annonce d'un troisième mandat par le président Pierre Nkurunziza. La violence qui s'en est suivie a entraîné des centaines de meurtres et a obligé des centaines de milliers de personnes à fuir et / ou à chercher refuge dans les pays voisins. Les enquêtes de la CPI au Burundi portent sur les présomptions de crimes contre l'humanité commis au Burundi ou par des ressortissants burundais hors du Burundi depuis le 26 avril 2015 jusqu'au 26 octobre 2017, notamment contre des personnes opposées ou perçues comme opposées au parti au pouvoir.

- Le 28 octobre 2017, le Burundi est devenu le premier État membre à se retirer officiellement du Statut de Rome, malgré une enquête préliminaire en cours du Procureur de la CPI lancée en avril 2016. Le Burundi a annoncé son intention de se retirer de la Cour le 27 octobre 2016. Le retrait est entré en vigueur exactement un an plus tard. Le gouvernement burundais a invoqué le parti-pris politique comme raison de son retrait et a accusé la Cour d'être un outil occidental ciblant les gouvernements africains.
- Le 9 novembre 2017, la CPP (conférence préalable au procès) III de la CPI a autorisé le Procureur de la CPI à ouvrir une enquête sur les crimes relevant de la compétence de la Cour qui auraient été commis au Burundi ou par des ressortissants burundais hors du Burundi depuis le 26 avril 2015 jusqu'à 26 octobre 2017 (le jour précédant l'entrée en vigueur du

[4] Notez que les sections du présent rapport sont basées sur des extraits tirés directement de la section 'Situations et cas' du site Web de la CPI au 23 Février 2018, https://www.icc-cpi.int/Pages/Home.aspx# ainsi que du blog sur la *justice pénale internationale en Afrique* au 23 février 2018, https://www.icjafrica.com/ .

retrait du Burundi).[5] La décision a été rendue sous scellé pour la première fois le 25 octobre 2017.

La CPI a trouvé des motifs raisonnables de croire que les agents de l'État et les groupes mettant en œuvre les politiques de l'État, ainsi que les membres de 'Imbonerakure', ont lancé une attaque généralisée et systématique contre la population civile burundaise. La CPP a décidé que la CPI pourrait exercer sa juridiction sur les crimes qui auraient été commis au Burundi à la période durant laquelle le Burundi était Etat partie au Statut de Rome. De plus, elle a statué que le Burundi avait l'obligation de coopérer avec la Cour aux fins de l'enquête autorisée.

LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO

Les enquêtes de la CPI en RDC se sont concentrées sur les crimes de guerre présumés et les crimes contre l'humanité commis principalement dans l'est de la RDC, dans la région de l'Ituri et dans les provinces du Nord et du Sud Kivu depuis le 1er juillet 2002. Le gouvernement de la RDC a déféré la situation à la CPI en 2004.

- Le 25 février 2017, le Tribunal militaire du Sud-Kivu a reconnu que les crimes contre l'humanité avaient été commis au cours du soi-disant massacre de Mutarule en 2014, et que les victimes avaient droit à une compensation financière. Cependant, la Cour n'a condamné aucun des trois accusés de crimes contre l'humanité.[6]
- Le 24 mars 2017, la Chambre de première instance de la CPI a rendu une ordonnance attribuant des réparations individuelles et collectives aux victimes des crimes commis par Germain Katanga en 2003, lors d'une attaque contre le village de Bogoro dans le district de l'Ituri en RDC.[7] 297 victimes au total ont reçu une compensation symbolique de 250 dollars américain chacune, ainsi que des réparations collectives sous forme d'aides au logement, d'activités génératrices de revenus, d'aide à l'éducation et de soutien psychologique. En raison de l'indigence de M.

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5 *Situation en République du Burundi, Version publique expurgée de Décision en vertu de l'article 15 du Statut de Rome relatif à l'autorisation d'une enquête sur la situation en République du Burundi,* ICC-01/17-X-9-US-Exp, 25 octobre 2017.

6 Deux prévenus ont été condamnés pour une autre infraction et un autre a été acquitté.

7 Le Procureur c. Germain Katanga CPI-01/04-01/07, 27 mars 2017.

Katanga, le Fonds au profit des victimes a été invité à envisager d'utiliser ses ressources pour les réparations et à présenter un plan de mise en œuvre d'ici la fin du mois de juin 2017.

CHAMBRES AFRICAINES EXTRAORDINAIRES AU SÉNÉGAL

Les Chambres africaines extraordinaires ont été créées au sein de la structure des tribunaux sénégalais existants en vertu d'un accord entre l'UA et le Sénégal. Le tribunal avait compétence pour poursuivre 'la ou les personnes' les plus responsables des crimes internationaux commis au Tchad entre le 7 juin 1982 et le 1er décembre 1990, période durant laquelle l'ancien dictateur, Hissène Habré, était président.

- Le 27 avril 2017, la Chambre d'appel des Chambres africaines extraordinaires a confirmé la condamnation de l'ancien président tchadien Hissène Habré (l'acquittant de l'accusation de viol) ainsi que sa condamnation à perpétuité. Habré avait été condamné le 30 mai 2016 pour la perpétration de crimes de guerre, de crimes contre l'humanité et de torture, y compris de la violence sexuelle et du viol. Cette décision marqua la fin d'une longue bataille de 17 ans menée par des groupes de défense des droits de l'homme et par des victimes pour traduire Habré en justice.

LA LIBYE

Le conflit en Libye a été le résultat d'affrontements entre des manifestants antigouvernementaux et les forces gouvernementales qui ont éclaté à Benghazi en février 2011 et se sont ensuite répandus dans toute la partie orientale du pays. La situation en Libye (un État non-partie) a été déférée à la CPI par le CSNU le 26 février 2011 et a été le deuxième renvoi du CSNU à la Cour.[8] *Le renvoi a noté que les attaques généralisées et systématiques contre la population civile peuvent constituer des crimes contre l'humanité.*

- Le 24 avril 2017, la Chambre préliminaire I de la CPI a fait droit à la demande du procureur de lever les scellés du mandat d'arrêt de Al-Tuhamy Mohamed Khaled, prétendument accusé de crimes de guerre et de crimes contre l'humanité en Libye en 2011. La Chambre préliminaire

[8] Résolution 1970(2011) du CSNU.

I a délivré le mandat d'arrêt sous scellés le 18 avril 2013. M. Al-Tuhamy est actuellement en fuite.

- Le 15 août 2017, la Cour pénale internationale a décerné un mandat d'arrêt contre Mahmoud Mustafa Busayf Al-Werfalli. Il est responsable présumé du meurtre en tant que crime de guerre commis dans le contexte du conflit armé non international en Libye.

L'AFRIQUE DU SUD

L'Afrique du Sud a été parmi les premiers États africains à ratifier le Statut de Rome. Le pays a également rapidement adopté une législation nationale pour mettre en œuvre le Statut de Rome dans son droit interne. Cependant, l'incapacité de l'Afrique du Sud d'appréhender le président Al-Bashir lors de sa visite en Afrique du Sud en 2015 a créé un conflit permanent entre ce pays et la CPI.

- Le 22 février 2017, la Haute Cour du North Gauteng à Pretoria a statué que la décision du gouvernement sud-africain de donner un avis de retrait de la Cour pénale internationale était inconstitutionnelle et invalide.[9]

  En octobre 2016, l'exécutif national a pris la décision de se retirer du Statut de Rome. Subséquemment, Le ministre sud-africain des Relations internationales a signé un avis de retrait, qui a été ensuite déposé auprès du Secrétaire général des Nations unies. Cela a déclenché le processus de retrait de l'Afrique du Sud qui, aux termes de l'article 127 (1) du Statut de Rome, prendrait effet 12 mois après le dépôt d'un avis à cet effet.

  La Haute Cour a statué que l'exécutif national n'avait pas le pouvoir de donner un avis de retrait des traités internationaux sans l'approbation préalable du parlement. Peu de temps après, l'Afrique du Sud a officiellement révoqué son avis de retrait de la CPI.

- Le 6 juillet 2017, la Chambre préliminaire II de la CPI a estimé que l'Afrique du Sud n'avait pas respecté ses obligations de coopération en vertu du Statut de Rome en n'arrêtant pas ni en rendant le président soudanais Omar Al-Bashir à la Cour alors qu'il participait au Sommet de

[9] *Democratic Alliance v Minister for External Relations and Cooperation and others (Alliance Démocratique c. Ministre des Relations internationales et de la Coopération et autres (Conseil pour l'avancement de la Constitution sud-africaine en tant que Partie intervenante))* [2017] 2 All SA 123 (GP).

l'UA en Afrique du Sud en juin 2015.[10] Cependant, la Chambre a décidé de ne pas renvoyer la question du non-respect de l'Afrique du Sud à l'Assemblée des États Parties ou au Conseil de Sécurité des Nations Unies pour suite à donner.

- En décembre, le projet de loi sur les crimes internationaux a été déposé devant le Parlement sud-africain. Le projet de loi vise à abroger l'application *du Statut de Rome prescrit dans la Loi* 27 de 2003 de *la Cour pénale* Internationale et de combler le vide qui en résultera si le retrait de l'Afrique du Sud de la CPI devenait effectif. Bien que l'Afrique du Sud ne serait plus liée par le Statut de Rome, le nouveau projet de loi prévoit la remise des personnes soupçonnées d'avoir commis des crimes internationaux à des 'entités' figurant sur la liste, y compris la Cour pénale internationale.

LE CONFLIT CPI-AFRIQUE

- Le 2 février 2017, les dirigeants de plusieurs pays africains ont annoncé leur soutien, avec des réserves non spécifiées, à une stratégie de retrait collectif de la Cour pénale internationale.[11]

Mise à jour : En février 2018, lors du 30ème Sommet des Chefs d'État et de Gouvernement de l'Union africaine, l'Union africaine a décidé de solliciter un avis consultatif auprès de la Cour Internationale de Justice sur la question des immunités des chefs d'État et de gouvernement et d'autres hauts fonctionnaires. L'UA cherche précisément à clarifier la relation entre les obligations des États parties à la CPI en droit international coutumier et l'article 27 du Statut de Rome (non-pertinence de la capacité officielle) ainsi que l'article 98 (coopération en matière de renonciation à l'immunité et de consentement à la remise).

AUTRES DÉVELOPPEMENTS

- **16e session de l'Assemblée des États parties (AEP) à la CPI:** En décembre, l'AEP a adopté une résolution activant la compétence de la

[10] *Le Procureur c. Omar Hassan Ahmad Al-Bashir* (Décision en vertu de l'article 87 (7) du Statut de Rome sur le non-respect par l'Afrique du Sud de la demande d'arrestation et de remise d'Omar Al-Bashir faite par la Cour) CPI-02/05-01/09, 6 juillet 2017.

[11] Assemblée, Projets de Décisions, Déclarations, Résolution et Motion de l'UA, 31 janvier 2017.

CPI à l'égard du crime d'agression en date du 17 juillet 2018. L'AEP a également nommé deux nouveaux juges africains et a adopté trois amendements à l'article 8 du Statut de Rome.

- **La Côte d'Ivoire :** Le 29 mars 2017, Simone Gbagbo, l'épouse de Laurent Gbagbo, actuellement jugée par la CPI pour crimes contre l'humanité, a été reconnue non coupable de crimes de guerre et de crimes contre l'humanité devant un tribunal national. A la surprise générale, le jury a voté à l'unanimité pour l'acquitter.

  La CPI a délivré un mandat d'arrêt contre Simone Gbagbo le 29 février 2012 et l'a descellé le 22 novembre 2012. Elle n'est pas sous la garde de la Cour.

- **Le Sud Soudan** : Au début de l'année 2017, les consultations entre l›UA et le ministère de la Justice du Sud Soudan ont abouti à la création d›un projet de statut de la Cour Hybride du Sud Soudan (CHSS) et à un mémorandum d'accord entre l'UA et le gouvernement sud soudanais sur la création de la cour. L'Accord d'août 2015 sur la résolution des conflits au Sud Soudan a envisagé la création d'un tribunal hybride UA-Sud Soudan pour juger les crimes internationaux commis durant la guerre civile du pays, qui a débuté en décembre 2013. Cependant, aucune autre mesure n'a été prise pour établir le tribunal hybride.

- **La Gambie** : En avril, le ministre gambien de la Justice annonce un plan pour la création d'une commission vérité et réconciliation chargée d'enquêter sur les crimes commis par le régime sortant de l'ancien président Jammeh.

- **L'Ouganda** : À la mi-novembre, l›Ouganda a accueilli le président soudanais Al-Bashir, même après avoir été référé au Conseil de sécurité en juillet 2016 pour n'avoir pas arrêté Al-Bashir lors de sa visite dans le pays en mai 2016.

TOWARDS COORDINATION OF THE GLOBAL SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE WITH THE CRIMINAL COURT OF THE AFRICAN UNION

Balingene Kahombo

Abstract

This chapter examines the relationship between the global system of international criminal justice, dominated by the International Criminal Court (ICC) and the United Nations Security Council (UNSC), and the proposed criminal chamber within the African Court of Justice and Human Rights (AU Criminal Court). It seeks to establish the appropriate approach to coordination between them in order to avoid any conflict or inconsistency, which may impair the cause of justice. In this regard, two possible approaches that have been envisaged in the literature are discussed, namely, the hierarchical model whereby the AU Criminal Court is subordinated and connected to the global system of international criminal justice, and the cooperative approach, which privileges mutual accommodation and principles on the resolution of potential conflicts between equally coexisting international criminal courts. The study also proposes a third alternative: the regionalisation of the ICC in connection with the principle of regional territoriality. The latter principle implies that crimes committed in one region should be tried by domestic courts of states belonging to that region or the competent regional criminal jurisdiction before any involvement from another region or global mechanisms of criminal accountability. This approach is preferable because it can lead to building a system of international criminal justice consisting of both regional and universal fragments of international criminal law, which are integrated and so standing in harmony one with another.

VERS LA COORDINATION DU SYSTÈME GLOBAL DE JUSTICE PÉNALE INTERNATIONALE AVEC LA COUR PÉNALE DE L'UNION AFRICAINE

Abstrait

Ce chapitre examine la relation entre le système global de justice pénale internationale, dominé par la Cour pénale internationale (CPI) et le Conseil de sécurité des Nations Unies, et la chambre criminelle proposée au sein de la Cour africaine de justice et des droits de l'homme et des peuples (La Cour pénale de l'UA). Il cherche à établir l'approche appropriée de la coordination entre eux afin d'éviter tout conflit et toute incohérence qui peuvent porter atteinte à la cause de la justice. À cet égard, deux approches possibles qui ont été envisagées dans la littérature sont discutées, à savoir, le modèle hiérarchique par lequel la Cour pénale de l'UA est subordonnée et reliée au système global de justice pénale internationale, et l'approche coopérative, qui privilégie l'accommodement mutuel et les principes sur la résolution des conflits potentiels entre des cours pénales internationales coexistantes. L'étude propose également une troisième alternative : la régionalisation de la CPI en lien avec le principe de la territorialité régionale. Ce dernier principe implique que les crimes commis dans une région devraient être jugés par les tribunaux nationaux des États appartenant à cette région ou par la juridiction pénale régionale compétente avant toute implication d'une autre région ou des mécanismes mondiaux de responsabilité pénale. Cette approche est préférable car elle peut conduire à la mise en place d'un système de justice pénale internationale composé de fragments de droit pénal international régionaux et universels qui sont intégrés et donc en harmonie les uns avec les autres.

1 Introduction

In July 2014, the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). This Protocol created within the African Court of Justice and Human Rights (ACJHR) an International Criminal Law Section[1] (AU Criminal Court) which will have jurisdiction over 14 international and transnational crimes: four International Criminal Court (ICC) crimes (aggression, genocide, crimes against humanity and war crimes) and 10 other crimes of transnational and regional interest (unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources).[2] The creation of the AU Criminal Court presupposes that Africa as a region claims to be an enforcer of international law and participates in the international struggle against impunity. It also implies that the ICC, although currently the dominant global judicial system of international criminal justice, is not the end of the story of the development of international criminal law.[3] Further developments remain possible. The creation of the AU Criminal Court is a step in this direction.

However, the establishment of an AU Criminal Court could cause fragmentation and complexity in international criminal law.[4] There would be normative fragmentation (on substantive and procedural levels) of two kinds. On the one hand, norms and features of African international criminal law differ from those of global international criminal law. The following, for example, are unique to the Malabo Protocol: corporate criminal liability, an extensive list of 'crimes against peace and security in Africa',[5] deletion of the confirmation of charges from the procedure applicable before the AU Criminal Court, and the possible application

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1 Article 16, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,* 27 June 2014, STC/Legal/Min/7 (1) Rev 1. (Malabo Protocol). The International Criminal Law Section has been created in addition to a General Affairs Section (for dealing with interstate disputes other than those relating to human rights) and a Human and Peoples' Rights Section. This Section consists of three Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.

2 See Jalloh C, 'The Nature of the Crimes in the African Criminal Court' 15 *Journal of International Criminal Justice,* 4 (2017), 799-826.

3 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, 9.

4 Sirleaf M, 'Regionalism, regime complex and the crisis in international criminal justice' 54 *Columbia Journal of Transnational Law* (2016), 743-747.

5 See Article 1(3), *Organisation of African Unity Convention for the Elimination of Mercenarism in Africa,* 3 July 1977, 1490 UNTS 25573.

by the latter of extensive jurisdictional principles, including passive personality. Another prominent example of African regional norms that diverge from rules of universal international criminal law is the rules on functional and personal immunity of state officials from international criminal prosecution.[6] Furthermore, there is institutional fragmentation.[7] This implies a plurality of courts that could get into competition with one another because they will have jurisdiction to try the same international crimes. In particular, the AU Criminal Court stands alongside the ICC at the regional level. It duplicates the mandate of the ICC with respect to the latter's substantive jurisdiction, personal jurisdiction (trying alleged African offenders), and territorial jurisdiction (trying crimes committed in Africa).[8]

The *normative* fragmentation does not pose difficult legal problems. It is well known that each criminal court shall apply first the norms provided for in its Statute. In the event of conflict with general international criminal law, regional criminal law benefits from the status of prevailing special applicable law, without prejudice to the respect for the rules of *jus cogens* or peremptory norms of general international law.[9] However, the *institutional* fragmentation and the plurality of courts resulting

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6 See Articles 46Abis and 46B(2), *Malabo Protocol.* Article 46Abis provides: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'. Article 46B(2) reads as follows: 'Subject to the provisions of Article 46Abis of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment'. Compare with Article 27, *Rome Statute of the International Criminal Court,* 17 July 1998, 2187 UNTS 38544; which reads: '1.This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

7 See Giorgetti C, 'Horizontal and vertical relationships of international courts and tribunals - How do we address their competing jurisdiction?' 30 *ICSID Review – Foreign Investment Law Journal,* 1 (2015), 98-117.

8 Soma A, 'Vers une juridiction pénale régionale pour l'Afrique' in Niang F and Bernard F (eds), *Colloque sur les droits humains. Mécanismes régionaux et mise en œuvre universelle/Colloquium on human rights: Regional mechanisms and global implementation,* University of Geneva, Global Studies Institute, 2014, 136.

9 Rules of jus cogens occupy the highest position in the hierarchy of international norms. The definition of *jus cogens* may well be borrowed from Articles 53 and 64, *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 UNTS 331. Article 53 provides: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized [sic] by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Article 64 adds: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

from jurisdiction over the same international crimes may engender very complex legal problems. Competition between courts should be avoided because it can lead to an inefficiency of justice for perpetrators of international crimes.[10] That is why a careful coordination of jurisdictions and activities must be attained. What then is the appropriate approach to coordination between the AU Criminal Court and the ICC? Which principles should apply to solve their potential jurisdictional conflicts? What role may the UN Security Council (UNSC) play in the functioning of the AU Criminal Court when it comes to dealing with crimes affecting international peace and security for the maintenance of which this UN organ assumes the main responsibility pursuant to the UN Charter?

The first part of this chapter discusses two different possible approaches to coordination of international criminal justice, namely, the hierarchical model whereby the AU Criminal Court is subordinated and connected to the institutions of global system of international criminal justice (the ICC and the UNSC), and the cooperative approach which privileges mutual accommodation and principles on the resolution of potential conflicts between equally coexisting international criminal courts. Thereafter, the chapter focuses on the proposal of a third alternative approach to coordination, which seems to be the best prospect for international criminal law. This third approach is based on the regionalisation of the ICC in connection with the establishment and application of *the principle of regional territoriality*. The latter principle could imply that crimes committed in one region should be tried by domestic courts of states belonging to that region or the competent regional jurisdictions before any involvement from another region or global mechanisms of criminal accountability. The final objective of this third approach is the establishment, from a holistic perspective, of an appropriate model of integrated system of international criminal justice, consisting of both regional and universal fragments of international criminal law, standing in harmony one with another.

Therefore, the arguments in favour of the regionalisation of international criminal justice that are developed below are divided into two main parts: first, the coordination of global system of international criminal justice with the AU Criminal Court, and, second, the prospect for the future of international criminal justice.

[10] Sirlief M, 'Regionalism, regime complex and the crisis in international criminal justice', 759.

2 The coordination with the Criminal Court of the AU

The ICC and the UNSC dominate the global system of international criminal justice. Yet, the Malabo Protocol (Annex) is silent on the relationship between the AU Criminal Court and the UNSC. It does not refer to the Rome Statute in the same way as the latter is silent on regional criminal courts. A possible justification is that no regional criminal courts with jurisdiction over core crimes existed when the ICC was established. However, the lack of reference of the Malabo Protocol (Annex) to the ICC Statute should not be seen as a legal gap. It seems to be a deliberate omission[11] by African states and the AU for two main reasons. First, the AU and some of its member states are not parties to the ICC Statute. Second, the omission is likely a manifestation of African contestations of the ICC's work in Africa and implies a tension of distribution of power between universalism and regionalism.[12] A compromise between states and the international community in terms of coordination of enforcement mechanisms of international criminal law must be found in order to avoid conflicts that may impair the efficacy of justice. Such coordination can be envisaged in respect of the AU Criminal Court's relationship with the ICC and the potential role the UNSC may play in its functioning.

2.1 The relationship with the ICC

The relationship between the AU Criminal Court and the ICC can be based on two possible approaches: the hierarchical model and the cooperative approach between the two courts.

2.1.1 The hierarchical model

This model takes into account the experience of the relationship between the ICC and domestic courts based on the principle of complementarity. The hierarchical model implies that the ICC 'would remain at the apex of international criminal law enforcement'.[13] According to Haren Van der Wilt, this model envisages a situation

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11 Rau K, 'Jurisprudential innovation or accountability avoidance? The International Criminal Court and proposed expansion of the African Court of Justice and Human Rights' 97 *Minnesota Law Review* (2012), 690.

12 Kahombo B, 'Africa within the justice system of the International Criminal Court: The need for a reform', Berlin/Potsdam Research Group 'The international rule of law: Rise or decline?' KFG Working Paper Series, No.2, Berlin, May 2016, 40.

13 Van der Wilt H, 'Complementarity Jurisdiction (Article 46H)' in Werle G and Vormbaum M (eds), *The African Criminal Court: A commentary on the Malabo Protocol,* Springer, Berlin, 2017, 191.

in which a judgment by the AU Criminal Court 'might be superseded by one of the ICC if the former's judgment be found not to measure up to the standards of the ICC Statute and therefore to exemplify the inability (or unwillingness) of the African Court to exercise jurisdiction in a particular case'.[14] This situation would lead to making the ICC complementary not only to domestic courts but also to any regional criminal jurisdiction.

In 2013, Kenya submitted to the ICC's Assembly of States Parties (ASP) a proposal of amendment in this respect.[15] Several commentators also support this proposal. For example, Abdoulaye Soma suggests that the principle of complementarity should result in a judicial dialogue whereby the jurisdiction of the ICC or the AU Criminal Court will prevail, depending on existing comparative advantages of either court for the prosecution of relevant international crimes.[16] However, this is a confusing suggestion given that complementarity is not meant to promote judicial dialogue but rather to test whether domestic tribunals or potential regional courts exercise or have exercised jurisdiction over the alleged crimes pursuant to what is expected in terms of quality of criminal prosecutions in view of preventing the ICC from stepping in. In contrast, judicial dialogue is a form of communication between courts and tribunals.[17] This is pursued through various channels such as cross-referencing in case law, which promotes normative coherence within the legal system, consultations and meetings between judicial actors from different courts and tribunals in order to harmonise policies and activities.[18] Furthermore, Abdoulaye Soma failed to indicate how his suggested principle of complementarity with regional courts should be operationalised in terms of admissibility of cases. There might be a need to amend Article 17 of the Rome Statute on issues of admissibility before the ICC to include proceedings before regional criminal courts. However, for Chacha Bhoke Murungu, even though the Rome Statute does not contemplate regional criminal jurisdiction such as the AU Criminal Court, 'a progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even regional criminal courts could have jurisdiction over international crimes within the ICC

14 Van der Wilt H, 'Complementarity Jurisdiction (Article 46H)', 191.

15 C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification).

16 Soma A, 'Vers une juridiction pénale régionale pour l'Afrique', 139.

17 Boisson de Chazournes L, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' 28 *European Journal of International Law,* 1 (2017), 30.

18 Boisson de Chazournes L, 'Plurality in the fabric of international courts and tribunals', 36.

jurisdiction'.[19] Miles Jackson espouses a similar view. He posits that, while Article 17 of the ICC Statute refers to states' jurisdictions, prosecutions by a regional criminal court should be seen as prosecutions by a state.[20] This is because such regional prosecutions should be regarded as a lawful way of collective exercise by states of their primary responsibility to investigate and prosecute crimes within their jurisdiction.[21] These states have simply delegated their powers to the said regional criminal court.[22] In any case, when prosecutions are barred by the rules on personal immunities before the AU Criminal Court, the ICC should intervene on the basis of inability to prosecute.[23]

Even if the AU has encouraged its member states – including Kenya – that are parties to the Rome Statute to submit to the ASP amendments to this treaty, a problem of acceptance of the hierarchical model based on complementarity between the ICC and the AU Criminal Court may arise after adoption of the Malabo Protocol in 2014. It must be recalled that such a hierarchy between international courts does not in principle exist under international law. In the *Tadič* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) indicated that:

> International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).[24]

The drafters of the Malabo Protocol also seem to have rejected the hierarchical model towards the ICC. This is how the silence on the relationship of the AU Criminal Court and the ICC could be understood. However, it has been foreseen that an agreement on cooperation between the two equally coexisting courts might be possible. In this regard, Don Deya has written:

> The drafters and negotiators are acutely aware of the fact that the proposed Court will be complementary to national courts and will co-exist with other international courts, which will have similar mandates and jurisdictions to it. For instance, part of its general affairs mandate will be shared with the International Court of Justice (ICJ), and also the Courts of

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19 Murungu CB, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9 *Journal of International Criminal Justice* (2011), 1081.

20 Jackson M, 'Regional complementarity: The Rome Statute and Public International Law' 14 *Journal of International Criminal Justice* (2016), 1062.

21 Jackson M, 'Regional complementarity', 1067-1068.

22 Jackson M, 'Regional complementarity', 1067-1068.

23 Van der Wilt H, 'Complementarity jurisdiction', 196.

24 *Prosecutor v Tadič,* ICTY Appeals Chamber, Decision of 2 October 1995, p 11.

> the African RECs. Similarly, its human and peoples' rights mandates will be shared with some (if not all) of the Courts of the RECs. Furthermore, its international criminal law mandate (at least in respect of the crimes of genocide, crimes against humanity and war crimes at the moment, and the crime of aggression in the future) will be shared with the ICC. This international criminal law mandate may eventually be shared with the Courts of the RECs as well, if some of the current discussions on the continent come to fruition. (….) The drafters and negotiators clearly envisage that, since multiple courts will share jurisdiction, these courts may opt to negotiate among themselves on how best to handle this shared jurisdiction so that the ends of justice are met in an effective, efficient, credible and fair manner. In this regard, it is left to the Courts themselves, once fully constituted, to negotiate how they will work together. The aim is to reduce the possibility of 'politics' or 'political considerations' playing a part in what should essentially be a judicial task. This, in my view, is another positive and pragmatic position.[25]

This rejection of the hierarchical model diverges from the acceptance of the latter model concerning the relationship between the AU Criminal Court and the courts of justice of Regional Economic Communities (RECs),[26] when they have criminal jurisdiction, on the basis of the principle of complementarity.[27] This differentiation is understandable. The reason is that within the AU institutional system, hierarchy already exists between the continental, regional, and national levels of exercise of public authority for the integration of the African continent. RECs are subordinated to the AU, which can coordinate and harmonise their policies and activities 'for the gradual attainment of the objectives of the Union'.[28] Against this backdrop, the cooperative approach to the relationship between the ICC and the AU Criminal Court may be preferable.

2.1.2 The cooperative approach

This approach can be based on two main ideas. First, the ICC will have to equally coexist with the AU Criminal Court. This plurality of jurisdictions implies

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25 Deya D, 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' *Openspace on International Criminal Justice* (2012), 25.

26 See Assembly of the African Union, *Decision on the Moratorium on the Recognition of the Regional Economic Communities (REC),* Assembly/ AU/Dec.112 (VII). This decision recognises eight Regional Economic Communities: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority for Development (IGAD) and the Southern African Development Community (SADC).

27 Article 46H(1), *Malabo Protocol:* 'The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'.

28 Article 3(1), *Constitutive Act of the African Union,* 11 July 2000, 2158 UNTS 37733.

that states parties will have an option to refer their situations to either court when it comes to prosecuting the ICC's crimes. Second, for the purpose of solving possible conflicts resulting from the situation of overlapping jurisdictions, an agreement on cooperation should be concluded between the ICC and the AU Criminal Court. This is because neither court may gain from lasting conflict at the expense of the struggle against impunity.[29] In this regard, Article 46L(3) of the Malabo Protocol (Annex) stipulates: 'The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-states parties or co-operating partners of the AU and may conclude agreements for that purpose'. The question is what could be the content of such an agreement on cooperation between the ICC and the AU Criminal Court.

Foremost, the simplest content could be providing for a division of work between the ICC and the AU Criminal Court. Haren Van der Wilt has suggested that this division of work could be made on the basis of one of the following options. On the one hand, 'one could envisage a selection and division of cases on the basis of gravity'.[30] This means that 'the ICC could opt for prosecuting the gravest crimes, while leaving others to the African Court'.[31] In the view of this author, this criterion would also help to distinguish between the specific incidents that could be addressed by the ICC and those that may be dealt with by the AU Criminal Court.[32] A criminal incident has to be understood here as 'a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators'.[33]

However, the problem with this option is that the criterion of gravity may not be clear enough to avoid conflict of jurisdiction. Each Court may even have its own interpretation as to whether the criterion is met, even if indicators of the gravest crimes are specified in the agreement on cooperation between the two courts. Furthermore, this kind of division of work may lead to different courses of international criminal justice in the same situation and even with respect to the same incident within the same country. Potential contradictions of court's decisions on

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29 Sirleaf M, 'Regionalism, regime complex and the crisis in international criminal justice', 759. See also Gehring T and Fraude B, 'The dynamics of regime complexes: Microfoundations and systemic effects' 19 *Global Governance,* 1 (2013), 124-125.

30 Van der Wilt H, 'Complementarity jurisdiction', 199.

31 Van der Wilt H, 'Complementarity jurisdiction', 199.

32 Van der Wilt H, 'Complementarity jurisdiction', 199.

33 *Situation in Libya in the Case of the Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11 OA 4), (Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I) of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014, p 62.

the qualification of crimes, the circumstances of their commission, the qualification of perpetrators (direct or indirect), the punishment applied, or the designation of victims are not totally inevitable.

On the other hand, the division of work may be made on the basis of the nature of the crimes.[34] According to Haren Van der Wilt, this is a stronger argument to uphold. It means that the ICC would continue to try exclusively the ICC's crimes, while the AU Criminal Court could focus on the rest of crimes of transnational nature.[35] One may add to this argument another distinction whereby the AU Criminal Court could even try part of the ICC's crimes when the acts committed are not covered by the Rome Statute but by the extensive definitions of crimes contained in the Malabo Protocol (Annex).

This option keeps the ICC's jurisdiction untouchable. All possible conflicts of jurisdiction with the AU Criminal Court would be avoided. But, the problem with this option is that it appears to be inconsistent with the very motives that have informed the creation of the AU Criminal Court. It must be recalled that this Court has been created for the purpose of realising African self-reliance and participation in dealing with crimes committed in Africa, before any involvement of non-African mechanisms of criminal accountability. It is also the result of the African contestations against part of the ICC's judicial work in Africa and the perception of certain bias in the treatment of important cases such as those involving (incumbent and former) African heads of states. Given the importance of these cases, instead of being heard exclusively by the ICC, they are the cases to which the AU Criminal Court should be dedicated.[36] Michelo Hansungule even recommended that such cases should fall within the jurisdiction of the AU Criminal Court rather than left to African domestic courts when he stated:

> (…) the AU should adopt a resolution to establish an international tribunal capable of prosecuting former heads of state of Africa instead of leaving prosecution in the hands of their national courts after the incumbents leave office. This will remove the influence and threat directed towards the judiciary by heads of state by eliminating the option of surrendering their power for fear of facing criminal responsibility under international law. This process will also create confidence and in time will establish the independence of the judicial authority from executive power in the implementation of the rule of law in Africa and respect for international human rights for Africans.[37]

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34 Van der Wilt, 'Complementarity jurisdiction', 199-200.

35 Van der Wilt, 'Complementarity jurisdiction', 199-200.

36 Hansungule M, 'The principle of complementarity in the Rome Statute in the context of EU-Africa-EU' 8 *The Bulletin of Fridays of the African Union Commission,* 1 (2014), 56.

37 Hansungule M, 'The principle of complementarity in the Rome Statute in the context of EU-Africa-EU', 56.

Consequently, the division of work based on the nature of crimes between the ICC and the AU Criminal Court is undesirable. It would render meaningless the establishment of the latter Court. However, the AU Criminal Court may be prevented from exercising jurisdiction when personal immunities come into play because the Malabo Protocol (Annex) provides that 'No charges shall be commenced or continued before the Court against any serving AU Heads of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials'.[38] In this case, no jurisdictional conflict may arise unless such immunities are waived by the state concerned. As noted above, the ICC whose Statute does not accord immunities to officials of states parties will remain the only competent court owing to the incapacity of the AU Criminal Court to proceed.[39]

That is why the proposed agreement on cooperation between the ICC and the AU Criminal Court would rather focus on other issues. First of all, given that each court may exercise its entire jurisdiction without limitations related to the division of work, the agreement on cooperation should prescribe applicable procedures designed to eliminate potential conflicts due to parallel proceedings and the risk of contradictory judgments. The most prominent example of these procedures is the principle of *litis alibi pendens*. This principle, which derives from domestic laws, is widely recognised by international courts and tribunals.[40] It is relevant to solving conflicts of jurisdiction resulting from pending disputes between the same parties for the same object and cause of action brought before two or more competent tribunals.[41] In such circumstances, the principle implies a set of procedural rules favouring the jurisdiction of one court and the decline of jurisdiction by the other. For example, it may be that the jurisdiction that has been activated first will be the competent court, or the court of the first-filed application.[42] The European Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 prescribes the same rule for domestic courts.[43] Preference may also be given to the court which has made

38 Article 46Abis, *Malabo Protocol.*

39 Article 27 (2), *Rome Statute.*

40 Boisson de Chazournes L, 'Plurality in the fabric of international courts and tribunals', 46.

41 George JP, 'International Parallel Litigation - A survey of current conventions and model laws' 37 *Texas International Law Journal* (2002), 522-523.

42 George JP, 'International parallel litigation', 522-523.

43 This is the solution provided for by Article 27, *European Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,* 30 October 2007, 1659 UNTS 28551. This article stipulates: '1.Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction

more progress in instance and proceedings than the other. This is particularly important because the alleged offenders should be tried and their cases terminated without unreasonable delay. The principle of *litis alibi pendens* should apply to investigations and prosecutions of concrete cases. In case of a motion challenging the jurisdiction of one Court on that basis, the proceedings should be suspended until the jurisdiction of the other Court has been established.

Secondly, the proposed agreement on cooperation between the ICC and the AU Criminal Court could also provide for principles on mutual recognition of jurisdiction and judicial decisions. These principles may include the principle of double jeopardy (*ne bis in idem*), which prevents perpetrators from being prosecuted more than once for the same crimes. They also include the principle of the authority of *res judicata*, which imposes the respect by a court of the decision made by it or another court when it is exercising its jurisdiction in order to avoid contradictory judgments and jurisprudence.

In any event, whichever procedural mechanism may be established by the said agreement on cooperation, there will still be a need for judicial dialogue between the two Courts. This dialogue may be promoted through regular meetings between their presidents and consultations and exchange of information as well as evidentiary elements between Offices of the Prosecutor (OTP). A conference of international prosecutors may even be established to this effect. This conference could be a forum whereby these offices would have to harmonise their criminal and prosecutorial policies or strategies and thus end mutual misunderstandings, which may potentially derive from their parallel activities.

2.2 The potential role of the UNSC

The UNSC is primarily responsible for the maintenance of international peace and security. In the past, the UNSC has resorted to the establishment of *ad hoc* international criminal tribunals when it viewed prosecutions as essential to achieving international peace and security. This is also why it has been provided a role in the functioning of the ICC through referral of situations to the ICC Prosecutor or deferral of investigations or prosecutions.[44] This raises the question: can or should the UNSC utilise the AU Criminal Court through referral of situations or deferral of investigations or prosecution for the purpose of maintaining international peace

of the court first seised is established, 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.

44 Articles 13(b) and 16, *Rome Statute.*

and security? Furthermore, the UNSC enjoys the principal authority to qualify acts of aggression. Given that aggression also falls within the jurisdiction of the AU Criminal Court, one may ask which kind of interplay may exist between this Court and the UNSC for the purpose of prosecuting such crime.

The first question can be answered in application of the principle of subordination of regional mechanisms of collective security to the United Nations.[45] African regional criminal justice can be considered as an important tool with potential to contribute to the maintenance of international peace and security in Africa. In this regard, the Malabo Protocol has explicitly indicated the pivotal role that the AU Criminal Court can play 'in strengthening the commitment of the AU to promote sustained peace, security and stability on the continent and to promote justice and human and peoples' rights (…)'.[46] Now, it is well known from the UN Charter that the UNSC is authorised to 'investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security'.[47] More importantly, the UNSC may 'where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority'.[48] In this context, there are no theoretically legal impediments to have a regime of connection of the UNSC to the AU Criminal Court which is similar to the one established by the Rome Statute in relation to the ICC. In terms of concrete proposal, the UNSC *could* have the power to refer situations to the Court's Prosecutor or to defer investigations or prosecutions in the interests of maintaining international peace and security in Africa.

Concerning the second question on the interplay between the AU Criminal Court and the UNSC with respect to the prosecution of the crime of aggression, there is no reason why the relationship should not be modelled on the Rome Statute. This is because the problem arises in the same terms.[49] In fact, how can the exercise of the Court's jurisdiction be reconciled with the power of the UNSC to qualify acts of aggression pursuant to Chapter VII of the UN Charter? Should the Court wait for the decision of the UNSC on whether a state has committed aggression before any determination on individual criminal responsibility? Or could the Court remain

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45 Article 52(1), *Charter of the United Nations and Statute of the International Court of Justice,* 26 June 1945.

46 *Malabo Protocol,* Preamble, p 5 and 13.

47 Article 34, *UN Charter.*

48 Article 53(1), *UN Charter.*

49 See May L, *Aggression and Crimes against Peace,* Cambridge University Press, Cambridge, 2008, 227.

free to exercise its criminal jurisdiction rather than eventually being blocked by political considerations on acts of aggression within the UNSC? The whole debate is therefore about the independence of the Court vis-à-vis the UNSC, the balance between judicial process and political control.[50]

The consensus found in the framework of ICC's proceedings is formulated in Article 15*bis* of the Rome Statute. The ICC Prosecutor shall proceed with an investigation upon the UNSC's determination whether the state concerned has committed an act of aggression. When no such prior determination is made within six months, the ICC Prosecutor may proceed with an investigation

> provided that the Pre-Trial Division has authorised the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the UNSC has not decided otherwise in accordance with Article16.[51]

In any case, 'a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute'.[52] If the AU Criminal Court does not adopt the same solution, it would practically enjoy more independence in the prosecution of acts of aggression than the ICC. Its judicial process would be completely independent from political control. The risk of contradiction between judicial determination and political considerations could be very high. This may impair judicial cooperation on the part of states parties and undermine the struggle against impunity.

However, there are several concerns with all these proposals. First, there is a risk that – like the ICC - the AU Criminal Court will become politicised if it allows political organs to interfere in its operation. The second concern is the potential contestation of the Court by non-contracting states that could be coerced to its jurisdiction through the referral of a situation by the UNSC. Thirdly, even African states, by adopting the Malabo Protocol, omitted to confer on the proper organ of the AU, namely the AU Assembly, the power to trigger the Court's jurisdiction in respect of non-party states or to suspend proceedings before the Court. The fourth concern is about the issue of legitimacy of the UNSC to enjoy increasing powers in the administration of regional criminal justice without being reformed in a manner that all the regions of the world are provided with equitable powers

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50 Weisbord N, 'Prosecuting Aggression' 49 *Harvard International Law Journal,* 1 (2008), 196.

51 Article 15bis(8), *Rome Statute* which refers to the initiation of investigations by the Prosecutor *proprio motu*. Article 16 concerns the power of the UNSC to refer situations to the Prosecutor or to defer investigations or prosecutions.

52 Article 15bis(9), *Rome Statute.*

and representation in its composition. Currently, the UNSC consists of 15 members states, of which five are permanent and dominate its operation with their veto right.[53] That is to say, the veto provides these states the power to block any resolution in conflict with their individual interests.

Generally speaking, the UNSC is a product of realism after the trauma of World War II and this situation is reflected by the veto power given to its permanent members,[54] which were the victorious nations: USA, Russia, United Kingdom, China, and France. More than fifty years after decolonisation, Africa remains with no permanent seat in the UNSC. True, membership in the Council as a whole should not be linked only to geographical balance, but also to effective 'contributions to maintaining peace and security'.[55] But, more than seven decades after the creation of the UN, the underrepresentation of Africa is unjustified and arbitrary, particularly because the meaning of contribution to the maintenance of peace and security has become very flexible.[56] In this regard, the proposed reform of the UNSC is expected to 'increase the involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically',[57] including 'contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United

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53 See Von Freiesleben J, 'Security Council reform' in Centre for UN Reform Education, *Managing Change at the United Nations,* New York, 2008, 1-20; Butler R, 'Reform of the United Nations Security Council' 1 *Penn State Journal of Law and International Affairs,* 1 (2012), 23-39; Gowan R and Gordon N, 'Pathways to Security Council Reform' A Report by the New York University Center on International Cooperation Commissioned by the Permanent Mission of Japan to the United Nations, 2014, csnu.itamaraty.gov.br/images/pathways_sc_reform_final.pdf on 22 October 2017.

54 Oteng Kufuor K, 'Recent Developments: The African Union and the Reform of the Security Council: Some Matters Arising' 14 *African Journal of International and Comparative Law* (2006), 291.

55 United Nations, 'A More Secure World: Our Shared Responsibility - Report of the Secretary General's High-Level Panel on Threats, Challenges and Changes', 2004, p 244 http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf on 25 April 2016.

56 Normally, developed and powerful states have particular responsibilities towards the maintenance of international peace and security since such countries contribute most to the United Nations in terms of decision-making, military capacity and financial support. These criteria are not in favour of developing countries in order to get permanent seats within the UNSC. However, due to the expansion of the UNSC's activities after the end of the Cold War, other criteria for gauging the contribution to the maintenance of international peace and security have come into consideration. For example, the bulk of the UNSC's activity relates to peacekeeping operations in states affected by civil wars. As powerful countries do not have troops and policemen to deploy everywhere, the UN increasingly rely on the contributions of developing states. As such, developing states can no longer be regarded as less able to contribute to the UN so that permanent seats within the UNSC should still be considered reserved for developed and powerful states.

57 United Nations, 'A More Secure World', p 249(a).

Nations objectives and mandates'.[58] On its part, the Common African Position on the Proposed Reform of the UNSC of the United Nations indicates that 'full representation of Africa in the UNSC means: i. not less than two permanent seats with all the prerogatives and privileges of permanent membership including the right of veto; ii. five non-permanent seats'.[59] Given the disagreements between UN member states on that proposed reform,[60] the concern about the legitimacy of the UNSC is likely to continue for a long time.

Ultimately, the proposals to reserve a role to the UNSC in the functioning of the AU Criminal Court require some amendments to the Malabo Protocol (Annex). In the absence of such amendments concerning the power to refer a situation to the Court or to suspend its proceedings, the UNSC could only *recommend* to the AU that a situation in a state party be referred to the Court. However, situations involving non-party states could be referred to the ICC. The suspension of proceedings will not yet be possible since the same power is not even given by the Malabo Protocol (Annex) to the AU Assembly. A better model for the relationship between the AU Criminal Court and the ICC may be based on the regionalisation of the ICC in conjunction with the establishment and application of the principle of regional territoriality. As discussed in the next section, this model might constitute the most realistic future for international criminal justice in Africa.

3 The future of international criminal justice

The future of international criminal justice lies in the regionalisation of international criminal law. Beside domestic courts, power to prosecute and try international crimes should be distributed between regions and universal mechanisms of criminal accountability. This requires some changes within the system, which currently gives a predominant role to the ICC. These changes can occur in two principal and complementary directions, that is to say the regionalisation of the ICC and the establishment and application of the principle of regional territoriality.

58 United Nations, 'A More Secure World', p 249(a).

59 Executive Council of the African Union, *The Common African Position on the Proposed Reform of the United Nations: 'The Ezulwini Consensus',* Ext/EX.CL/2 (VII), 9.

60 Institute for Security Studies, 'Peace and Security Council Report' Issue 77, February 2016, 5.

3.1 The regionalisation of the ICC

This is one of the most controversial issues in international criminal law. It has been argued that 'the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC'.[61] But, the idea to regionalise international criminal justice is not entirely accepted in respect of Africa. The AU Criminal Court is said to imply negative or cynical complementarity, that to say 'an attempt to undermine the existing work of the ICC through a commitment to an alternative mechanism for dispensing international criminal justice but which stands no realistic chance of providing such justice, at least not without significant changes in the funding available to the AU'.[62] States should rather strengthen their domestic legal systems as a key to achieving an effective struggle against impunity in line with the principle of complementarity. But this position does not resist critique. As William Schabas has noted, the debate over the usefulness of regional criminal justice has been 'short-circuited'.[63] This is because regional criminal courts are often presented as an alternative to the ICC rather than a mechanism necessary to complement its operations and work. On his part, William Burke-White suggests his vision of strong regionalisation based on the establishment of regional criminal courts to soft forms of regional enforcement of international criminal law in the framework of existing arrangements, notably through the creation of hybrid courts with regional judges or the ICC sitting regionally in place where the crime in question was committed.[64] According to Burke-White, soft forms of regional enforcement of international criminal law should be favoured given that the ICC has already gained significant support and it would be unnecessary duplication of effort to create regional criminal courts.[65] However, this statement might be tenable only if regional criminal courts enjoy the same substantive jurisdiction as the ICC or if the latter Court does not itself face contestations against a part of its judicial work. The regionalisation of the ICC is simply a way to decentralise the system of international criminal justice, to

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61 Du Plessis M, 'Complementarity and Africa: The promises and problems of international criminal justice' 17 *African Security Review,* 4 (2008), 167; Manirakiza P, 'L'Afrique et le système de justice pénale internationale' 3 African Journal of Legal Studies (2009), 49.

62 Du Plessis M, Louw A and Maunganidze O, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions', Institute for Security Studies Paper No.241, November 2012, 2.

63 Schabas WA, 'Regions, regionalism and international criminal law' 4 *New Zealand Yearbook of International Law* (2007), 23.

64 Burke-White W, 'Regionalization of international criminal law enforcement: A preliminary exploration' *Texas International Law Journal* (2003), 731.

65 Burke-White W, 'Regionalization of international criminal law enforcement', 731.

bring confidence in such a system, to promote ownership of justice, and proximate access to judicial forums. Against this backdrop, the debate on the regionalisation of the ICC turns to the potential creation of regional chambers of the ICC or the transformation of existing regional criminal courts into jurisdictions of first instance within the ICC justice system.

3.1.1 The creation of regional trial chambers of the ICC

The first way in which the ICC can be regionalised is through the creation of regional ICC trial chambers, which may sit in the regions of the world where crimes have been committed. William Burke-White has indicated that, 'from a legal perspective then, the possibility of the ICC sitting in a regional context is both possible and easy to achieve without structural changes'.[66] Jérôme De Hemptinne supports this notion and argues that it could strengthen the legitimacy of the Court's judicial work.[67] But it is Stuart Ford who has thoroughly studied the creation of regional trial chambers without making amendments to the Rome Statute.[68] The basis of his analysis is found in Articles 3, 4 and 62 of the Rome Statute. Article 3(1) provides that the seat of the ICC is established at The Hague. However, Article 3(3) indicates that 'the Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute'. Article 62 of the same Statute provides that, 'unless otherwise decided, the place of the trial shall be the seat of the Court'. This Article makes The Hague the default seat of the Court. Article 4 gives to the Court legal capacity as an intergovernmental organisation, including treaty-making power in relation to the state on whose territory it may decide to sit. Article 4 specifies:

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 62 above indicates that it is rather the place of the trial that may be moved from the seat of the Court. This literally implies that pre-trial proceedings

66 Burke-White W, 'Regionalization of international criminal law enforcement', 751.

67 De Hemptinne J, 'Trois propositions de réforme du système de la justice pénale internationale' 19 *African Yearbook of International Law* (2014), 402.

68 Ford SF, 'The International Criminal Court and proximity to the scene of the crime: Does the Rome Statute permit all of the ICC's trials to take place at local or regional chambers?' 43 *John Marshall Law Review* (2010), 735 and 739.

are out of the scope of this provision and should take place in The Hague. This is the case of procedures on confirmation of charges or challenges to the Court's jurisdiction.[69] Furthermore, the Court may sit elsewhere to hold a trial in whole or in part. The possibility has been invoked before the Court on several occasions.[70] For example, in the *Ntaganda* case, Trial Chamber IV recommended to hold the opening statements of the trial in Bunia (DRC) in order to bring the judicial work of the Court closer to the communities most affected by the crimes that the accused person allegedly committed.[71] However, creating a regional chamber goes far beyond displacing the Court's hearing in a particular case. It would require 'entering into a formal agreement with the receiving country, posting staff to the receiving country, and signing a multi-year contract to acquire the use of suitable facilities'.[72] According to Stuart Ford, if Article 62 of the Rome Statute permits the ICC to displace the trial from The Hague, 'there is nothing within the other provisions of the Rome Statute or its negotiating history that would prohibit the Court from deciding to hold all or most of the trials arising out of a particular situation away from the seat of the Court if that would be in the interests of justice'.[73] Article 4(1) above reinforces this possibility as it implies the relevant authority of the Court to enter into agreements that could be necessary to establish a regional trial chamber for the exercise of the Court's functions and the fulfilment of its purposes.[74]

However, the ICC Statute is silent on who could make the decision to establish such a regional trial chamber. It is also silent on the applicable procedure. But, one may rely on Rule 100 of the Court's Rules of Procedure and Evidence which seems to grant that power to the Presidency of the Court,[75] that is to say the organ consisting of the Court's President, First and Second Vice-Presidents.[76] Pursuant to this Rule, the Presidency can not only decide to displace the Court's hearing in a particular case from The Hague, but also, by extension, create a regional trial chamber. In this regard, Rule 100 specifies:

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69 Ford, 'The International Criminal Court and proximity to the scene of the crime', 739.

70 Ford, 'The International Criminal Court and proximity to the scene of the crime', 732-734.

71 *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda* (ICC-01/04-02/06), Recommendation to the Presidency on Holding part of the Trial in the State Concerned, Trial Chamber IV, 19 March 2015, p 21.

72 Ford, 'The International Criminal Court and proximity to the scene of the crime', 732.

73 Ford, 'The International Criminal Court and proximity to the scene of the crime', 739.

74 Ford, 'The International Criminal Court and proximity to the scene of the crime', 739.

75 Ford, 'The International Criminal Court and proximity to the scene of the crime', 742.

76 Article 38(3), *Rome Statute.*

1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.
2. The Chamber, at any time after the initiation of an investigation, may *proprio motu* or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.
3. The Presidency shall consult the State where the Chamber intends to sit. If that State agrees that the Chamber can sit in that State, then the decision to sit in a State other than the host State shall be taken by the Presidency in consultation with the Chamber. Thereafter, the Chamber or any designated Judge shall sit at the location decided upon.

In deciding on whether the Court may sit in a state other than the host country, the Presidency must take into account various factors, including those which make the displacement of the trial desirable. Rule 100(1) above refers to the interests of justice. In the *Ntaganda* case, for example, the appraisal of these interests of justice proved to be negative and the recommendation of the Trial Chamber IV to the Presidency for the purpose of sitting in Bunia was therefore rejected. The ICC specifically explained:

> In deciding whether it was desirable and in the interests of justice to sit in Bunia, the Presidency considered a number of factors. Most importantly, it considered concerns over the consequences of the *in situ* hearings on the witnesses and victims' safety and well-being, as well as the security of the local communities involved. Furthermore, the Presidency considered the concerns expressed by the victims that the accused's return would remind them of the suffering and trauma. The Presidency also considered the impact of the logistics required for the hearings, which may have resulted in the affected communities having limited access to them, given their length and nature. Finally, the Presidency noted the financial impact of the costs of hosting the opening statements in Bunia, which were estimated to be more than €600,000. The ICC Presidency concluded that the potential benefits of holding proceedings in Bunia are, in view of the Presidency, outweighed by these risks.[77]

[77] ICC, 'Ntaganda case: Trial opening statements will be held at the seat of the ICC, in the Netherlands' Press Release ICC-CPI-20150615-PR1118, 15 June 2015, https://www.icc-cpi.int/Pages/item.aspx-?name=pr1118 on 20 April 2017.

In the end, there are two specific problems with this possibility of creating regional trial chambers. First of all, regional trial chambers may be established at odd times, depending on circumstances peculiar to each situation and each region. Secondly, creating regional trial chambers leaves the issue of coordination of the ICC with potential regional criminal courts unsolved. It would be preferable to restructure the Court by expressly establishing permanent regional trial chambers to act at first instance in all cases in the regions concerned. This will require more resource mobilisation, including increasing the Court's staff with the majority involvement of judges from the region concerned, as well as amendment of the Rome Statute. The ICC at The Hague would retain appeal jurisdiction. These regional chambers are envisaged only in the absence of the establishment of regional criminal courts. Thus, if the African experience with the creation of the AU Criminal Court becomes effective and is copied in other regions of the world, it could make sense to prefer an alternative to the creation of regional ICC trial chambers, namely, the transformation of the existing regional criminal courts into jurisdictions of first instance within the ICC justice system.

3.1.2 The regional criminal courts as jurisdictions of first instance

Regional criminal courts may be defined as judicial organs established within the framework of regional or sub-regional intergovernmental organisations such as the AU. Transforming these courts into jurisdictions of first instance within the system of international criminal justice may be the best option for the regionalisation of the ICC. Given the protracted conflict between Africa and the ICC as well as Africa's objections to the use of universal jurisdiction in Africa, regionalisation promises to deliver the benefits of greater regional participation and ownership in the prosecution of international crimes. The ICC at The Hague would become a court of appeal.

Even if this proposal appears to be a move back to a form of institutional hierarchy, as the ICC would be given the power to say the last word within the system, it is quite different from the hierarchical model that has been developed above, which is based on the ICC's complementarity jurisdiction to the AU Criminal Court. First, the principle of complementarity pre-supposes the fragmentation of the system of international criminal justice, whilst the current proposal aims to integrate the latter. Second, it is well known that a court of appeal will not re-start the proceedings but base its examination on the work done by the regional criminal court which has heard the case at the first instance. The reasons for lodging an appeal against decisions of acquittal or conviction could be similar to those provided for

under Article 81 (1) of the Rome Statute, namely, procedural error, error of fact or error of law. In case of conviction in particular, the same Article provides that appeal may be based on 'any other ground that affects the fairness or the reliability of the proceedings or decision'. This clearly means that the competence of a court of appeal could be more limited than the ICC's complementary jurisdiction to the AU Criminal Court. Such a limited competence is likely to be beneficial to the timely termination of the case by the ICC. Therefore, the current proposal could reduce the risk of perception that lengthy proceedings before the ICC deliberately aim to sustainably remove the accused person from his homeland or the region of his origin for political reasons, in favour of his opponents. This is likely to increase the legitimacy of the ICC's operation.

Two main arguments can be advanced in support of this option. First, the creation of regional criminal courts appears to be the next step in the development of international criminal law, even outside the African continent. Prior to the African experience, the first regional court to enjoy explicit criminal jurisdiction is the Caribbean Court of Justice (CCJ) established within the Caribbean Community (CARICOM), which was created by a treaty adopted in 1973 and revised in 2001 in order to include the CARICOM single market and economy.[78] Being a community court, the CCJ also aims to consolidate the sovereignty of member states towards Great Britain, the former colonial power.[79] In fact, after independence, these states allow the Judicial Committee of the Privy Council, the British court of highest instance, to hear appeals against decisions of their domestic tribunals and to render final binding judgments.[80] The Agreement establishing the CCJ provides that 'an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter'.[81] In this respect, the CCJ shall operate as a court of last instance for member states. If the Agreement above does not exclude the exercise of jurisdiction over international crimes, it remains to be seen whether it could be utilised by CARICOM for that purpose.

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78 *Treaty establishing the Caribbean Community (with annex relating to the Caribbean Common Market and Agreement establishing the Common External Tariff for the Caribbean Common Market).* Concluded at Chaguramas on 4 July 1973; Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, 5 July 2001.

79 Maharajh AN, 'The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court' 47 *Cornell International Law Journal* (2014), 736-737.

80 Maharajh AN, 'The Caribbean Court of Justice', 736. See also Kocken J and Van Roozendaal G, 'Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices' 93 *European Review of Latin American and Caribbean Studies* (2012), 96-97.

81 Article XXV(4), *Agreement Establishing the Caribbean Court of Justice,* 14 February 2001,

The replication of the African experience in some other parts of the world can also be envisaged outside the EU zone where the ICC currently finds the most enthusiastic state supporters. In Latin America, for example, there is a long history of initiatives to establish regional tribunals. The Central American Court of Justice could be regarded as the first modern regional court that was established out of the Central American Peace Conference in 1907.[82] This Court performed its functions for ten years in Costa Rica. It ceased to exist in March 1918 because member states failed to extend its life duration.[83] However, American countries remained receptive to the possibility of creating a regional criminal court in the 1990s within the Organisation of American States (OAS) as part of their efforts to prosecute collectively the crimes of terrorism and drug trafficking.[84] However, the initiative has so far failed, probably because of the disinterest of some member states, including the USA, to promote such a court.[85] It has to be noted that the need for international prosecution of the crime of drug trafficking in the Americas seems to be persistent. This is probably why Trinidad and Tobago and Belize submitted to the ASP an amendment to the Rome Statute in order to give jurisdiction to the ICC to try the said crime.[86] It was also Mexico that proposed the inclusion of 'employing nuclear weapons' as war crime.[87] Perhaps, if these issues are not addressed with satisfaction within the ICC, the idea to create a regional criminal court for the Americas could be revived.

In Asia, the situation is quite different. International criminal justice was experienced at an earlier stage in different Asian countries. This is true in respect of prosecutions of war criminals in Tokyo (Japan) out of World War II. Other experiences include the establishment of hybrid special panels of judges within the District Court in Dili in East Timor in 2000[88] and the Extraordinary Chambers in the

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82 Tiba FK, 'Regional International Criminal Courts: an Idea Whose Time Has Come?' 17 *Cardozo Journal of Conflict Resolution* (2016), 525.

83 Tiba FK, 'Regional International Criminal Courts', 525. See also Hudson MO, 'The Central American Court of Justice' 26 *American Journal of International Law,* 4 (1932), 781.

84 Bassiouni MC, 'The Time Has Come for an International Criminal Court' 1 Indiana International & Comparative Law Review (1991), 17-18.

85 Bassiouni MC, 'The time has come for an international criminal court', 18; Tiba FK, 'Regional International Criminal Courts', 547.

86 Secretariat of the Assembly of the States Parties, 'Informal Compilation of Proposals to Amend the Rome Statute', 23 January 2015, 7, http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf on 29 September 2015.

87 Secretariat of the Assembly of the States Parties, 'Informal Compilation of Proposals to Amend the Rome Statute', 4-7.

88 *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences within the District Court in Dili in East Timor* (United Nations Transitional Administration in East Timor) UNTAET/REG/2000/15, 6 June 2000.

Courts of Cambodia (ECCC) in 2004.[89] However, it is clear that these experiences have been more promoted from abroad rather than from regional initiatives in Asia.[90] Up to now, there is not in this continent any regional organisation comparable to the AU or the OAS,[91] which may promote the idea of a regional criminal court. From this perspective, the lack of regional initiatives in favour of international criminal law comes as no surprise. It follows from the absence of a system of regional human rights protection for the entire Asian continent.[92] According to Alvin Tan Poh Heng, 'it is recognised from the international human rights debate that Asia is too diverse to claim that any homogeneous culture and uniformity of norms exists'.[93] Therefore, for a regional approach to international criminal law to be pursued, it might be 'more prudent to focus attention at the sub-regional level, rather than argue for a pan-Asian system'.[94] In this regard, the Association of South East Asian Nations (ASEAN) created by the Bangkok Declaration of 1967[95] is the most developed Asian intergovernmental organisation.[96] The pivotal role of ASEAN in Asian regionalism has been described as follows:

> ASEAN serves as the core of other important regional organizations such as ASEAN+3, the Asian Regional Forum, and the East Asian Summit, among others. In a region with some of the most dynamic economies in the world and also some of the most intractable conflicts, some see regionalism as an answer to the region's development and security challenges. ASEAN, made up of mostly small powers and developing nations, has taken the opportunity to shape the incipient regionalism. In other words, due to the lack of other viable centers for regionalism ASEAN has taken the helm and at the same time it has institutionalized some of its norms.[97]

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89 Article 2, *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003;* (Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea), *with Inclusion of Amendments as Promulgated on 27 October 2004,* NS/RKM/1004/006.

90 Tiba FK, 'Regional International Criminal Courts', 548.

91 Chresterman S, 'Asia's ambivalence about international law and institutions: Past, present and future' 27 *European Journal of International Law,* 4 (2016), 957.

92 Freeland S, 'International Criminal Justice in the Asia-Pacific Region: The role of the International Criminal Court treaty regime' 11 *Journal of International Criminal Justice,* 5 (2013), 1035.

93 Tan Poh Heng A, 'Advancing international criminal justice in Southeast Asia through the regionalisation of international criminal law', PhD Thesis, University of Nottingham, 2014, 3, http://eprints.nottingham.ac.uk/27831/1/Thesis.pdf on 22 May 2017.

94 Tan Poh Heng A, 'Advancing international criminal justice in Southeast Asia', 4.

95 Article 1, *ASEAN Declaration (Bangkok Declaration),* 8 August 1967.

96 Chresterman S, 'Asia's ambivalence about international law and institutions', 958.

97 Von Feigenblatt O, 'ASEAN and human security: Challenges and opportunities', Ritsumeikan Center for Asia Pacific Studies (RCAPS), Working Paper No. 09-5, July 2009, 3 http://www.apu.ac.jp/rcaps/uploads/fckeditor/publications/workingPapers/RCAPS_WP09-5.pdf on 7 May 2017.

In the field of human rights protection, the ASEAN Charter of 20 November 2007, which institutionalises and confers legal personality on this organisation, provides that the Association aims 'to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the member states of ASEAN'.[98] It also aims 'to respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and trans-boundary challenges'.[99] To this effect, ASEAN member states adhere to several principles, such as 'respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice'.[100] In 2012, the ASEAN Human Rights Declaration was adopted.[101] In terms of enforcement of ASEAN human rights law, the ASEAN Charter provided for the establishment of the ASEAN human rights body, which should operate 'in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting'.[102] Member states preferred to establish a commission on human rights rather than a court. This modest choice might be due to some hesitations to create a robust institution that could take decisions binding on member states, because of a conservative approach to state sovereignty. The ASEAN Inter-governmental Commission on Human Rights (AICHR) was launched in 2009.[103] It is a consultative body to develop strategies for the promotion and protection of human rights and has no judicial competence to hear cases on matters of individual rights.[104]

It is hard to predict if these relatively new developments in human rights law will lead to the creation of a regional court vested with criminal jurisdiction under the auspices of ASEAN. Alvin Tan Poh Heng has demonstrated that such evolution towards a regional criminal court is desirable in order to deal with international and regional crimes of collective concern to ASEAN member states, including maritime piracy.[105] However, non-penal options and alternative processes could remain legitimate and valid in this region, notably recourse to amnesties and

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98 Article 1(7), *Charter of the Association of Southeast Asian Nations,* 20 November 2007.

99 Article 1(8), *Charter of the Association of Southeast Asian Nations.*

100 Article 2(2)(i), *Charter of the Association of Southeast Asian Nations.*

101 Schuldt L, 'Southeast Asian hesitation: ASEAN Countries and the International Criminal Court' 16 *German Law Journal,* 1 (2015), 101.

102 Article 14, *Charter of the Association of Southeast Asian Nations.*

103 Ramcharan R, 'Asean's human rights commission: Policy considerations for enhancing its capacity to protect human rights' 3 *UCL Human Rights Review* (2010), 204.

104 Article 4, *Terms of Reference of the ASEAN Inter-governmental Commission on Human Rights,* 2009.

105 Tan Poh Heng A, 'Advancing international criminal justice in Southeast Asia', 25, 161-170 and 196.

truth commissions.[106] For example, 'after winning independence, even the East Timorese Government acknowledged the benefits of post-conflict reconciliation with Indonesia over legal proceedings under a criminal tribunal'.[107] While criminal prosecutions might be a better approach to uphold the responsibility of high-level perpetrators of international and regional crimes, restorative justice and non-penal forms of regional accountability will constitute a viable alternative to criminal trials for masses of lower-level offenders in the ASEAN context.[108]

The second argument in support of transforming potential regional criminal courts into jurisdictions of first instance rather than creating ICC's regional trial chambers is that regional criminal courts' substantive competences are likely to be broader than the ICC's jurisdiction. Regional criminal courts may therefore have more potential to contribute to the struggle against impunity than regional trial chambers since these courts could also focus on crimes that are specific to the regions concerned. In the end, regional criminal courts are better placed to give effect to the principle of regional territoriality.

3.2 The establishment and application of the principle of regional territoriality

It is suggested that the principle of regional territoriality implies that international crimes should be prosecuted or tried in each region where they have been committed to the exclusion of external judicial interventions of foreign states and the international community. The region that is referred to in this proposed definition constitutes a geographical sphere consisting of coexisting states sharing a number of commonalities (notably culture, history, political and economic organisation).[109] In this context, the principle of regional territoriality aims to create for the states of the region concerned or the regional criminal courts the primary responsibility for the struggle against impunity of international crimes around the world. In Africa, the AU explicitly claims this responsibility. The Protocol on the AU Peace and UNSC (PSC) indicates that Africa, through the AU, should play

106 Tan Poh Heng A, 'Advancing international criminal justice in Southeast Asia', 161.

107 Tan Poh Heng A, 'Advancing international criminal justice in Southeast Asia', 161.

108 Tan Poh Heng A, 'Advancing international criminal justice in Southeast Asia', 161.

109 Borella F, 'Le régionalisme africain et l'Organisation de l'unité africaine' 9 *Annuaire français de droit international* (1963), 839 ; Sharma SP, 'Regionalism versus universalism in institutional building' in Anand RP (ed), (Asian states and the development of universal international law), Vikas Publications, Delhi, 1972, 133.

'a central role in bringing about peace, security and stability on the continent'.[110] In the field of international criminal justice, the principle of regional territoriality implies that Africans should prosecute international crimes committed in Africa through mechanisms of criminal accountability existing on the continent. It also reflects the ideas of regional self-reliance in dealing with African matters *in situ*. This ideal has informed the creation of the AU Criminal Court. The principle of regional territoriality could be extended to other regions of the world in the collective effort to regionalise the system of international criminal justice or to take part of international jurisdictional powers away from the universal level to the regions and their different judicial actors. Two main rules should characterise the principle of regional territoriality and its application. First, a court of a state in a region should not hear cases concerning crimes committed in a foreign state from another region of the world, except in cases involving the application of the active personality principle. It will be up to the courts of states belonging to the region of commission of the crimes in question to exercise jurisdiction if they are competent with regard to any traditional basis of criminal jurisdiction, namely, territoriality, personality, protection principle, or universal jurisdiction. Second, global mechanisms of criminal accountability, notably the ICC, should not intervene in the repression of international crimes in a given region at the first instance. The task must be executed by the competent regional criminal court, that is to say the court established in the region where the alleged crimes have been committed.[111]

These main rules raise the question as to how the principle of regional territoriality could be reconciled with the principle of universal jurisdiction. The latter principle involves the power to adjudicate, which potentially stands at the disposal of any state. It implies that a perpetrator of a crime may be prosecuted abroad irrespective of his nationality or that of the victim, or without any other connection to the prosecuting state, except his presence within its territory.[112]

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110 *Protocol relating to the Establishment of the Peace and Security Council of the African Union,* Preamble, p 16. See also Assembly of Heads of State and Government of the Organisation of African Unity, *Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution,* AHG/Decl.3 (XXIX), p 11, 30 June 1993.

111 It must be noted that, were several regional criminal courts to coexist in any region, the principle of regional jurisdiction of first instance as regards the ICC would not be undermined by intra-regional judicial relationships. It is simply important to know whether a case has been adjudicated at the regional level by a competent court. Conflicts between regional criminal courts can be regulated and resolved otherwise. In Africa, for example, it should be recalled that the AU Criminal Court would be complementary to courts of justice of Regional Economic Communities, and the latter to domestic criminal tribunals.

112 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, Bruxelles, 2000, 29.

However, universal jurisdiction could be limited by way of an international arrangement of universal character, such as a multilateral treaty, to states of the region of commission of the crimes in question.[113] In effect, when a crime has to be prosecuted on the basis of such a principle, it will be up to the state in the region concerned which is willing and capable to prosecute, and which is competent in law to act, to exercise jurisdiction. In cases of jurisdictional conflict, when several states claim to be competent or if a state claiming jurisdiction is accused of not complying with the rules on jurisdictional powers such as the principle of subsidiarity of universal jurisdiction or the rules on immunities of state officials, the matter should be referred to the prosecutor of the competent regional criminal court. In this case, the regional prosecutor could request the latter court to issue an order whereby it designates the state of the region that may exercise jurisdiction. Alternatively, the prosecutor may take the situation or the case away from a state in favour of a regional trial. In the context of the African continent, regional trials could be initiated with due regard to one of the following judicial options available to the AU, either through delegation of jurisdiction to an AU member state or before a hybrid tribunal or the competent regional criminal court.

There are technical and policy advantages of establishing such a system of international criminal justice. First, it clearly eliminates the duplication of international mechanisms of criminal accountability, either at the state, regional or universal levels. Second, the system is based on the ownership of justice by states and in each region. Third, this system could promote equitable participation of regions in the struggle against impunity. In time, it would reveal those regions which are actively defending the cause of justice and safeguarding the peace and security of mankind. Fourth, this system is likely to reduce the perception

[113] In its decisions of July 2008 and 2010, the AU Assembly mandated the chairperson of the Union to follow up on the matter of the abuse of universal jurisdiction by some non-African states with a view to ensuring that it is exhaustively discussed for a durable solution at the level of the UN. The Permanent Representative of Tanzania raised the African concerns to the United Nations. On 29 June 2009, Tanzania requested that the matter be included in the agenda of the 64th session of the UN General Assembly (UNGA) under the title 'the scope and application of the principle of universal jurisdiction'. Tanzania advanced that the purpose of referring the issue of the principle of universal jurisdiction for discussion in the UNGA was to establish 'regulatory provisions for its application'. It is not impossible for the discussion at the UN level to result in an arrangement such as an international treaty. See Assembly of the African Union, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, X Assembly/AU/Dec.199 (XI), 30 June 1993, p 6. ; Tanzania, 'Explanatory Memorandum: Scope and Application of the Principle of Universal Jurisdiction' (23 July 2009) UNGA Sixty-third session (A/63/237/Rev.1) Annexe I, p 6; Executive Council of the African Union, *Progress Report of the Commission on the Abuse of the Principle of Universal Jurisdiction,* EX.CL/540 (XVI), 29 January 2010, p 3.

of instrumentalisation of international criminal justice by states from one region against the sovereignty, nationals, or political leadership of states from another region.

However, there are also some weaknesses. In fact, for the ICC to become a court of appeal against decisions of regional criminal courts, it should enjoy wide international recognition in order to avoid the risk of judicial vacuum when this recognition is lacking. For example, that may be the case when a state is a party to the treaty establishing the competent regional court and not to the Rome Statute. There should also be a legal basis allowing the ICC to sit on appeal in cases involving crimes that are specific to a region, unless such an appeal is lodged with a special chamber of the regional criminal court which has heard those cases at the first instance. This is a matter of particular arrangements within the system. Similarly, regional criminal courts should be established in every region and widely accepted by the states concerned for the purpose of exercising jurisdiction at first instance. Given these weaknesses, the principle of regional territoriality may be difficult to apply. One may reasonably doubt that a system of international criminal justice based on this principle will be established in the near future. The establishment of such a system is highly dependent on the political will of states and the international community as a whole. For its efficiency, it would be necessary to promote inter-regional judicial cooperation in criminal matters in order to avoid that a given region becomes a sanctuary of impunity.

Finally, in the context of Africa, the intervention of the AU criminal court should be exceptional. This is because recognition of its jurisdiction by African states might remain limited. Furthermore, recourse to universal jurisdiction in the framework of the principle of regional territoriality should be prioritised. In the event of regional prosecutions or trials, priority should be accorded to the delegation of jurisdiction to an AU member state or the creation of a hybrid court with participation of regional judges. When the AU Criminal Court exceptionally upholds its jurisdiction, it will act as a jurisdiction of first instance in the repression of ICC crimes. In this regard, the AU Criminal Court should benefit from the support of the international community as a whole. Globally, the ICC Prosecutor should work hand in hand with the regional prosecutors and offices, share expertise and judicial information. The ICC could equitably allocate part of its financial resources to regional criminal courts to support their proceedings. In short, all of this may constitute the better system of international criminal justice insofar as, to borrow Heike Krieger's words, 'there is a strong presumption that effective

enforcement requires a multilevel system',[114] which is integrated and unified. This evolutionary shift towards the regionalisation of international criminal law would require profound legal reforms.

4 Conclusion

The AU Criminal Court is not a replacement of the ICC in Africa. There is rather an institutional overlap of competences requiring a degree of coordination of reciprocal relationship. This study has discussed three alternative approaches in this regard: the hierarchical model, the cooperative approach, and the regionalisation of the ICC in conjunction with the principle of regional territoriality.

It was demonstrated that the hierarchical model contains two variants. On the one hand, it would apply to the relationship between the UNSC and the AU Criminal Court, which is perceived in this regard as a regional arrangement under Chapter VIII of the UN Charter as long as criminal justice is to be used as a means of maintenance of international peace and security. But, to reserve a role to the UNSC in the functioning of the AU Criminal Court requires some amendments to the Malabo Protocol. In the absence of such amendments concerning the power to refer a situation to the Court, the UNSC could only *recommend* to the AU organs that a situation in a state party be referred to the Court. Regarding a non-party state, the situation could be referred to the ICC. The suspension of proceedings cannot be recommended since the same power is not even given by the Malabo Protocol (Annex) to the AU Assembly and the PSC.

On the other hand, the drafters of the Malabo Protocol rejected the hierarchical model, which subordinates the AU Criminal Court to the ICC on the basis of the principle of complementarity. Rather, they opted for the cooperative approach which privileges mutual accommodation between equally coexisting criminal courts. In this respect, the relationship between the AU Criminal Court and the ICC should be regulated by a specific agreement in order to prevent jurisdictional conflicts in terms of parallel criminal proceedings and contradictory judgments.

However, this study has suggested that the regionalisation of the ICC could be better than the two previous approaches since it promotes the establishment

[114] Krieger H, 'A turn to non-state actors: Inducing compliance with international humanitarian law in war-torn areas of limited statehood', SFB-Governance Working Paper Series, June 2013, 27; Krieger H (ed.), *Inducing compliance with international humanitarian law - lessons from the african great lakes region,* Cambridge University Press, Cambridge, 2015, 539.

of an integrated system of international criminal justice. In this system, which seems to move back to the model based on the institutional hierarchy, existing regional criminal courts would act as jurisdiction of first instance and the ICC at the appeal level. This will allow any regional court to apply the principle of regional territoriality, according to which crimes committed in one region should be tried by states of that region or the competent regional criminal court at first instance, before any possible external judicial intervention.

As demonstrated, this third approach requires political will towards profound reforms and the regionalisation of international criminal law, including an adaptation of the principle of universal jurisdiction to the principle of regional territoriality. Therefore, it is unlikely that states and the international community could adopt such an approach in the near future, although such an adoption appears to be a necessity. In this context, the cooperative model between the AU Criminal Court and the ICC will flourish.

AFRICAN REGIONAL AND SUB-REGIONAL INSTRUMENTS ON ENDING IMPUNITY FOR INTERNATIONAL CRIMES: HIT OR MISS?

Gift Joseph Kweka

Abstract

Over the years, international crimes have been committed in a number of African countries. These crimes have not been limited to one geographical area. They occur throughout the continent. However, this does not imply that international crimes are confined to Africa. To the contrary, international crimes are also committed in other parts of the world. However, the focus of this chapter is on Africa and centered on the accountability of perpetrators of international crimes on the continent. On the international level, a number of instruments prohibiting the core international crimes of genocide, war crimes, the crime of aggression, and crimes against humanity have been adopted. These international instruments call on member states to ensure the perpetrators are brought to justice. Most African states are party to these international instruments. On top of that, African states, either as members of the African Union or their respective regional economic blocs, have taken the initiative to adopt additional instruments to address issues related to international crime. This chapter analyses the instruments that are in place at both regional and sub-regional levels in Africa. The chapter concludes that African states have a reasonable framework to end impunity to international crimes denoting the phrase that the framework is a 'hit' to a certain extent, while the conflicting provisions in some instances show where the framework is a 'miss' particularly with reference to the immunity of heads of states and governments.

INSTRUMENTS RÉGIONAUX ET SOUS-RÉGIONAUX AFRICAINS POUR METTRE FIN À L'IMPUNITÉ DES CRIMES INTERNATIONAUX : UN COUP RÉUSSI OU UN COUP RATÉ ?

Abstrait

Au fil des années, des crimes internationaux ont été commis dans un certain nombre de pays africains. Ces crimes ne se sont pas limités à une zone géographique. Ils se produisent à travers le continent. Cependant, cela ne signifie pas que les crimes internationaux sont confinés à l'Afrique. Bien au contraire, des crimes internationaux sont également commis dans d'autres parties du monde. Cependant, ce chapitre porte sur l'Afrique et se concentre sur la responsabilité des auteurs de crimes internationaux sur le continent. Au niveau international, un certain nombre d'instruments interdisant les principaux crimes internationaux de génocide, crimes de guerre, crimes d'agression et crimes contre l'humanité ont été adoptés. Ces instruments internationaux demandent aux États membres de veiller à ce que les auteurs soient traduits en justice. Il est important de noter que la plupart des États africains sont parties à ces instruments internationaux. En outre, les États africains, en tant que membres de l'Union africaine ou de leurs intégrations économiques régionales respectives, ont pris l'initiative d'adopter des instruments supplémentaires pour résoudre les problèmes liés à la criminalité internationale.

Cet article analyse les instruments en place aux niveaux régional et sous-régional en Afrique. Le chapitre conclut que les États africains disposent d'un cadre raisonnable pour mettre fin à l'impunité des crimes internationaux, dénotant que le cadre est un 'coup réussi' dans une certaine mesure, tandis que les dispositions contradictoires montrent parfois que le cadre est un 'coup raté', particulièrement en référence à l'immunité des chefs d'État.

1 Introduction

The history of the pursuit of accountability for international crimes via the creation of supranational legal mechanisms began with the establishment of the Nuremberg and Tokyo International Military Tribunals (IMTs).[1] The Nuremberg and Tokyo IMTs introduced and applied the concept of individual criminal responsibility for breaches of international law.[2] The laws that were applied during that time were found mainly under customary international law. During this time, most African countries were still under colonial domination. Because of this, they had minimal participation in the early development of international criminal law. However, prior to this time, Africa had traces of courts with elements of internationalisation aimed at the prosecution of slave traders, which was a prominent international crime in the 19th Century.[3] In the years following the Nuremberg and Tokyo trials, states started adopting international instruments addressing one or more categories of the core international crimes. At the international level, international crimes are limited to war crimes, crimes against humanity, genocide, and the crime of aggression. After the Second World War (WW II), key instruments were adopted including the Genocide Convention of 1948[4] and the Geneva Conventions of 1949 (which were later supplemented by three Additional Protocols).[5] Other important instruments were subsequently adopted, including the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[6] the 1970 Hague

1 *Charter of the International Military Tribunal*, 8 August 1945; *International Military Tribunal for the Far East Charter (IMTFE Charter)*, 19 January 1946; *Statute of the International Criminal Tribunal for the Yugoslavia*, UN. Doc. S/RES/827 (1993); *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/RES/955 (1994); *Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, U.N. Doc. A/Conf.183/9.

2 Principle III, Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 82 *Yearbook of the International Law Commission,* 1950*,* 374-378.

3 Blattmann R, 'International criminal justice in Africa: Specific procedural aspects of the first trial judgment of the International Criminal Court' in Werle G, Fernandez L and Vormbaum M, *Africa and the International Criminal Court,* Asser Press, The Hague, 2014, 35-37.

4 *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 227 UNTS 78.

5 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 *U.N.T.S.* 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85; G*eneva Convention Relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 287 UNTS 75; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135.

6 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 85 UNTS 1465.

Convention for the Suppression of Unlawful Services of Aircraft[7] and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[8]

Throughout the Cold War period to date, many international crimes and other crimes of international concern have been perpetrated in Africa. The genocide in Rwanda and the civil war in Sierra Leone led to the establishment of the *ad hoc* International Criminal Tribunal for Rwanda[9] and the Special Court for Sierra Leone respectively.[10] The ongoing civil wars in the continent and the desire to end impunity for international crimes in Africa moved African states to sign the Rome Statute of the International Criminal Court (Rome Statute) in large numbers.[11] To date, 33 African member states have adopted the Rome Statute.[12]

Through regional and sub-regional organisations, African states have adopted instruments that nurture an environment conducive to putting an end to impunity for international crimes. While some instruments have explicitly dealt with international crimes, others have inferred the issue of ending impunity from international crimes. The latter instruments were originally not adopted as key instruments addressing core international crimes; as a result issues of international crimes are not the central purpose of the instruments.

The aim of this chapter is to provide an overview of regional and sub-regional instruments addressing international crimes in Africa including the African Charter on Democracy, Election and Governance (ACDEG), African Union Model Law on Universal Jurisdiction (AU Model Law), the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination. This chapter does not offer a detailed analysis of the provisions of the instruments. Rather, it elaborates on selected provisions of the instruments in order to establish whether the existing legal framework represents a 'hit' or 'miss'

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7 *Hijacking Convention,* 14 October1971, 860 UNTS 105.

8 974 UNTS 178.

9 *Statute of the International Criminal Tribunal for Rwanda*.

10 *Statute of the Special Court for Sierra Leone UN Security Council,* Resolution 1325 (2000), 14 August 2000.

11 *Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, U.N. Doc. A/Conf.183/9.

12 https://asp.icccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx on 20 April 2017.

on the continent. This is achieved through an overview of the instruments paying special attention to the nature of crimes covered by the instruments with the aim of establishing a clear pattern on crimes considered to be 'international crimes' within the African context. Moreover, other aspects of prosecution of international crimes such as jurisdiction are examined to establish novelty in their formulation that covers the peculiarity of the state of affairs in Africa. Lastly, an examination of immunity of state officials as articulated in the instruments is provided. Through this assessment, the author concludes that key hit elements include: consistency in the increased number of crimes listed as 'international crimes', innovations on issues surrounding the exercise of universal jurisdiction, corporate criminal liability and complementarity principle. As the title of the chapter reads 'a hit or miss', the existing framework is considered to be a miss as it has failed to provide a common position on immunity of state officials. Now, there are instruments which have limited the immunity of state officials while one instrument has granted immunity to state officials, something that is a setback to achieving the purpose of international criminal justice.

2 Instruments addressing international crimes at regional level under the banner of the African Union

The African Union (AU) represents 54 African member states. It was founded in 2002 taking after its predecessor the Organisation of African Unity (OAU). The AU has addressed the issue of impunity to international crimes in many ways including through soft and binding legal instruments.[13] The desire to end impunity on the continent has been reflected in AU's efforts to aid member states to ensure accountability of perpetrators of international crimes present in their territories. This was the case with the Extra Ordinary Chambers of Senegal for the prosecution of Hissène Habré.[14] The focus of this chapter is, however, on regional and sub-regional instruments that address international crimes in Africa. This chapter does not analyse

[13] Grand Bay (Mauritius) Declaration and Plan of Action, 16 April, 1999, available at http://www.achpr.org/instruments/ [on 8 October 2014 p. 11; Decision on the Hissène Habré Case and The African Union (Doc.Assembly/AU/8 (VI)) Add.9; Decision on the Trial of Mr. Hissène Habré and the African Union 124 Assembly/AU/Dec.157 (VIII); 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); Decision on the Hissène Habré Case Doc. Assembly/AU/12 (XIII) Rev.1, July 2009; Decision on the Hissène Habré Case Doc. Assembly/AU/9(XVI), February 2010; Decision on the Hissène Habré Case Doc. Assembly/AU/12(XVIII), January 2012.

[14] Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990.

resolutions addressing issues relevant to the prosecution of international crimes, especially those expressing a negative attitude towards the ICC and the purported abuse of the universality principle by European states in order to prosecute Africans. The ACDEG, the AU Model Law, and the Malabo Protocol have expanded the list of international crimes beyond the core international crimes. This chapter gives the ACDEG a wide coverage. Further, provisions in the Malabo Protocol addressing jurisdiction have been elaborated to provide for corporate criminal liability and a newer version of the complementarity principle. Moreover, the AU Model Law has provided the limits for the exercise of universal jurisdiction. Lastly, the issue of immunity has attracted divergent positions in the instruments assessed giving a conflicting obligation between regional and international instruments.

2.1 African Charter on Democracy, Elections and Governance

The ACDEG was adopted in 2007 to address democracy and good governance (as the title suggests) as well as human rights, fair elections, judicial independence, building democratic culture, sustainable development, human security, and the fight against corruption.[15] The ACDEG makes an explicit link between its core objectives of bolstering democracy and good governance and the promotion and protection of human rights.[16] The principles under the ACDEG are human rights cautious.[17] This approach has taken aboard the reality that the African continent has a long and painful history of undemocratic change of government and a lack of good governance in some member states.[18] To tackle inherent problems in such situations, ACDEG calls for the end of impunity in respect of human rights violations on the continent.[19]

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15 Preamble and Article 1 and 2, *African Charter on Democracy, Elections and Governance,* 30 January 2007.

16 Article 2(1), 3(1), 4(1) - (2), 6, 9, *African Charter on Democracy, Elections and Governance*. These Articles address general human rights commitment while others call for specific respect to a category of human rights; for example political and minority rights.

17 Article 3, *African Charter on Democracy, Elections and Governance*.

18 Edward RM, 'The African Charter on Democracy, Elections and Governance: Positive step on a long path', Open Society Institute, Africa Governance Monitoring and Advocacy Project, May 2007, http://www.afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf. on 21 June 2016. See also the problems relating to democracy and election facing Burundi where over a thousand people have been killed and thousands displaced to Tanzania and elsewhere for refuge at http://www.bbc.com/news/world-africa-33590991 on 21 June 2015. Patrick JG, 'Institutionalising democracy in Africa: A comment on the African Charter on Democracy, Elections and Governance.' *African Journal of Legal Studies* 5 (2012), 119-146.

19 Article 7, *African Charter on Democracy, Elections and Governance*.

The ACDEG has specifically dealt with the crime of unconstitutional change of government. The ACDEG was preceded by the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, which addresses issues of unconstitutional change of government in detail.[20] This has also been inferred under articles 3(g) and 4(j), (m), (o) and (p) of the AU Constitutive Act. While unconstitutional change of government is not a crime under international law, Africa has come to introduce it as a new international crime (as shall be assessed in subsequent parts of this chapter). Thus, unconstitutional change of government entails:

> Any putsch or coup d'états against a democratically elected government, any intervention by mercenaries to replace a democratically elected government, any replacement of a democratically elected government by armed dissidents or rebels, any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections or any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.[21]

By proscribing 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government,'[22] the ACDEG addresses one of the recent challenges facing African countries.

The provisions referred to above, although lengthy, do not cover changes of government through uprising. This means that, as things stand, changes of government through uprising would fall outside the scope of ACDEG. However, the law is subject to interpretation. It is therefore yet to be seen whether courts will adopt a progressive approach in order to expand the scope of unconstitutional change of government. Currently, there are efforts to elaborate on the mental, material, and contextual element of the crime.[23]

The political remedies for unconstitutional change of government are of an obligatory character due to the use of the term 'shall' in the relevant provisions. Thus, where unconstitutional change of government has taken place, the AU shall

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20 *Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of Government* (AHG/Decl.5 (XXXVI).

21 Article 23(1) - (5), *African Charter on Democracy, Elections and Governance.*

22 Article 23(5), *African Charter on Democracy, Elections and Governance.*

23 Jalloh C, 'The distinction between international and transnational crimes in the African Criminal Court,' in Wilt H and Paulussen C (eds), *Legal responses to transnational and international crimes: Towards an integrated approach,* Edward Elgar Publishing, Cheltenham, 2017.

suspend a state party from the exercise of the right to participate in its activities.[24] Moreover, the AU could impose sanctions on any member state found to have instigated or supported unconstitutional change of government in another member state.[25] These provisions are not directly applicable to individuals but to states. Sanctions for unconstitutional change of government are also prescribed under the Protocol for the Establishment of the Peace and Security Council[26] and the AU Constitutive Act.[27] To date, the AU has on a number of occasions imposed sanctions against such unconstitutional changes of government.[28]

The ACDEG does not focus on states alone but also covers individual perpetrators of unconstitutional change of government. The ACDEG therefore appeals to member states to end impunity for unconstitutional change of government either via domestic courts of the territorial state or a third state[29] or under the proposed African Court of Human and Peoples' Rights (AfCHPR).[30] The provision for accountability, that is, Article 25(5), is more relaxed making the use of the word 'may' as opposed to Art 25(9) which is more authoritative by the use of the word 'shall.'

The ACDEG also limits the rights to vote and to participate in elections as guaranteed in Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR). The ACGED expressly states that, '[t]he perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.'[31] The wording of the ICCPR[32] is very clear that the right to vote and

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24 Article 25(1), *African Charter on Democracy, Elections and Governance*; Kane I, 'The implementation of the African Charter on Democracy, Elections and Governance', 17 *African Security Review,* 4 (2008), 43-63.

25 Article 25(6), *African Charter on Democracy, Elections and Governance.* These sanction are imposed pursuant to article 23 (2), *AU Constitutive Act,* 11 July 2000, 2158 UNTS 3.

26 Article 7(1) (g), *Protocol for the Establishment of the Peace and Security Council*, 9 June 2002.

27 Article 30, *AU Constitutive Act*.

28 Omorogbe EY, 'A club of incumbents? The African Union and coups d'Etat' 44 *Vanderbilt Journal of Transnational Law* (2011), 138–153: 'AU response to the successful coups in Togo (February 2005), Mauritania (August 2005 and August 2008), Guinea (December 2008), Madagascar (March 2009), and Niger (February 2010). When responding to coups, the AU has consistently favoured the constitutional order, irrespective of the conduct of incumbent regimes, the claims made by those challenging them, or the likelihood that the coup might advance democracy. As a result, the AU's actions have generally protected incumbent governments'.

29 Article 25(9), *African Charter on Democracy, Elections and Governance.*

30 Article 25(5), *African Charter on Democracy, Elections and Governance.* There was no court to prosecute the crime until the Protocol adopted in 2014 to extend the jurisdiction of the AfCHPR.

31 Article 25(4), *African Charter on Democracy, Elections and Governance.*

32 Article 25*, International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 71.

to be elected can be limited provided that the restrictions are not unreasonable. The provisions under the ACDEG are a reasonable limitation of these rights. The ACDEG does not limit the rights of the perpetrators indefinitely. To the contrary, the limits are only applicable in those elections that are held to restore the democratic order. Therefore, the perpetrators of unconstitutional change of government will be eligible to vie in subsequent democratic elections.

It should be noted that, even if unconstitutional change of government is not one of the core international crimes under international law, its commission is often coupled with the commission of other core international crimes like war crimes or crimes against humanity. Therefore, the ACDEG takes an innovative and necessary approach that addresses a common problem in Africa.

2.2 African Union Model Law on Universal Jurisdiction

The universality principle entails the ability of a state to prosecute international crimes committed elsewhere i.e. outside its territory with persons and against persons who are not its nationals.[33] This understanding is detailed under the Princeton Principles on Universal Jurisdiction.[34] The exercise of universal jurisdiction does not require any nexus between the crime, perpetrator, victim, or the country seeking to invoke it.[35] The applicability of universal jurisdiction is based on the shared common values of the international community, the protection of which transcends traditional understandings and exploitations of state sovereignty.[36] Therefore, the universality principle dilutes state sovereignty by giving the community of states the power to prosecute perpetrators of crimes that violate their shared common

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33 UNGA, *The scope and application of the principle of universal jurisdiction,* A/64/452, 16 December 2009; Cassese A, *The Oxford companion to international criminal justice,* Oxford University Press, Oxford, 2009; Lafontaine F, 'Universal jurisdiction-the realistic utopia' 10 *Journal of International Criminal Justice* (2012), 1277-1302; O'Keefe R, 'Universal Jurisdiction: Clarifying the basic concept' *Journal of International Criminal Justice,* 2 (2004), 735-76; Bassiouni MC, 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' in Bassiouni MC (ed), *International criminal law: International enforcement,* 3ed, Martinus Nijhoff Publishers, Leiden, 2008, 153; Bassiouni MC, 'The history of universal jurisdiction and its place in international law' in Macedo S, (ed*), Universal jurisdiction, national courts and the prosecution of serious crimes under international law,* University of Pennsylvania Press, Philadelphia, 2004, 39-63.

34 Article 1(1), *The Princeton Principles on Universal Jurisdiction* (2001), 'niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.'

35 Bassiouni MC, 'Universal jurisdiction for international crimes', p 42.

36 Bruce B, 'Towards the development of an effective system of universal jurisdiction for crimes under International Law' 35 *New England Law Review,* 2 (2001), 399 – 420.

values or interests.[37] This shared interest is the basis for the invocation of universal jurisdiction.[38]

Further, the rationale for the applicability of universal jurisdiction on international crimes is premised on the fact that in most circumstances territorial states are usually unable to hold the perpetrators accountable for the crimes committed, hence giving other states jurisdiction to intercede.[39] Recent practice in Africa has revealed a different tone with regard to the domestic prosecution of international crimes. Of late, states where international crimes have been committed have been actively prosecuting international crimes in domestic courts, for example, Democratic Republic of Congo,[40] Kenya,[41] Libya, Rwanda,[42] and Uganda.[43] However, this does not rule out the advantages of invoking universal jurisdiction especially in instances when territorial states are still unable or unwilling to prosecute.

The practice of prosecuting perpetrators of international crimes under the universal jurisdiction has been prevalent in Europe. Over the years, various European countries have been actively prosecuting perpetrators of international crimes under this principle.[44] Cases like *R v Bow Street Metropolitan Stipendiary Magistrate and*

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37 Bassiouni MC, 'Universal jurisdiction for international crimes', p 42.

38 Jalloh C, 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction,' 21 *Criminal Law Forum*, 1 (2010), 7.

39 Joyner C, 'Arresting impunity: The case for universal jurisdiction in bringing war criminals to accountability,' 59 *Law and Contemporary Problems*, 4 (1996), 166.

40 Clark P, 'Law, politics and pragmatism: The ICC and case selection in the Democratic Republic of Congo and Uganda,' in Clark P and Waddell N (eds), *Courting conflict? Justice, peace and the ICC in Africa,* Royal African Society, London, 2008, 38.

41 Kenya post-election violence cases have been prosecuted under the ordinary crime approach. The quantity of such prosecutions is still very low. It is yet to be seen whether restorative justice will be adopted as opposed to retributive justice. See http://www.capitalfm.co.ke/news/2015/03/uhuru-apologises-for-past-atrocities-much-to-kiplagats-delight-2/ on 16 June 2016.

42 William AS, 'Genocide trials and Gacaca Courts' *Journal of International Criminal Justice* (2005) 889; Report on the completion strategy of the International Criminal Tribunal for Rwanda as at 5 November 2014, S/2014/829 p 5.

43 Uganda's International Crimes Division (ICD) has been up and running since 2011. So far the case of *Uganda v Thomas Kwoyelo*, Constitutional Appeal No. 01 of 2012; Decision of 8 April 2015 has been cleared to proceed for trial. The prosecutor has drawn charges based on both the Geneva Conventions Act and the Penal Code.

44 Wolfgang K, 'From Pinochet to Rumsfeld: Universal jurisdiction in Europe 1998–2008' 30 *Michigan Journal of International Law,* 3 (2009), 931 – 958. The author assessed the practice of applying universal jurisdiction in European countries particularly Austria, Belgium, France, Germany, Netherlands, Scandinavia, Switzerland, Spain, The Netherlands and United Kingdom.

Others, Pinochet Ugarte [45] and the Prosecutions in Belgium of Rwandan nationals for the 1994 genocide (famously referred to as the Butare four: Vincent Ntezimaro, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera)[46] are classic examples. The recent arrest of General *Karanzi* Karake of Rwanda is another exercise of extraterritorial jurisdiction (on the basis of universality or passive personality) by European countries on African indicted officials.[47] The prosecution of international crimes under the universality principle in Europe was facilitated by the presence of legislative frameworks authorising national courts to prosecute international crimes under the principle.

Besides the prosecution of Hissène Habré before the Extra Ordinary Chambers in Senegal, African countries have not applied the principles of universal jurisdiction.[48] The lack of an effective regional legislative framework on universal jurisdiction was one of the main reasons for the absence of such practice.[49] While most African states have laws on extradition, which is an aspect for the successful application of universal jurisdiction,[50] they do not have laws enabling them to exercise universal jurisdiction in their own courts.[51] Recently, many African

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45 *R. v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3),* 2 All E.R. 97 (H.L. 1999).

46 Reydams L, 'Belgium's first application of universal jurisdiction: The Butare Four Case,' 1 *Journal of International Criminal Justice*, 2 (2003), 428 – 436. The author has given a background of the cases, summary of the trial and assessed the merits and shortcomings of the cases.

47 'Tracy Wilkinson: Spain indicts 40 Rwandan officers' *Los Angeles Times,* 7 February 2008, http://articles.latimes.com/2008/feb/07/world/fg-rwanda7 on 6 July 2018; Audiencia Nacional (Central Examining Magistrate No 4) (Spain), 6 February 2008.

48 See information available at www.chambresafricaines.org/ on 4 November 2014. Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System; Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990; Ntahiraja B, 'The present and future of universal jurisdiction in Africa: Lessons from the Hissène Habré case' in Van der Merwe HJ and Kemp G (eds), *International Criminal Justice in Africa, 2016*, Strathmore University Press, Nairobi, 2017, 1-36; Williams S, 'The Extraordinary African Chambers in the Senegalese Courts: An African solution to an African problem?' 11 *Journal of International Criminal Justice,* 5 (2013), 1139-1160.

49 Mdximo L, 'The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of International Crimes' 105 *American Journal of International Law* (2011), 1, 5. Other factors that may have caused the lack of prosecution of international crimes under the universality principle in Africa may be attributed to the absence of political incentives to ensure that the principle is utilised and the high costs of prosecuting international crimes coupled with the absence of necessary infrastructure.

50 Example; South Africa: *Extradition Act* 67 of 1962; Malawi: *Extradition Act*, chapter 8:03 of 1972; Botswana: *Extradition Act*, 2005; Tanzania: *Extradition Act* CAP.368 REV 2002.

51 Except for the countries with general laws on universal jurisdiction like Democratic Republic of the Congo: *Penal Code Book 1*, Section VI, article 3-6; the Republic of Congo: Law N° 8-98 of 31 October 1998; Ethiopia: articles 17 and 18, *Penal Code*; Ghana: article 56(4), *Courts Act* 1993; article 208, Niger *Law No 2003-025 of 13 June 2003*; Rwanda: *Organic Law No 08/96 of 30 August 1996 on the Organization*

countries that have implemented the Rome Statute have adopted national legislation providing for the exercise of (conditional) universal jurisdiction over perpetrators of international crimes.[52] The case of *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another*[53] has acknowledged the principle of universal jurisdiction and elaborated on its application as contained in the South Africa Implementation of the Rome Statute of the International Criminal Court Act. Due to the *lacuna* that existed in law prior to this development, European countries dominated efforts to try alleged African perpetrators of international crimes.[54] This was negatively perceived by many AU member states. In a series of resolutions, the AU expressed its disappointment about the abuse of universality principle by European states.[55] This dissatisfaction has also paved the way for cases relating to the operation of the universality principle to be instituted before the International Court of Justice.[56] Thus, to aid African states with an Africanised legislative framework on universal jurisdiction, the AU Commission drafted a Model Law on Universal Jurisdiction,[57] which was later adopted by the AU Assembly of States.[58]

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of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990. The Geneva Conventions implementing legislations also provide for the exercise of universal jurisdiction only in relation to the grave breaches which are limited to war crimes perpetrated in international armed conflicts. Example Botswana: Section 3(1), *Geneva Conventions Act 1970*; Kenya: Section 3(1), *Geneva Conventions Act 1968*; Malawi: Section 4(1), *Geneva Convention Acts 1967*; Mauritius: Section 3(1), *Geneva Conventions Act 1996*; Namibia: Section 2(1)(3), *Geneva Conventions Act 2003*; Nigeria: Section 3(1), *Geneva Conventions Act 1960*; Tanzania: *Geneva Conventions Act 1957 (UK)* and *Geneva Conventions Act (Colonial Territories Act) Order 1959 (UK)*; Uganda: Section 1(1), *Geneva Conventions Act 1964* and Zimbabwe: Section 3(1), *Geneva Conventions Act 1981*.

52 *International Criminal Court Act*, Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010; South Africa *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002; Kenya *International Crimes Act* No. 16 of 2008, Revised Edition 2012; Mauritius: *The International Criminal Court Act* 27 of 2011. Some laws do not provide for absolute universal jurisdiction, instead the exercise of universal jurisdiction requires a nexus to the country wishing to prosecute.

53 2015 (1) SA 315 (CC).

54 See The AU-EU Expert Report on the Principle of Universal Jurisdiction 8672/1/09 REV1 RdB/lgf 1 Brussels, 16 April 2009.

55 Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/731(XXI) July 2012. Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.199(XI) July 2008; Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.213(XII) February 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/11(XIII) July 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/540(XVI) February 2010.

56 *Arrest Warrant of 1 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, 3; *Certain Criminal Proceedings in France (Republic of the Congo v. France),* Order of 11 July 2003, ICJ Reports 2003, 143.

57 The African Commission, Resolution 167 (XLVII), 48th Ordinary Session held from 10 to 24 November 2010.

58 *African Union (Draft) Model Law on Universal Jurisdiction on international crimes* EX.CL/731(XXI) July 2012.

The AU Model Law makes reference to the core international crimes recognised in international law, i.e. war crimes, crimes against humanity, and genocide.[59] On top of that, the AU Model Law provides for an extended category of crimes over which states can exercise universal jurisdiction. These include the crime of piracy,[60] trafficking in narcotics,[61] and terrorism.[62] African states have embraced such crimes that are of concern to their community hence a slight departure from the position under international criminal justice. This does not mean that these crimes do not form a basis of concern to the international community; to the contrary, there have been instruments adopted addressing these crimes but the international community could not reach a consensus to include them as part of the traditional core international crimes.

The aim of the AU Model Law is to end impunity for international crimes[63] by giving national courts jurisdiction to try non-nationals who have committed international crimes in foreign territory.[64] This type of universal jurisdiction is conditional as opposed to absolute.[65] The AU Model Law provides that:

> The Court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State.[66]

The AU Model Law has ascribed universal jurisdiction to the highest court with original jurisdiction. This is not a recent development. Limitations on the exercise of universal jurisdiction can be found in the national legislation of African countries providing for universal jurisdiction. The AU Model Law has therefore borrowed from existing state practice in Africa.[67]

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59 Article 8-1, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*. The definition of the core international crimes under the model law is similar to the one found in international treaties and customary international law.

60 Article 12, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*.

61 Article 13, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*.

62 Article 14, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*.

63 Article 3 (a), *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*.

64 Article 4, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*.

65 Example Belgium: *Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 10 February 1999. Article 7 provides that '[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.' This law was, however, amended in 2003.

66 Article 4, *African Union (Draft) Model Law on Universal Jurisdiction on international crimes*.

67 Botswana: Section 3(3), *Geneva Conventions Act 1970* provides that a subordinate court shall have no jurisdiction to try grave breaches of the Geneva Conventions; Nigeria: Section 11(2), *Geneva Conven-*

The AU Model Law is a non-binding instrument providing recommendations on universal jurisdiction to be implemented in domestic legislative frameworks. This is its major weakness. The AU Model Law does not impose a mandatory obligation to be incorporated into the national law. States may choose a mode of adoption and how best it fits in the already existing legislative framework.

The AU Model Law has embraced aspects of immunity for state officials before foreign courts.[68] The provision on immunity is not absolute. It is limited to the extent of existing treaty obligations by member states which waive immunity of state officials.[69] This can be read together with Article 27 of the Rome Statute, which has done away with immunity of state officials before the ICC. It is expected that member states will follow a similar inclination when implementing the AU Model Law. The AU Model Law has further incorporated aspects such as extradition,[70] cooperation among states,[71] punishment,[72] rehabilitation and reparation for victims,[73] and witness protection.[74] While some of the aspects are inherent in the functioning of the universal jurisdiction principle, some have been borrowed from the contemporary aspects of international criminal justice, thereby enabling states to adopt a holistic approach to ending impunity for international crimes.

2.3 The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

Unlike the AU Model Law on Universal Jurisdiction, the Malabo Protocol is a binding instrument. The AU Assembly of States adopted it after a series heated of discussions on the relationship between the ICC and the AU.[75] The Malabo

tions Act 1960 provides that a magistrate's court shall have no jurisdiction to try grave breaches of the Geneva Conventions.

68 Article 3, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes.*

69 Article 16, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes*.

70 Article 17, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes.*

71 Article 18, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes.*

72 Article 19, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes.* The model law has provided for punishment not below 20 years.

73 *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes.*

74 Article 7, *African Union (Draft) Model Law on Universal Jurisdiction on International Crimes.*

75 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), July 2009; Decision on international jurisdiction, justice and the International Criminal Court (ICC), 2 Doc. Assembly/AU/13(XXI), May 2013; Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), July 2009; Decision on the report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC),

Protocol gives the AfCHPR international criminal jurisdiction.[76] It is commendable that, once operational, the AfCHPR will be the first regional court to be vested with international criminal jurisdiction. AU member states are in step with the spirit of Article 4(h) of the AU Constitutive Act by being the first regional block to address international crimes from intervention to prosecution.

The international criminal jurisdiction of the AfCHPR has followed the spirit of the AU Model Law on Universal Jurisdiction, departing from the position under different international instruments. Therefore besides the traditional core international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression,[77] the Malabo Protocol has included the following crimes: unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.[78] The definitions of crimes provided under the Malabo Protocol largely borrow from the existing international legal framework. Others like the crime of unconstitutional change of government have been modelled after the relevant provisions of the ACDEG (discussed above).

Notably, apart from individual criminal responsibility,[79] which is the only mode of responsibility under *ad hoc* tribunals and the ICC,[80] the Malabo Protocol has provided for corporate liability.[81] This is a clear reflection of the reality on the ground that as much as international crimes are committed by individuals these are in many cases assisted by corporations. Therefore, while it has almost been impossible to hold corporations responsible for the commission or facilitation of international crimes, this is bound to change. The AfCHPR is providing an avenue that will create a new jurisprudence in international criminal justice where legal entities may be held accountable for their actions.

Doc. Assembly/AU/8(XIV), February 2010; Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia October 2013 http://www.au.int/en/content/extraordinary-session-assembly-african-union on 15 October 2014.

76 Article 3, *Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights* (Malabo Protocol).

77 Article 28A (1)-(3) and (14), Article 28B-D and Article 28M, *Annex Statute to the Malabo Protocol.*

78 Article 28A (4)-(13), *Annex Statute to the Malabo Protocol.*

79 Article 28N and 46D, *Annex Statute to the Malabo Protocol.*

80 Article 25, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (Rome Statute).

81 Article 46C, *Annex Statute to the Malabo Protocol.*

Also, the Malabo Protocol has expanded on the concept of complementarity,[82] which is the basis for the operation of the ICC.[83] Both the ICC and the AfCHPR are courts of last resort. They operate only where national courts are unable or unwilling to prosecute. The concept of complementarity under the Rome Statute has been limited to national justice mechanism. The Malabo Protocol on the other hand has made the AfCHPR complementary to not only national courts but also sub-regional courts.[84] This is the realisation that in Africa, courts established by sub-regional economic integrations may in future be empowered to prosecute international crimes, a notion that was envisioned by the East African Community (EAC).

When it comes to the issue of immunity of state officials, the Malabo Protocol has taken a different position from that in the Rome Statute and the jurisprudence of the *ad hoc* tribunals.[85] While the trend that developed and was adopted under the Rome Statute was to strip away the immunity of both current and former state officials from prosecution on alleged charges of international crimes, the Malabo Protocol endorses immunity from prosecution during the state officials' tenure.[86]

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82 Stigen J, *The relationship between the International Criminal Court and national jurisdictions: The principle of complementarity,* Martinus Nijhoff Publishers, Laiden, 2008; Kleffner JK, *Complementarity in the Rome Statute and national criminal jurisdictions,* Oxford University Press, New York, 2008; Jurdi NN, 'Some lessons on complementarity for the International Criminal Court review conference' 34 *South Africa Year Book of International Law,* 1 (2009); Philippe X, 'The Principles of universal jurisdiction and complementarity: How do the two principles intermesh?' 88 *International Review of the Red Cross*, 862 (2006), 375-398; Kress C and Lattanzi F (eds), *The Rome Statute and domestic legal orders volume 1: Constitutional aspects and constitutional issues*, Editrice il Sirente, 2000.

83 Article 17, *Rome Statute.*

84 Article 46 H (1), *Annex Statute to the Malabo Protocol.*

85 Article 6(2), *ICTR Statute;* Article 7(2) *ICTY Statute;* Article 27 (1)*, Rome Statute*; *Prosecutor v Al Bashir* (Decision on the Prosecutions Application for a warrant of Arrest against Omar Hassan Al Bashir) ICC-02/05-01/09, PTC, 14 March 2009, p 41. Dire T, 'The ICC decision on Chad and Malawi: On cooperation, immunities and article 98,' 11 *Journal of International Criminal Justice,* 1 (2013), 202.

86 Article 46Abis, *Malabo Protocol.* This article has embraced the traditional understanding of immunity *ratione personae* as found in UNGA*, Third report on the immunity of State officials from foreign criminal jurisdiction,* A/CN.4/673*, 2 June 2014, 7 where the Special Rapporteur Concepción Escobar Hernández states that, this immunity is 'afforded to political leaders who serve as central organs of the State in international relations (Head of State, Head of Government or Minister for Foreign Affairs) is justified because they are the highest-ranking representatives of the State or because they play a key role in the management of foreign policy. In this connection, when they leave office, they will only be protected by immunity *ratione materiae*, which would protect them against criminal action solely for public acts performed in the fulfillment of the highest functions of State.' Despite this position, the Malabo Protocol has not ellaborated as to who are the state officials who enjoy this kind of immunity. It is yet to be seen how the Court, once operational, will interpret this provision. The question is whether it will adhere to this understanding or it will expand to protect officials as covered under immunity *ratione materiae.*

This position, which mirrors customary international law in relation to immunity of state officials from criminal jurisdiction of foreign courts,[87] is one area in which African member states to the Rome Statute incur conflicting treaty obligations. Should they choose to adopt the Malabo Protocol they will be breaching obligations under the Rome Statute. Similarly, should they wish to adhere to the Rome Statute they will be in breach of the Malabo Protocol. The belief is that the member states will adhere to the latter because if they were satisfied with the provisions of the Rome Statute they would not have adopted a very different position under the Malabo Protocol. It remains to be seen whether these conflicting obligations will someday raise issues of state responsibility for breach of international obligations or whether member states will dissolve former obligations in favor of the latter.

3 Sub-regional instruments

Sub-regional economic integrations have mushroomed in different parts of Africa. Notable are the EAC, Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA) and Economic Community of West African States (ECOWAS). None of these regional economic blocks has a document that addresses the issue of international crimes and the need to end impunity. However, the EAC demonstrates the desire to end impunity for international crimes through conferring international criminal jurisdiction to the East African Court of Justice.[88] Further, the ECOWAS Court of Justice has heard a case arising from the prosecution of Hissène Habré in Senegal, giving a decision that limited the ability of Senegal to prosecute international crimes committed in Chad before its domestic courts,[89] thereby leading to the establishment of the Extraordinary African Chambers (*Chambre Africaine Extraordinaire*).[90]

The International Conference on the Great Lakes Region (ICGLR), which is an inter-governmental organisation[91] with the principal aim of promoting the

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87 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* p 58. The ICJ stated that there exists [no] customary international law [in] any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

88 The desire to extend the criminal jurisdiction of the court started in 2004. See 2004, 2005, 2011 East African Legislative Assembly (EALA) hansard http://www.eala.org/component/docman/cat_view/45-key-documents/34-hansard.html on 22 October 2016.

89 The Community Court of Justice (ECCJ) has provided decisions denying the petition by Habré to suspend his on-going trial before Extraordinary Chambers in Senegal.

90 Information available at http://www.chambresafricaines.org/ on 23 November 2016.

91 http://www.icglr.org/index.php/en/background on 24 October, 2016.

attainment of lasting peace in the Great Lakes Region, has developed a key instrument for addressing international crimes. The member states to ICGLR include: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania, and Zambia. Because the Great Lakes Region has been prone to civil wars, it has inevitably had a high rate of international crimes committed within member states' territories.[92] To tackle the issue of impunity for international crimes, the member states in 2004 adopted the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (Great Lakes Protocol).[93] This was the first key instrument in Africa to explicitly deal with international crimes and accountability.

The Great Lakes Protocol closely mirrors the definitions of crimes provided in existing international instruments addressing core international crimes i.e. the crime of genocide, war crimes, and crimes against humanity.[94] The crime of aggression is not part of the core international crimes, reflecting the state of flux of the crime of aggression at the time that the Great Lakes Protocol was adopted.

Unlike other instruments that establish courts or confer existing courts with international criminal jurisdiction, the Great Lakes Protocol only places obligations on member states to fulfill their primary duty of prosecuting international crimes.[95] In the event member states are unable or unwilling to prosecute, they are under an obligation to surrender cases to international judicial organs with jurisdiction to prosecute international crimes.[96] Such cases would include those involving serving state officials. Unlike the Malabo Protocol, the Great Lakes Protocol has embraced the Rome Statute position on immunity of state officials.[97] The Great Lakes Protocol provides *inter alia* that a 'Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State' shall be

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92 Kalron N, 'The Great Lakes of confusion' 19 *African Security Review*, 2 (2010), 25–37.

93 *Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in The Great Lakes Region,* 20 November 2004.

94 Preamble, Article 1(a), 2-7, 8(2), *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination,* 29 November 2006.

95 Article 9, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination,* which requires member states to have legislative framework that give effect to the provisions of the Protocol.

96 Article 9(1)-(2), *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination.*

97 Article 12, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*.

prosecuted equally as any other person or official.[98] Therefore, member states cannot shelter an accused person from being prosecuted for alleged charges of war crimes, crimes against humanity, and the crime of genocide on the basis of their official capacity. This was the position ascribed to in 2004. A decade later, member states have taken a different position before the AU under the Malabo Protocol though states are yet to ratify the document. This is again a clear instance of conflicting treaty obligations for member states from the Great Lakes Region. Unclear is what informs African states when ratifying a treaty whose obligations they are not sure they want to adhere to. Are they moved by wind like flags? It is notable that the Great Lakes Protocol has yet to be implemented by member states except for those countries that have implemented the Rome Statute, which has similar obligations.

To ensure prosecution of perpetrators of international crimes, member states are called upon to cooperate[99] on issues such as extradition,[100] joint commission of inquiry,[101] exchange of information relevant in the prosecution of crimes under the Great Lakes Protocol,[102] and the obligation to cooperate with the ICC in accordance with the provisions of the Rome Statute.[103]

4 Concluding remarks: A hit or miss?

From the preceding analysis, it is clear that the African continent has been at the forefront of adopting instruments aiming to curb impunity for international crimes. The instruments adopted at both regional and sub-regional level have been progressive and, from that perspective, one cannot help but to conclude that they are 'a hit'. The common feature in the instruments is the inclusion of crimes with an

98 Article 12, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*.

99 Article 13, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*.

100 Article 14 and 15, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*.

101 Article 16, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*.

102 Article 20, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*. Information referred to is on the a) 'perpetrators, co-perpetrators and accomplices involved in the commission of the crime of genocide, war crimes, and crimes against humanity; b) Any items of evidence connected to the crimes mentioned above, whether committed or attempted; c) The elements needed to establish the evidence for these crimes; d) Arrests and police investigations carried out by the competent authorities against the nationals of other Member States and persons residing in their territories.'

103 Article 21, 22 and 23, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*.

international element beyond the traditional core international crimes. This gives room for the progressive development of international criminal justice to address other crimes of international or regional concern that are not within the limits of 'core international crimes'. This will enable Africa to tackle problems surrounding the exploitation of natural resources in Africa and other economically-related crimes listed under the instruments.

Other notable improvements include the mode of criminal liability whereby there is an expansion from individual criminal liability to corporate criminal liability and the embracing of possible prosecutions of international crimes before domestic courts and sub-regional economic integration courts. The failure to reach a consensus to include corporate criminal liability during the negotiations of the Rome Statute has been remedied on the African continent by the Malabo Protocol. This will enable the imposition of criminal liability on corporations, regardless of the fact that persons within the corporation may be subject to individual criminal liability.

Regarding universal criminal jurisdiction, the AU Model Law endorses conditional universal jurisdiction, which has become the accepted mode of invoking universal jurisdiction as opposed to the unconditional variant. By giving universal jurisdiction to high courts, the instrument gives a conscious realisation of the weight which ought to be attached to international crimes thereby giving no room for lower courts to entertain such cases. Further, this will enable the creation of specialised divisions before the high courts as Rwanda and Uganda have done. This enables the courts to specifically deal with international crimes thereby regulating the composition of the chambers by judges with knowledge in the field of international criminal law and justice.

Despite these positive provisions, the legal framework is not uniform due to the presence of provisions giving rise to conflicting obligations. This is where one must conclude that these legal instruments are 'a miss'. The issue of immunity of state officials in particular has caused misalignment between provisions of the Rome Statute, the Great Lakes Protocol, and the AU Model Law on Universal Jurisdiction on the one hand, and the more recent Malabo Protocol, on the other. The first three instruments, notwithstanding the formulation and parameters covered by the relevant provisions, have maintained the absence of the immunity of state officials from prosecution before international courts or tribunals in the event they are alleged to have perpetrated international crimes. However, the Malabo Protocol has embraced the immunity *ratione personae*. The immunity issue represents a big stain on an otherwise white garment.

THE INTERNATIONAL CRIMINAL COURT, UNIVERSAL JURISDICTION AND AFRICA: INTRUSION OR INTERCESSION?

HJ Van Der Merwe

Abstract

The principle of universal jurisdiction applies to crimes under international law as an exception to the territoriality principle requiring a nexus to the crime, the offender or the victim. This exception is justified by the nature of international crimes, which affect the interests of the international community as a whole.

In the context of the International Criminal Court (ICC), jurisdiction is primarily based not on universal jurisdiction but on the principles of territoriality and active personality. However, the principle of universal jurisdiction may apply to the ICC in two ways: First, the Court's jurisdiction may be founded on United Nations Security Council (UNSC) referral irrespective of the situs of the crime or the nationality of the offender. Second, when states incorporate the Rome Statute of the International Criminal Court (Rome Statute) into their domestic law through incorporation legislation, they are in principle free to draft such legislation to provide for universal prescriptive jurisdiction in respect of ICC crimes.

It is well known that the application of the universality principle has been subject to heavy criticism, especially from within Africa. As far the ICC's universal jurisdiction in concerned, African concerns are encapsulated by legal conflicts arising from South African domestic legislation incorporating the Rome Statute, namely the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act) as well as South Africa's treaty obligations in respect of cooperation with the ICC. This chapter draws on the abovementioned legal developments to reflect on the scope, limitations and controversies surrounding the ICC's universal jurisdiction, both directly via UNSC referral and indirectly via domestic incorporation of the Rome Statute.

COUR PÉNALE INTERNATIONALE, JURIDICTION UNIVERSELLE ET AFRIQUE : INTRUSION OU INTERCESSION ?

Abstrait

Le principe de la compétence universelle s'applique aux crimes relevant du droit international en tant qu'exception au principe de territorialité exigeant un nexus avec le crime, le délinquant ou la victime. Cette exception est justifiée par la nature des crimes internationaux qui affectent les intérêts de la communauté internationale dans son ensemble.

Dans le contexte de la CPI, la compétence repose principalement non sur la compétence universelle mais sur les principes de territorialité et de personnalité active. Cependant, le principe de compétence universelle peut s'appliquer à la CPI de deux manières : Premièrement, la compétence de la Cour peut être fondée sur le renvoi du CSNU indépendamment du situs du crime ou de la nationalité du contrevenant. Deuxièmement, lorsque les États intègrent la loi du Statut de Rome dans leur législation nationale par le biais d'une loi constitutive, ils sont en principe libres de rédiger une telle législation pour prévoir une compétence prescriptive universelle en ce qui concerne les crimes de la CPI.

Il est bien connu que l'application du principe d'universalité a fait l'objet de nombreuses critiques, notamment de la part de l'Afrique. En ce qui concerne la compétence universelle de la CPI, les préoccupations africaines sont encapsulées par des conflits juridiques découlant de la législation sud-africaine interne incorporant le Statut de Rome, à savoir l'application du Statut de Rome prescrit dans la Loi 27 de 2003 de la Cour pénale internationale ('ICC Act') ainsi que les obligations conventionnelles de l'Afrique du Sud en matière de coopération avec la CPI. Ce chapitre s'inspire des développements juridiques susmentionnés pour réfléchir sur la portée, les limites et les controverses entourant la compétence universelle de la CPI, à la fois directement par le biais du renvoi du Conseil de sécurité et indirectement par l'incorporation du Statut de Rome dans la législation nationale

1 Introduction

Traditionally, the study of international criminal law goes hand in hand with the study of the principle of universal jurisdiction, which applies to crimes under international law.[1] The most prominent of these crimes fall within the substantive jurisdiction of the International Criminal Court (ICC or the Court). However, somewhat paradoxically, the ICC does not have universal jurisdiction *per se* (or sometimes referred to *proprio motu* universal jurisdiction) over the crimes within its substantive jurisdiction (despite the universally offensive nature of these crimes). As an institution that exists by virtue of a multilateral international legal instrument, the ICC's jurisdiction is treaty-based. The Rome Statute of the International Criminal Court (Rome Statute) limits the jurisdiction of the ICC primarily only to core crimes committed within the territory of its member states or by nationals of such states.[2]

But the standard jurisdictional reach of the ICC may be expanded in two ways: First, the Rome Statute provides for a *sui generis* regime of jurisdiction that approximates universal jurisdiction if a situation is referred to the Court by the United Nations Security Council (UNSC). Second, many states party to the Rome Statute provide for universal jurisdiction over ICC crimes in their national law, which represents an indirect extension of the ICC's substantive jurisdiction. For the purposes of this chapter, these direct and indirect expansions of the ICC's standard treaty-based jurisdiction are regarded collectively as the ICC's universal jurisdiction.[3]

This chapter investigates the scope, limitations and controversies surrounding the ICC's universal jurisdiction from an African perspective. Developments arising from South Africa's membership to the ICC illustrate that the ICC's universal jurisdiction, although limited in scope and *sui generis* in nature, seems to add to the belief among some African states that the ICC displays an anti-Africa bias and poses a threat to African sovereignty, peace and stability.

The first part of the chapter provides a brief overview of the concept of universal jurisdiction (Part 2). This is followed in Part 3 by a more detailed

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1 It is generally acknowledged that some crimes, such as torture and terrorism, do not at present provide a basis for universal jurisdiction. See Werle G and Jessberger F, *Principles of international criminal law*, 3ed, Oxford University Press, Oxford, 2015, 74.

2 Article 12(2), *Rome Statute of the International Criminal Court,* 17 July 1998, 2187 UNTS 38544.

3 Of course, as noted in the introduction, it is duly recognized that the ICC does not have universal jurisdiction *per se*.

description of what I refer to as the ICC's universal jurisdiction. Broadly speaking, the phrase is used to describe two exceptional circumstances where ICC crimes can be prosecuted without a link to state territory, the nationality of the offender, a recognised unilateral state interest,[4] or the consent of the host state. In this chapter, the ICC's universal jurisdiction refers simultaneously to: (1) the Court's *sui generis* jurisdiction activated by way of UNSC referrals and (2) the jurisdiction of states to prosecute ICC crimes via national laws incorporating universal jurisdiction.[5]

Part 4 discusses legal conflicts encapsulating African concerns regarding the jurisdiction of the ICC arising from South Africa's treaty obligations in respect of cooperation with the ICC as well as its domestic legislation incorporating the Rome Statute, namely, the *Implementation of the Rome Statute of the International Criminal Court* (ICC Act).[6] This is followed in Part 5 by a critical analysis of the intersection between African concerns regarding the ICC and its universal jurisdiction and outlines a number of lessons learned regarding the crisis of international criminal law in Africa.

2 Universal jurisdiction

There is no generally accepted definition of universal jurisdiction. Broadly, it refers to criminal jurisdiction exercised on the basis of the universality principle, which, like other heads of jurisdiction allowing for the extra-territorial application of national criminal laws, embodies a permissive rule under customary international law.[7] According to Roger O'Keefe's basic definition, universal jurisdiction is essentially 'the assertion of jurisdiction to prescribe in the absence of any accepted jurisdictional nexus at the time of the relevant conduct'.[8] As pointed out by O'Keefe, the term *universal jurisdiction* is shorthand for *universal prescriptive jurisdiction*.[9] The latter refers to the power of a state to universally proscribe and

4 As recognised under the protective principle or the effects doctrine.

5 It is important to highlight that, in both scenarios; prosecution either by the ICC or domestic courts would be based on the universality principle. See 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), 454.

6 *Implementation of the Rome Statute of the International Criminal Court* ICC Act (Act No. 27 of 2002). These legal conflicts are a useful point of reference since they involve respectively the direct and indirect variants of the ICC's universal jurisdiction (as described in Part 3 below).

7 See Jessberger F, 'Universal jurisdiction' in Cassese A (ed), *Oxford companion to i international criminal justice*, Oxford University Press, Oxford, 2009, 555-556.

8 O'Keefe R, 'Universal jurisdiction: Clarifying the basic concepts' 2 *Journal of International Criminal Justice* (2004), 737.

9 O'Keefe R, 'Universal jurisdiction', 737.

criminalise conduct under its national law and should be clearly distinguished from states' enforcement jurisdiction, which is limited under international law to the territory of the prosecuting state. Most states do not permit the exercise of universal jurisdiction *in absentia*.[10] Thus, universal jurisdiction can only be used as the basis for prosecution where there is a convergence between (broad) universal prescriptive jurisdiction and (narrow) enforcement jurisdiction.

It is important to emphasise that Africa is, in principle, in favour of the principle of universality and the exercise of universal jurisdiction.[11] What is disputed, however, is the scope of its application and its perceived abuse by western states and supranational criminal courts.[12]

3 The ICC's universal jurisdiction

The jurisdiction of the ICC is fundamentally limited in various ways. Most obviously: (1) it has no jurisdiction in respect of any crimes other than those contained in the Rome Statute; (2) it cannot prosecute any such offenses if they were committed outside its temporal jurisdiction;[13] and (3) its jurisdiction is limited to natural persons over the age of 18 years old.[14]

The ICC is not vested with universal jurisdiction in the true or absolute sense. Its jurisdiction is primarily based not on universal jurisdiction but on the territoriality and active personality principles.[15] O'Keefe offers the following succinct description of territoriality and nationality as heads of prescriptive jurisdiction:

> The two heads of jurisdiction unquestionably available to states in respect of all offences are territoriality and, in relation to extra-territorial offences, nationality: that is, a state may criminalise conduct performed on its territory, as well as conduct performed abroad by one of its nationals.[16]

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10 Most states that did provide for such jurisdiction have since modified such legislation to provide for conditional forms of universal jurisdiction. Belgium's amendment of legislation providing for universal jurisdiction over genocide, crimes against humanity, and war crimes is often cited as a prominent example.

11 See the *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction,* Assembly/AU/Dec.199 (XI) (2008), adopted at the AU's Ordinary Session of 30 June - 1 July 2008 in Sharm El-Sheik, Egypt.

12 *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*; see generally Dube A, 'The AU Model Law on Universal Jurisdiction'.

13 Article 11, *Rome Statute*.

14 Article 26, *Rome Statute*.

15 Article 12(2-3), *Rome Statute*.

16 O'Keefe R, 'Universal jurisdiction', 738-739.

State practice confirms the widespread acceptance of territoriality and nationality as a means for states to assert the applicability of their criminal law.[17] The fact that the ICC has jurisdiction where crimes within its substantive jurisdiction are perpetrated within the territory of one of its member states or by nationals of such states is non-contentious. This is underlined by the fact that the ICC may only intervene when its member states are unable or unwilling to act under these heads of jurisdiction or when a non-member state cedes its jurisdiction to the ICC on an *ad hoc* basis in terms of Article 12(3). Crimes committed on the territory of non-member states and by nationals of non-member states are therefore predominantly excluded from the Court's jurisdiction. However, non-party states may accept the jurisdiction of the Court on an *ad hoc* basis,[18] in which case the Court's jurisdiction is activated on the basis of territoriality and active nationality.

It is important to note that grounds for jurisdiction above are all consent-based. Accordingly, the Court's intervention would not infringe on the sovereignty of member states or those non-member states that accept its jurisdiction on an *ad hoc* basis. This is the result of compromises regarding the reach of the Court's jurisdiction that had to be made during the negotiation of the Rome Statute. Proposals to endow the Court with universal jurisdiction were firmly rejected. This was necessary to obtain sufficient state support for the Court and was almost certainly a prudent choice in light of the practical and political realities that the Court has faced since its establishment.

Although less politically contentious, the primarily consent-based jurisdiction ultimately settled on by negotiating parties can only take the Court so far in terms of fulfilling its mandate to prosecute those bearing the greatest responsibility for international crimes. As noted by Madeline Morris:

> [...] those crimes [enshrined in the ICC Statute] are often committed by or with the approval of governments. It is unlikely that a government sponsoring genocide, war crimes, or crimes against humanity would consent to the prosecution of its nationals for his or her participation.[19]

In the majority of cases, the Rome Statute can only extend to state-sponsored crimes, when such cases are referred to the Court by the UNSC (3.1 below) or when the state elects to exercise universal jurisdiction over ICC crimes (3.2 below).

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17 O'Keefe R, 'Universal jurisdiction', 738-739.

18 Article 12(3), *Rome Statute*.

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

3.1 UNSC referral: Triggering the ICC's quasi-universal jurisdiction

Article 13(b) of the Rome Statute provides that the Court may exercise jurisdiction if '[a] situation in which one or more of [the crimes in Article 5 of the Statute] appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the Charter of the United Nations'. Such referral is one of three trigger mechanisms provided in the Rome Statute.[20] Apart from voluntary acceptance by a non-member state of the Court's jurisdiction as provided for in Article 12(2) (a) and (3) of the Rome Statute, this is the only way in which the Court can exercise jurisdiction over nationals of non-member states. However, unlike voluntary acceptance of the Court's jurisdiction, the justification for the triggering of the ICC's jurisdiction through Article 13(b) is not based on the consent of the state in question.[21]

When the ICC is acting directly under the auspices of a binding UNSC resolution, the theoretical basis for its jurisdiction is uncertain. Is it universal jurisdiction or delegated jurisdiction? Does the UNSC have criminal jurisdiction to delegate? In my view, universal jurisdiction is embedded in the Rome Statute but remains inactive or dormant unless triggered by the UNSC in respect of a specifically defined situation. The UNSC cannot delegate its criminal jurisdiction to the Court because it does not have any criminal jurisdiction to delegate. UNSC referral thus cannot add to the Court's jurisdiction. It cannot and does not add any jurisdiction above and beyond that which is already contained - albeit in dormant form - in the Rome Statute as negotiated and accepted by the Court's member states. Adding (or removing or otherwise amending) the Court's jurisdiction can only happen via amendment of the Rome Statute by state parties. However, theoretical debates aside, the Court's jurisdiction in these circumstances essentially fits the classical notion of universal jurisdiction, namely, prosecution of crime without a traditional jurisdictional link to the conduct in question.

To date, two situations have been referred to the ICC by the UNSC (that includes 11 cases under investigation and 9 situations under preliminary examination). In March 2005, following the publication of the report of the International Commission

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20 See Article 13, *Rome Statute*.

21 While the non-member state would not have given any explicit consent to the jurisdiction of the ICC being extended to cover their sovereign territory or crimes committed by their nationals, it may be argued that such consent may be found indirectly through the state's obligations under the UN Charter. Article 25, *Charter of the United Nations and Statute of the International Court of Justice,* 26 June 1945 provides that all members of the United Nations 'agree to carry out and accept the decisions of the UNSC in accordance with the present Charter'. This would include a binding UNSC decision to extend the jurisdiction of the ICC to the territory of the state in question.

of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur,[22] the UNSC determined that 'the situation in Sudan continues to constitute a threat to international peace and security' and referred the situation in Darfur since 1 July 2002 to the ICC.[23] Then, in February 2011, the UNSC referred the situation in Libya since 15 February 2011 to the ICC citing 'violence and use of force against civilians' and 'the gross and systematic violation of human rights, including the repression of peaceful demonstrators'.[24]

At first glance, the jurisdiction conferred on the ICC by way of a binding UNSC resolution would appear to amount to the kind of universal jurisdiction *per se* that was suggested by Germany during the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). However, it is important to acknowledge that the ICC's universal jurisdiction via the UNSC is limited in various ways, some more obvious than others, which makes it a unique form of *quasi* or delegated universal jurisdiction.

First, as a general principle, the Court has no inherent universal jurisdiction and is wholly dependent on the UNSC for any expansion of its treaty-based jurisdiction. Thus, it could be argued that the ICC gains universal jurisdiction by proxy and is acting on the authority of the UNSC, which, in turn, is representative of the will of the international community.

Second, the UNSC may circumscribe the Court's jurisdiction when using its power of referral. For example, in Resolution 1593 (2005) referring the situation in Darfur to the ICC, the UNSC also directed that:

> ... nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.

This direction has the effect of excluding from the ICC's jurisdiction crimes committed in Darfur by nationals of certain states, barring the unlikely event of a waiver of jurisdiction by such a state.[25]

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22 *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur,* 1 February 2005, UN Doc S/2005/60.

23 UNSC Resolution 1593 (2005) referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.

24 UNSC Resolution 1970 (2011) on peace and security in Libya.

25 For instance, US personnel in Darfur are excluded from the court's jurisdiction.

Third, even when the ICC is seized of a situation that would normally fall outside its treaty-based jurisdiction, the Court will still only be concerned with the most serious cases. In accordance with the Rome Statute, only cases of sufficient gravity warrant the attention of the Court. This is the first hurdle of admissibility of cases to the ICC under the Rome Statute.

Finally, UNSC referral does not suspend the other limb of the admissibility analysis, namely, complementarity. Therefore, the host state will always have an option (or right of first refusal) to launch domestic proceedings or to challenge the admissibility of a case to the ICC. The ICC is a court of last resort for serious cases. Its default position therefore should be one of deference towards states. However, it may be rare to find a host state that is willing and able to prosecute in circumstances where a UNSC referral was required in the first place. However, contemporary history has delivered one such example, namely, the ICC decision concerning the admissibility of the case against a Libyan national, Abdullah Al Senussi.[26]

3.2 The domestic prosecution of ICC crimes: The ICC's indirect universal jurisdiction

Unlike the treaty-bound ICC, state parties to the Rome Statute are not constrained to jurisdiction based on the principles of territoriality and active nationality when giving effect to their obligations under the Rome Statute through domestic legislation. Many ICC member states provide for a limited or conditional form of universal jurisdiction over ICC crimes in their national laws, which, because of the complementary relationship between states and the ICC and their co-dependent mandate to ensure accountability, represent an indirect extension of the ICC's substantive jurisdiction.

The ICC's jurisdiction via states must be understood through the lens of admissibility and complementarity. Complementarity dictates that the ICC will only intervene in cases where states with jurisdiction over such cases are unable or unwilling to investigate or prosecute and thereby reduces the need for the universality principle to be imbedded in the Rome Statute.[27] The centrality of the complementarity regime in the mandate and functioning of the ICC means that universal jurisdiction is less important for the ICC than it is for states, since these states are primarily responsible for the investigation and prosecution of ICC crimes.

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[26] *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the admissibility of the case against Abdullah Al-Senussi) PTC I, ICC-01/11-01/11-466-Red, 11 October 2013.

[27] See further Ryngaert C, 'The International Criminal Court and universal jurisdiction: A fraught relationship', 12 *New Criminal Law Rev*iew (2009), 504-510.

A useful example of national legislation incorporating the Rome Statute and providing for a conditional form of universal jurisdiction is South Africa's ICC Act. The ICC Act creates a framework for implementing the Rome Statute in South Africa and criminalises genocide, crimes against humanity and war crimes by creating substantive offences under South African law with direct reference to the definitions of the crimes provided for in the Rome Statute. Section 4(1) of the ICC Act reads:

> Despite anything to the contrary in any other law of the Republic, any person who commits a crime is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.

Section 4(3) of the ICC Act allows a South African court to try 'any person who commits a crime contemplated in subsection (1) outside the territory of the Republic' if:

a) that person is a South African citizen; or

b) that person is not a South African citizen but is ordinarily resident in the Republic; or

c) that person, after the commission of the crime, is present in the territory of the Republic; or

d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

A notable aspect of Section 4(3) is that it allows for jurisdiction over non-nationals who are present in South African territory as well as non-nationals who have committed core crimes against South African citizens irrespective of whether such perpetrator's state of nationality is a party to the Rome Statute. It is also noteworthy that Section 4(2) of the Act excludes immunity from prosecution for *inter alia* sitting heads of state '[d]espite any other law to the contrary, including customary and conventional international law'.

4 Legal conflicts encapsulating African concerns regarding the jurisdiction of the ICC

4.1 South Africa's failure to arrest President Al Bashir

The ICC arrest warrants for President Al Bashir may be regarded as the catalyst of the protracted row between Africa and the ICC. The controversy arising from the issuing of his arrest warrant and the UNSC's referral of the situation in

Darfur to the ICC (and their subsequent non-deferral thereof) is no coincidence. Since the warrant was issued, multiple African state parties to the Rome Statute have been found in breach of their obligations of cooperation with the Court, the latest of which is South Africa. South Africa's failure to cooperate with the ICC has been subject to litigation in its own courts (4.1.1) and at the ICC (4.1.2), as discussed below.

4.1.1 Southern African Litigation Centre v Minister of Justice and Constitutional Development and others

In June 2015, Al Bashir of Sudan attended the 25th African Union (AU) Summit in Johannesburg, South Africa. At the same time, the Southern African Litigation Centre (SALC) made an application for his arrest in the Southern Gauteng High Court. The High Court ordered the respondents to prevent Al Bashir from leaving the country and to arrest and detain him pending a formal request for his surrender to The Hague.[28] Around the same time, the state's legal representatives notified the High Court that Al Bashir had already left the country. The following day, the High Court provided reasons for its order.[29] The High Court held that the expressed exclusion of head of state immunity in the Rome Statute and ICC Act in respect of crimes under the Rome Statute precluded both Al Bashir and South African authorities from relying on immunity as a bar to his arrest. The High Court also found that an ICC arrest warrant could not be nullified by the granting of immunity under domestic law.

The respondents unsuccessfully appealed to the Supreme Court of Appeal (SCA), which, in a unanimous judgment, held that failure of South African authorities to take steps to arrest and detain Al Bashir for surrender to the ICC was inconsistent with South Africa's obligations in terms of the Rome Statute as well as section 10 of the ICC Act.[30] On 19 October 2016, the South African Cabinet made an executive decision to withdraw South Africa from the Rome Statute, citing the SCA's decision earlier in the year.

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28 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and others* 2015 (9) BCLR 1108 (GP), 1110.

29 2015 (9) BCLR 1108 (GP), 1110.

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

4.1.2 ICC jurisprudence

South Africa's failure to arrest Al Bashir also raised issues concerning its obligations to cooperate with the ICC. On 8 December 2016, the ICC Pre-Trial Chamber (PTC) decided to convene a public hearing on whether South Africa had failed to fulfil its obligations under the Rome Statute.[31]

On 6 July 2017, the PTC II issued its decision.[32] Interestingly, the phrases 'universal jurisdiction' or 'universality' are not even mentioned anywhere in the judgment. The PTC held that referral under Article 13(b) of the Rome Statute creates a *sui generis* jurisdictional regime under which Sudan should effectively be treated as a member of the Court but stressed that the legal framework provided in the Rome Statute applies only to the specific situation that has been referred.[33]

This chapter is not primarily concerned with the legal issues surrounding immunity, whether under conventional or customary international law, that should or should not be afforded to Al Bashir, whether before foreign domestic courts or the ICC. It is noted that both the SCA and the ICC Pre-trial Chamber have ruled that Al Bashir's status - a sitting head of state of a non-member state - did not prevent South Africa from affecting his arrest and surrender.

4.2 The Torture Docket Case and limits of conditional universal jurisdiction in national legislation implementing the Rome Statute

States are primarily responsible for the prosecution of international crimes under the Rome Statute. States are also able to extend their prescriptive jurisdiction to cover events and perpetrators that are beyond the reach of the ICC. This is especially important in those cases where crimes are committed in non-member states and in situations where the UNSC is unable or unwilling to use its power of referral.

Alleged international crimes committed in Zimbabwe represent one such situation. Zimbabwe is not party to the Rome Statute, nor did it represent a situation threatening international peace and security that would have raised the possibility

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31 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision convening a public hearing for purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa) ICC-02/05-01/09, 8 December 2016.

32 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09, 6 July 2017.

33 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under article 87(7) of the Rome Statute), 85.

of ICC involvement via the UNSC. In 2008, the SALC and the Zimbabwean Exiles Forum submitted a dossier of evidence (the so-called 'torture docket') to the South African Priority Crimes Litigation Unit requesting for the matter to be investigated in terms of the ICC Act. The docket purported to contain evidence on acts of torture amounting to crimes against humanity committed in Zimbabwe.

South African authorities decided not to investigate the matter, whereupon SALC approached the court for judicial review of that decision. Both the High Court and SCA found in favour of the appellants. South Africa's Constitutional Court (SACC) finally settled the matter by finding that South African authorities had a *duty* to investigate international crimes in light of South Africa's international and domestic legal obligations. The SACC also highlighted that:

> There is not just a power [to investigate the allegations of torture], but also a duty. [...] That duty arises from the Constitution read with the [ICC] Act, which we must interpret in relation to international law.[34]

However, the SACC also drew attention to international law principles limiting the duty of the state to investigate international crimes, namely, the principles of subsidiarity and practicability.[35] Subsidiarity resembles complementarity in that a state is prohibited from launching an investigation where another state with jurisdiction on the basis of territoriality or active nationality is willing and able to do so. The principle of practicability requires authorities to determine whether it would be reasonable and practical in all circumstances to investigate.

4.3 African concerns

The cases discussed in the two previous sections highlight some contemporary African criticisms of the ICC. An often-heard criticism of the ICC is that *the Court unfairly targets Africans*. It has become common to read that the ICC *meddles* in African affairs*, persecutes* Africans and *abuses* its mandate at Africa's expense. As a criminal law institution, the ICC can only *target* someone or something in the sense of pursuing his or her prosecution. The ICC can only prosecute offenders in situations falling within its jurisdiction. Therefore, the argument that the ICC targets Africa and Africans must be closely aligned to the idea that it abuses its jurisdiction or, more specifically, its power or right to administer substantive

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34 *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another (Dugard and others as amici curiae)* 2014 (12) BCLR 1428 (CC), 55.

35 2014 (12) BCLR 1428 (CC),61-64.

international criminal law over persons, offences and territory as per the provisions of the Rome Statute.

On a supranational level, the concern from Africa is that the ICC's jurisdiction poses a threat to African sovereignty, peace, and stability. These concerns are evident especially in respect of the arrest warrant for Al Bashir. Extra-legal concerns also featured prominently in South Africa's written submissions to the ICC. South Africa argued, for example, that 'to keep peace, one must first make peace'.[36] Furthermore:

> [...] international criminal courts and tribunals are created for a specific purpose and have to operate within the cultural, political and diplomatic realities that confront them when dealing with particular issues. Therefore, *the Court risks undermining its effectiveness if it fails to recognise these contextual realities of each case*.[37] [Emphasis added]

We find similar concerns at the domestic level. South Africa has gone from a vocal proponent of the ICC to a kind of conscientious objector, which, at the time of writing, had maintained its intention to withdraw from the Court. At least part of South Africa's concern seems to relate to the impact of the Rome Statute on state sovereignty. In the *Torture Docket* case, South African authorities were concerned about 'the political impact of the envisaged investigation' and particularly concerned that 'the President of South Africa's role as mediator between the opposition and ruling parties of Zimbabwe would be compromised'.[38] More generally, there was concern about the implications of the case on Zimbabwe's sovereignty.[39]

Considering these concerns, the next section provides a closer analysis of African concerns on the jurisdictional reach of the ICC.

5 Analysis: The (limited) intersection between African concerns regarding the ICC and its universal jurisdiction

Africa is not a monolithic unit. Many African states (for example, Botswana, Ghana, and Nigeria) and a great number of African civil society organisations

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36 Written submissions of the Republic of South Africa, 19. See generally Asin J, 'South Africa is not an accused': State (non) cooperation with the International Criminal Court and critique in the case of the arrest warrant for President Al Bashir' in HJ Van der Merwe and Gerhard Kemp (eds), *International criminal justice in Africa 2016,* Strathmore University Press, Nairobi, 2017.

37 Written submissions of the Republic of South Africa, 24.

38 *National Commissioner, South African Police Service and Another* v *Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA), 19.

39 2014 (2) SA 42 (SCA), 19-21.

openly continue to support the ICC.[40] Yet there is an undeniable political conflict between the ICC and Africa. One of Africa's main objections to the ICC is that it may interfere with peace processes and democratic decision-making. However, just because the ICC's involvement produces politically inconvenient effects (at least from some perspectives) does not mean that the ICC is interfering in the sense of engaging in intrusive or meddlesome behaviour. Yet there does not seem to be any clear discrimination between ICC involvements based on its treaty-based jurisdiction (for example, in Kenya where the ICC Prosecutor used *proprio motu* powers of investigation) or the *sui generis* jurisdiction triggered by UNSC referral (Darfur and Libya). In the former case, the State has ratified the Rome Statute and thereby accepted all obligations arising from its application. In other words, the State may question the exercise of the Prosecutor's discretion but cannot contend that the prosecution is not within its right to intervene. In the case of UNSC referral, the issue of interference may be more apposite. Yet, as will be discussed below, it may be argued that the UNSC and not the ICC should bear the brunt of Africa's criticisms. Yet, these distinctions are rarely acknowledged. Both in Kenya and Sudan, it was primarily the ICC that came under fire from Africa (with the AU as its mouthpiece).

It seems then that the jurisdictional reach of the ICC via the UNSC is much less controversial than the manner and timing of its invocation. The UNSC can undermine the legitimacy of the ICC through its power of referral and deferral.[41] Consider, for example, the following criticism of the UNSC referrals to the ICC by former President of the Assembly of States Parties (ASP) to the Rome Statute, Wenaweser, to the UNSC:

> The referral decisions of the Council have proven to be a mixed blessing for the Court and for international criminal justice as they were driven by political convenience as much as by the desire to establish justice. The referral decisions were significant in the history of international criminal justice but they came at a high cost for the Court. The Court was accused of politicisation, of bias against a particular region and of manipulation by powerful countries that chose to stay outside the Rome Statute, and it found itself with very limited support from its constituency. It is therefore paying the price for the decisions of the Council, and sometimes the lack thereof.[42]

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40 As confirmed by recent country statements from the UN General Assembly debate on the International Criminal Court. Statements available athttps://papersmart.unmeetings.org/ga/72nd-session/plenary-meetings/statements/ on 5 July 2018.

41 It is notable in this regard that three out of the five permanent, veto-wielding members of the UNSC (China, Russia and the United States) are not state parties to the Rome Statute.

42 UN Doc. S/PV.6849 (Resumption 1), 2.

As such, these powers must be exercised with extreme caution, especially regarding situations in parts of the world that are under-represented in the UNSC. The political double standard for the triggering of its quasi-universal jurisdiction represents a major problem for the ICC. It is powerful ammunition for the Court's detractors. The prime example is the UNSC's failure to trigger the ICC's universal jurisdiction in Syria (a resolution to this effect was blocked by Russia and China).[43] Negative votes (especially by non-state parties) in the UNSC are, of course, wholly outside the Court's influence or control. In fact, the ICC's lack of swaying power at the UNSC is clearly acknowledged by the PTC's acknowledgement of the futility of asking the UNGA or UNSC to sanction South Africa's non-cooperation with the ICC.[44] Furthermore, African arguments concerning extra-legal concerns relating to peace processes and diplomatic relations such as those raised by South Africa before the ICC are largely misdirected. The Rome Statute binds decision-makers at the ICC, and largely prohibits those decision-makers from considering such political concerns.[45] If considerations of *peace versus justice* were to be taken into account when considering the implications of ICC involvement, it would be more appropriate and sensible for it to be considered by the UNSC, which is, after all, a political body (unlike the ICC). Otherwise, policy and extra-legal issues must be addressed at the ASP. Be that as it may, the ICC is much easier to take on politically than the UNSC or ASP because it is a much softer target for arguments based on the traditional state-centred approach to international affairs. Thus, regional frustrations with the UNSC's use of its power of referral and deferral are likely to find expression in criticism of functioning and overall legitimacy of the ICC, including that it abuses its jurisdiction.

Looking at the Al Bashir situation and *Torture Docket* case, both South African courts and the ICC pointed out the limitations of the universal jurisdiction of the ICC (as described in this chapter). The *Torture Docket* case highlights the limitation of the ICC's universal jurisdiction via domestic incorporation of the Rome Statute. While states have universal prescriptive jurisdiction, the jurisdiction to investigate such crimes is subject to a number of limitations. Such jurisdiction can only be enforced under specified conditions, namely, in the actual presence of the alleged offender or with consent of the foreign state. But, in the *Torture Docket* case, it was also held that:

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43 'Russia, China block Security Council referral of Syria to International Criminal Court' *UN News*, 22 May 2014 https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court on 5 July 2018.

44 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under article 87(7) of the Rome Statute), 138.

45 One exception might be the Prosecutor's discretion in terms of Article 53(1) (a) not to proceed if there are 'substantial reasons to believe that an investigation would not serve the interests of justice'.

> Once jurisdiction is properly founded, the principle of non-intervention in the affairs of another country must be observed; investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.[46]

And that:

> Before our country assumes universal jurisdiction it must consider whether embarking on an investigation into an international crime committed elsewhere is reasonable and practicable in the circumstances of each particular case.[47]

Similarly, in considering South Africa's obligation to cooperate with the ICC, the PTC was careful to respect state sovereignty and recalled that:

> [...] functional immunities based on official capacity are not provided, in international law, for the benefit of a particular individual, but are grounded on the need to avoid interference with the functioning and sovereignty of one State by another State.[48]

The PTC also reiterated that 'the Court may not, in principle, without first obtaining a waiver of immunity, request a State Party to arrest and surrender the Head of State of a State not party to the Statute.'[49] From the foregoing, it seems that there is a clearly discernible thread of attempts to recognise and protect state sovereignty and to balance the sovereign rights of states against equally important emerging legal obligations in respect of the struggle against impunity and human rights.

As this chapter has illustrated, one can only truly speak of the ICC's universal jurisdiction in a very narrow sense and then only as an exception to the general rule. To date, the ICC has exercised this quasi-universal jurisdiction only in respect of the situations in Darfur and Libya. Other conflicts between Africa and the ICC on the one hand, (e.g. in respect of the Kenyan situation) and, on the other, within states (e.g. in South Africa regarding the domestic obligations imposed by the ICC Act) are not the result of the ICC's jurisdiction, whether universal or otherwise, being too expansive. For the most part then, broader criticism of the abuse of universal jurisdiction must be disassociated and conceptually distinguished from the jurisdiction of the ICC. It is a mistake for Africa to lump them into the same category of evil or undesirability.

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46 2014 (12) BCLR 1428 (CC), 61.

47 2014 (12) BCLR 1428 (CC), 63.

48 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under article 87(7) of the Rome Statute), 78.

49 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under article 87(7) of the Rome Statute), 82.

Understanding the true nature of the ICC's universal jurisdiction also undercuts accusations of anti-Africa bias at the ICC. That is not to say that such bias is totally non-existent. That would likely be an oversimplification. Rather, a fuller understanding of the ICC's universal jurisdiction may be used to properly distinguish between areas of misunderstanding between African states and the Court and valid criticisms of the ICC. Criticism of the ICC in the Al Bashir matter, for example, does not centre on its right to be seized of the case in general (or administer substantive international criminal law in Darfur) but a much narrower and more technical legal issue involving what is perceived to be a clash of conflicting norms under the Rome Statute (or conventional international law) and customary international law.

5 Conclusion

We are living in the age of human rights optimism, a core feature of which is the emergence of the broader project of international criminal justice. In this era, the fundamental axiom behind the concept of universal jurisdiction – that some crimes are so universally bad that their prosecution should not be inhibited by traditional rules of criminal jurisdiction – retains widespread support in the international community. It is a major part of attempts in international law to gradually supplant the state-oriented-approach with a human being-oriented-approach.[50] This is the background that should frame and guide the debate on the ICC's universal jurisdiction and Africa.

As far as the ICC's universal jurisdiction is concerned, this chapter has shown the limited application of universal jurisdiction in the legal regime the Rome Statute creates. It should be unequivocally acknowledged that the ICC only truly exercises jurisdiction regardless of the *situs* of the crime or nationality of the offender when it acts at the behest of the UNSC exercising its power under the UN Charter. Even then, its quasi-universal jurisdiction is limited in various respects. The same can be said of the ICC's indirect universal jurisdiction. States are equally constrained in law in the exercise of conditional universal jurisdiction. This reality stands in contradiction to the frequent over-exaggeration of the ICC's jurisdictional reach and the abuse thereof. One can only conclude that most of this is political rhetoric or based on political expedience. All things considered, the concept of universal jurisdiction is not a stick with which to beat the ICC. But that is not to say that other sticks may not be found.

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50 *Prosecutor v Dusko Tadić,* ICTY, Appeals Chamber, Decision, 2 October 1995, 97.

Via their membership of the ICC, the vast majority of African states are committed to the principle that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[51] Africa showed much support for a strong and independent ICC and became the dominant regional block in terms of state membership. A serious commitment to the struggle against impunity requires acknowledgment of the reality that serious conflicts that produce such crimes – although not confined to Africa - are especially prevalent on the continent. Africa must recognise the fact that, absent UNSC referral of cases to the ICC, the most egregious crimes committed in Africa are highly unlikely to be prosecuted. This is broadly the result of the following: (1) the poor track record of states in Africa and elsewhere in pursuing the domestic prosecution of such crimes; (2) the general reticence of African states to exercise universal jurisdiction over crimes committed extra-territorially; (3) the practical and political limitations to the exercise of universal jurisdiction; and (4) the absence of a viable and effective regional alternative for the prosecution of international crimes. Africa must take more ownership of its impunity problem. Until then, African victims should not be deprived of the possibility of accountability via ICC's universal jurisdiction, which, if invoked, would then have to be described as necessary intercession.

51 *Rome Statute*, preamble.

BURUNDI-CPI: LES NON-DITS ET LA VRAIE-FAUSSE STRATÉGIE D'UN RETRAIT

Aimé-Parfait Niyonkuru

Résumé

Le Burundi aura été le premier pays membre de la Cour pénale internationale (CPI) à déclencher le processus officiel de divorce avec cette organisation au travers l'adoption par le gouvernement, le 6 octobre 2016, d'un projet de loi ayant pour objet le retrait du Burundi de la CPI. Le 18 octobre 2016, le président de la République promulguait la loi portant retrait de la République du Burundi du Statut de Rome de la CPI; une loi votée six jours plus tôt, à une écrasante majorité par la chambre basse du parlement[1] *et à l'unanimité par le sénat. Le sprint final de la procédure de retrait du Burundi de la CPI se conclura le 27 octobre 2016, par la notification du retrait au Secrétaire général de l'ONU, en sa qualité de dépositaire du traité.*

Au regard du timing choisi, le retrait du Burundi est intervenu in tempore suspecto. En effet, ce retrait est intervenu après que le procureur de la CPI a ouvert, en avril 2016, un examen préliminaire sur la situation au Burundi depuis avril 2015. La procédure de retrait s'est accélérée au lendemain de l'adoption par le Conseil des droits de l'homme de l'ONU, lors de sa 41e séance, le 30 septembre 2016, de la résolution A/HRC/RES/33/24. Par cette résolution, le Conseil décidait d'établir, pour une période d'un an, une commission d'enquête chargée, entre autres, de 'mener une enquête approfondie sur les violations des droits de l'homme et atteintes à ces droits commises au Burundi depuis avril 2015, notamment pour en évaluer l'ampleur et déterminer s'il s'agit de crimes de droit international, afin de contribuer à la lutte contre l'impunité'; et d''identifier les auteurs présumés de violations des droits de l'homme et d'atteintes à ces droits commises au Burundi, en vue de faire pleinement respecter le principe de responsabilité'.

[1] 94 voix pour, deux contre et 14 abstentions.

L'article propose une réflexion sur les vrais enjeux du retrait du Burundi de la CPI et, à la lumière de ces enjeux, discute des mérites et des limites de la stratégie choisie par le Burundi, celle du retrait.

BURUNDI-CPI: THE UNSAID STAKES AND THE TRUE-FALSE STRATEGY OF A WITHDRAWAL

Abstract

Burundi is the first member state of the International Criminal Court (ICC) to withdrawal from the Court. It did so at lightning speed. On 6 October 2016, the Burundian government adopted draft legislation seeking to withdraw Burundi from the ICC. On 12 October 2016, the Burundian parliament voted overwhelmingly in favour of such withdrawal. Consequently, on 18 October 2016, the President of the Republic of Burundi signed the withdrawal act. Finally, on 27 October 2016, Burundi deposited its official notice of withdrawal with the UN Secretary-General.

Burundi's withdrawal from the ICC was triggered and concluded in tempore suspecto. The withdrawal was triggered in April 2016 when the ICC Prosecutor opened a preliminary examination into the situation in Burundi since April 2015. The process was accelerated with the United Nations Human Rights Council decision, via resolution A/HRC/33/24 of 30 September 2016, to create Commission of Inquiry on Burundi. The Commission tasks include 'a thorough investigation into human rights violations and abuses in Burundi since April 2015, including on their extent and whether they may constitute international crimes, with a view to contributing to the fight against impunity'; as well as the identification of 'alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability'.

The article proposes a reflection on the real stakes of Burundi's withdrawal from the ICC and, in light of these stakes, discusses the merits and limitations of the withdrawal strategy chosen by Burundi.

1 Introduction

La menace – réelle ou simple chantage[2] – de retrait du Statut de Rome de la Cour pénale internationale (CPI), de la part d'un certain nombre de pays, africains pour la plupart, était brandie depuis un certain temps. Sans doute en vue de vaincre les réticences des pays moins enthousiastes à l'idée de se retirer de la Cour, il fut même suggéré l'idée d'un retrait collectif[3] ou en masse, et un draft de document de cette stratégie a été élaboré.[4]

Le retrait collectif aura-t-il lieu? L'avenir le dira. Mais rien n'est moins sûre que la concrétisation de ce retrait, tant l'idée d'un tel retrait est encore loin de faire l'unanimité au sein des Etats africains membres de la CPI.[5] Quoi qu'il en soit, un début d'un 'mouvement' de retrait individuel – qui s'est vite essoufflé –, a tenu le monde en haleine en automne 2016. Le Burundi en ouvrit le ballet, en devenant le premier pays membre de la CPI[6] à déclencher le processus officiel de divorce avec

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2 A propos du vote, le 13 octobre, par le parlement burundais, d'un projet de loi qui prévoit le retrait du Burundi de la CPI, le *Courrier international* titre 'Burundi. Le retrait de la CPI ou la tactique du coup d'éclat', 14 octobre 2016. A propos du Kenya et de l'Afrique du Sud, voy, entre autres, Orenga E, Rambolamanana V, 'Retour sur les travaux de la 14e Assemblée des Etats parties de la Cour pénale internationale: Qui sont les grands gagnants?', *La Revue des droits de l'homme,* 3 mars 2016, http://revdh.revues.org/1850 consulté le 6 avril 2017.

3 La Conférence de l'Union africaine des 30 et 31 janvier 2016 chargea un comité ministériel à participation ouverte de développer une stratégie pour un retrait collectif du Statut de Rome (Assembly/AU/Dec.590(XXVI) *Décision sur la Cour pénale internationale*, –Doc. EX.CL/952(XXVIII)–para.10 (iv).

4 African Union, *Withdrawal strategy document*, Draft 2, version 12 janvier 2017.

5 Lors du 28e sommet de l'Union Africaine tenu, à Addis-Abeba, les 30 et 31 au janvier 2017, une résolution demandant un «retrait collectif» de la Cour pénale internationale (CPI), aurait fait l'objet d'une opposition vigoureuse de la part du Nigeria, du Sénégal et du Cap-Vert (Elbasri A, 'Grâce à la CPI, l'étau de la justice se resserre autour des dictateurs africains', *Jeune Afrique*, 17 février 2017. Sur ce doute, voy. aussi, 'African States will not withdraw from the Rome Statute after all', *Journalists for Justice (JFJ),* April, 2016; Barrie S, ' ICC turmoil as African nations withdraw', *Australian Institute of International Affairs*, 16 November 2016; Procopio, M, 'Reforms or withdrawal? The evolving mosaic of Africa's ICC strategies', *ISPI,* March 2017: 'These countries [Nigeria, Senegal, Liberia, Cape Verde Malawi, Tanzania, Tunisia, and Zambia], together with another dozen, among which most notably are Botswana and Senegal, formed the group of "ICC supporters", voicing their concerns against withdrawal'. Voy. aussi: Ngari A, 'The AU's (other) ICC strategy', *ISS Today*, 14 February 2017; Kersten M, 'Not all it's cracked up to be – the African Union's "ICC Withdrawal Strategy"', *Justice in Conflict blog*, 6 February 2017; Keppler E, 'AU's 'ICC Withdrawal Strategy' less than meets the eye opposition to withdrawal by states', *Human Rights Watch*, 1 February 2017; Kokko L, 'Beyond the ICC exit crisis', *European Union Institute for Security Studies (EUISS),* December 2016; Kowonu, 'International Criminal Court: Beyond the threats of withdrawal. African countries in dilemma over whether to leave or support the International Criminal Court", *African Renewal*, Mai 2017.

6 Le Burundi a signé le Statut de Rome le 13 janvier 1999, l'a ratifié le 30 août 2003 (Loi n° 1/011, *B.O.B.*, N° 9/2004, 629). Il a déposé auprès du Secrétaire Général de l'ONU, dépositaire du Statut, l'instrument de ratification le 21 septembre 2004. Le Burundi a renoncé à faire usage de la possibilité laissée par l'article 124 du Statut de la Cour qui permet à un Etat de ne pas accepter la Compétence

la CPI.[7] En l'espace de seulement quatre mois, d'octobre 2016 à janvier 2017, le statut de la CPI connaîtra trois exit,[8] dont finalement deux, à savoir et dans l'ordre, la République de Gambie[9] et la République d'Afrique du Sud,[10] reviendront sur leur décision en réintégrant la CPI. Comme une trainée de fumée qu'une brise dissipe, le spectre d'un effet domino[11] avec son 'mass exodus' s'évanouira très vite.[12]

Au regard du *timing* choisi, le retrait du Burundi est intervenu in *tempore suspecto*, tant d'un point juridique que politico-diplomatique. Il est en effet tombé quelques mois après l'ouverture, à La Haye, d'un examen préliminaire sur la situation au Burundi depuis avril 2015, et au lendemain de l'adoption, par le Conseil des droits de l'homme de l'ONU, de la résolution A/HRC/RES/33/24 décidant l'établissement, pour une période d'un an, d'une Commission d'enquête sur les violations des droits de l'homme commises au Burundi depuis avril 2015. Il est important de rappeler que le mandat de cette Commission comprenait, entre autres,

> l'[identification des] auteurs présumés de violations des droits de l'homme et d'atteintes à ces droits commises au Burundi, en vue de faire pleinement respecter le principe de responsabilité.

Une résolution dont le gouvernement burundais a dénoncé avec force la partialité et la finalité, au point de refuser la collaboration avec la Commission mise en place conformément à la résolution A/HRC/RES/33/24. Le retrait est également

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de la Cour en ce qui concerne les crimes de guerre, pour une période de sept ans à partir de l'entrée en vigueur du Statut à son égard, lorsqu'il est allégué qu'un tel crime a été commis sur son territoire ou par ses ressortissants.

7 En effet, si la République d'Afrique du Sud a été le premier Etat partie au Statut de la CPI à déposer l'instrument de notification de son retrait du Statut de la CPI, le 19 octobre 2016, le Burundi a été le premier à mettre en marche la procédure législative visant la promulgation d'une loi retirant le Burundi du Statut de la Cour par l'adoption, le 6 octobre 2016, d'un 'projet de loi portant révision de la loi n° 1/011 du 30 août 2003 portant ratification par la République du Burundi du statut de Rome de la Cour Pénale Internationale adopté à Rome le 17 juillet 1998' (Philippe Nzobonariba, *Communiqué de presse de la réunion du Conseil des ministres du jeudi 06 octobre 2016,* 7 octobre 2016*).*

8 Le 19 octobre 2016, l'Afrique du Sud notifie au Secrétaire général de l'ONU, dépositaire du Statut de Rome de la Cour pénale internationale, sa décision de retrait dudit statut (Notification dépositaire:C.N.786.2016.TREATIES-XVIII.10). Huit jours plus tard, soit le 27 octobre, le dépositaire du Statut de Rome enregistre la notification du Burundi de retrait du Statut de la CPI (C.N.805.2016. TREATIES-XVIII.10 (Notification dépositaire)). Le 10 novembre 2016, le dépositaire du Statut de Rome de la CPI enregistre la notification du retrait de la République de Gambie (Notification dépositaire : C.N.862.2016.TREATIES-XVIII.10.

9 Notification dépositaire: C.N.62.2017.TREATIES-XVIII.10.

10 Notification dépositaire: C.N.121.2017.TREATIES-XVIII.10.

11 Kaba S, *Communiqué de presse* du 22 octobre 2016: https://www.icc-cpi.int/Pages/item.aspx?-name=pr1248&ln=fr consulté le 19 juin 2017.

12 Surtout lorsque, médusés, les Etats frondeurs assisteront au retour au bercail de la République d'Afrique du Sud et de la République de Gambie en réintégrant la CPI.

tombé au plus fort d'une crise politique et humanitaire, consécutive à la décision de Pierre Nkurunziza de briguer un troisième mandat à la tête du Burundi. Un mandat dont une partie de la classe politique et de la société civile contestait la légalité. Enfin, le divorce du Burundi avec la CPI est arrivé dans un contexte d'isolement diplomatique du Burundi et d'un dialogue interburundais au point mort.[13] Un dialogue soutenu par la communauté internationale et destiné à mettre fin à la crise provoquée par ledit mandat.

Au regard de ce contexte, cet article suggère que derrière le discours officiel en rapport avec ce retrait, se cachent plusieurs enjeux. Il met également en doute l'efficacité de la stratégie du retrait, compte précisément tenu desdits enjeux.

D'un point de méthodologique, cet article commence par restituer le retrait dans son contexte singulier (2). Il met ensuite en lumière les enjeux majeurs au cœur de la décision du Burundi de se retirer de la CPI, au-delà du discours officiel (3). Enfin, à la lumière de ces enjeux, il apprécie l'impact de stratégie de retrait (4).

2 Retour sur le contexte du retrait du Burundi de la CPI

Une analyse des enjeux du retrait du Burundi de la CPI ne saurait se permettre de faire l'impasse sur contexte dans lequel il est intervenu.[14] Un contexte dont de nombreux éléments donnent à penser qu'il a, non seulement déterminé la décision de retrait, mais également en a imposé le rythme [du processus].

S'agissant précisément du contexte au sein duquel le Burundi s'est retiré au Statut de la CPI, force est de constater qu'il est caractérisé par une grave crise politique et humanitaire (1), un isolement diplomatique du pays, sur fond de suspension d'une grande partie de l'aide au développement (2) ainsi que des allégations de commission de violations de droits de l'homme, y compris des crimes relevant de la compétence de la CPI (3). Sur au moins un aspect, ce contexte en rappelle d'ailleurs d'autres dans des pays qui, à un moment donné, ont emprunté la voie du retrait, menacé de se retirer de la Cour ou s'en sont éloignés davantage, d'une manière ou d'une autre (4).

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13 FIDH, Ligue Iteka, *Le Burundi au bord du gouffre: retour sur deux années de terreur,* Rapport, Juin 2017 / N° 693f, spéc. 31.

14 Dans son *Analysis and Policy Brief n°20*, d'octobre 2016, intitulé: 'The ICC Burexit: Free at last? Burundi on its way out of the Rome Statute', Stef Vandeginste écrit: 'The withdrawal also needs to be seen against the background of the crisis that erupted after President Nkurunziza's nomination for a third term on 25 April 2015.' https://www.uantwerpen.be/images/uantwerpen/container2673/files/Publications/APB/20-Vandeginste.pdf consulté le 15 mai 2017.

2.1 Un contexte de crise politique majeure

Le retrait du Burundi du Statut de la CPI est tombé au milieu d'une crise politique et humanitaire déclenchée par la désignation, le 25 avril 2015, par le parti CNDD-FDD,[15] de Pierre Nkurunziza, comme candidat de ce parti aux élections présidentielles de 2015. Cette désignation a été suivie d'une contestation populaire exprimée **à travers** des manifestations de rue organisées dans le cadre d'un mouvement de contestation 'halt au troisième mandat'[16]; des manifestations violemment réprimées par les forces de défense et de sécurité.[17] Au moment du retrait, le pays traversait une impasse politique majeure accompagnée d'une grave crise humanitaire.[18] En vue de mettre fin à cette crise, la 'communauté internationale' a proposé et soutient l'organisation d'un dialogue inclusif entre le gouvernement burundais et l'opposition pacifique.[19]

Sans en avoir été probablement un facteur déterminant, ce contexte pourrait, néanmoins, avoir influencé la décision du Burundi de se retirer de la CPI, en raison de spéculations sur de possibles bénéfices politiques attendus d'un soutien de la part d'Etats hostiles à la CPI, sympathisant un acte de défiance[20] dirigée contre une organisation qui ne leur donne plus satisfaction.

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15 Conseil National pour la Défense de la Démocratie–Forces de Défense de la Démocratie.

16 Ce mouvement a été initié par 304 organisations de la société civile burundaise.

17 FIDH, Ligue Iteka, *Burundi: Répression aux dynamiques génocidaires,* novembre 2016 / N°685f; Nations Unies, *Rapport du Secrétaire général sur la Mission électorale des Nations Unies au Burundi*, 7 juillet 2015, spéc. para. 46; Human Rights Watch, *Burundi: Répression contre des manifestants. Le gouvernement réagit durement face à une vague de contestation*, (Nairobi, le 27 avril 2015).

18 En 2016, le nombre de Burundais dans le besoin urgent d'une assistance humanitaire atteignait le chiffre de 3 millions, soit, à peu mois du tiers de la population (Nations Unies, Commission économique pour l'Afrique, *Profil de pays 2016: Burundi,* Addis Abéba, mars 2017). En octobre 2016, au moment où le Burundi se retirait du Statut de la CPI, le nombre de réfugiés burundais enregistrés par le Haut-Commissariat des Nations Unies pour les Réfugiés était de 312.418 (Données du HCR du 6 mars 2007: http://data2.unhcr.org/en/situations/burundi).

19 Ce dialogue est conduit sous l'égide du président ougandais Yoweri Kaguta Museveni, médiateur désigné par les Etats de l'Afrique de l'Est (East African Community, *Communiqué*: 3rd Emergency Summit of Heads of States of the East African Community on the Situation in Burundi, 6 July 2015; *Joint Communiqué: 17th Ordinary Summit of the East African Heads of States*, March2, 2016). Approuvé par l'Union africaine (Conseil de Paix et de Sécurité, 523e Réunion, *Communiqué*, PSC/PR/COMM. (DXXIII), 9 juillet 2015.), le médiateur est épaulé par William Mkapa, facilitateur désigné par ladite communauté (*Joint Communiqué: 17th Ordinary Summit of the East African Heads of States*, 2 March 2016).

20 Manirakiza P, 'Le retrait du Burundi de la Cour pénale internationale et ses implications', *Arib.info* (16 octobre 2016), <http://www.arib.info/Le-retrait-du-Burundi-de-la-Cour-penale-internationale.pdf> consulté le 05 octobre 2017.

2.2 Un contexte d'isolement diplomatique sur fond de suspension d'une grande partie de l'aide au développement

Le retrait du Burundi de la CPI est tombé dans un contexte d''isolement' diplomatique de ce pays, sur fond de suspension d'une grande partie de l'aide, tant financière que technique, de la part de nombreux bailleurs traditionnels. Depuis l'investiture de Pierre Nkurunziza, par sa formation politique, le CNDD-FDD, à la candidature pour un troisième mandat à la tête du Burundi en avril 2015 et la crise politico-humanitaire qui a suivi, le Burundi a fait face à un isolement croissant par la 'communauté internationale'. Plusieurs organisations internationales ont revu leur coopération avec le Burundi. C'est le cas notamment de l'Union européenne (UE) et de l'Organisation internationale de la Francophonie (OIF). Premier donateur du Burundi (430 millions d'euros pour la période 2015-2020), l'UE a suspendu, en mars 2016, son aide directe au gouvernement du Burundi.[21] Pour sa part, lors de la 97e session du Conseil Permanent de la Francophonie (CPF), l'OIF a décidé

> la suspension de la coopération multilatérale francophone déployée au Burundi, à l'exception des programmes qui bénéficient directement aux populations civiles et de ceux qui peuvent concourir au rétablissement de la démocratie.[22]

Au niveau bilatéral, la plupart des pays occidentaux bailleurs de fonds traditionnels du Burundi ont reconsidéré un certain nombre d'activités et de programmes de coopération au développement. C'est le cas de l'Allemagne,[23] de la

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21 Décision (UE) 2016/394 du Conseil du 14 mars 2016 relative à la conclusion de la procédure de consultation avec la République du Burundi au titre de l'article 96 de l'accord de partenariat entre les membres du groupe des États d'Afrique, des Caraïbes et du Pacifique, d'une part, et la Communauté européenne et ses États membres, d'autre part, *OJ L* 73, 18.3.2016,90–96.

22 OIF, '97e session du CPF: la Francophonie réintègre la République centrafricaine et suspend sa coopération multilatérale au Burundi', *Communiqué de presse*, CP/SG/JT/16, Paris, le 7 avril 2016.

23 Ainsi, en juin 2015, l'Allemagne a décidé la suspension, jusqu'à nouvel ordre, des activités de ses programmes de coopération bilatérale au développement qui impliquent une coopération étroite avec le gouvernement burundais. Cette suspension concerne des programmes et projets des agences allemandes gouvernementale GIZ (l'agence de coopération internationale allemande pour le développement), la KfW (Établissement de crédit pour la reconstruction) et BGR (L'institut fédéral de la géoscience et des ressources naturelles) (Ambassade de la République Fédérale d'Allemagne à Bujumbura, *Note Verbale*, Réf.: Wz. 440.00, N° 27/2015, Bujumbura, 6 juin 2015).

Belgique,[24] des Etats Unis d'Amérique,[25] de la France[26] et des Pays Bas[27] qui étaient les principaux donateurs du Burundi en matière d'aide au développement.

Il convient toutefois de relativiser cet isolement. En effet, si les pays occidentaux ont suspendu une partie de l'aide au développement qu'ils accordaient au Burundi, pendant qu'ils multipliaient des critiques en matière de gouvernance démocratique et des droits de l'homme envers le Burundi, d'autres pays ont, en même temps, intensifié leurs liens de coopération avec le Burundi. D'un point de vue cartographique, le nouvel axe privilégié des relations a basculé vers l'Est, avec

[24] La suspension de l'aide de la Belgique n'est pas venue comme une surprise. Déjà avant les élections présidentielles de juillet 2015, le ministre de la Coopération, Alexander De Croo avait prévenu: 'Les choix dans les semaines à venir pourraient avoir une influence drastique sur la coopération', ajoutant qu''un troisième mandat présidentiel entacherait au plus haut niveau la légitimité de l'exécutif burundais et placerait le gouvernement belge dans l'impossibilité (...) de conclure un programme de coopération bilatéral classique' (Agence France Presse (AFP), Bruxelles, 21 mai 2015). Après les élections de 2015 et la candidature contestée de Pierre Nkurunziza à un troisième mandat présidentiel, le montant des programmes exécutés par l'Agence Belge de Coopération CTB est passé de 46 à 6 millions d'euros (Centre national de Coopération au Développement (CNCD-11.11.11)*, Rapport 2016 sur l'aide belge au développement*, 20.

[25] Les Etats-Unis ont retiré au Burundi son statut de partenaire privilégié: 'The designation of Burundi as a beneficiary sub-Saharan African country for purposes of section 506A of the 1974 Act is terminated, effective on January 1, 2016' (Presidential Proclamation – African Growth and Opportunity Act. To take certain actions under the African Growth Opportunity and for other purposes. By the President of the United States of America; Barack Obama, December, 21, 2015. https://obamawhitehouse.archives.gov/the-press-office/2015/12/21/presidential-proclamation-african-growth-and-opportunity-act) et ont suspendu leur coopération militaire ('US suspends Burundi peacekeeping training over protests', *Reuters*, 22 mai 2015).'

[26] L'Aide publique au développement (APD) qui atteignait 25,48 millions d'euros en 2014 et qui faisant de la France le cinquième donateur bilatéral du Burundi a été revue. Les concours financiers de la France en faveur du Burundi dans le cadre des projets exécutés par l'Agence française de développement (AFD) ont été redimensionnés dans la ligne des mesures appropriées prises par l'Union européenne dans le cadre de l'article 96 de la convention ACP-UE.

[27] En novembre 2016, le Burundi a notifié aux Pays Bas la suspension sa participation aux activités du programme de Développement du Secteur de Sécurité (DSS) –*Communiqué de presse de l'Ambassade du Royaume des Pays-Bas au Burundi*, novembre 2016 (http://programmedss.bi/images/fichiers/documents/16-fr-DSS%20Press%20Release.pdf); un programme sur huit ans, mis en place en vertu d'un protocole d'accord signé en avril 2009 et ayant pour mission de progressivement améliorer la capacité institutionnelle du secteur de sécurité et d'assurer un haut niveau de justice pour une protection efficace des citoyens burundais. Cependant, les Pays-Bas avaient suspendu leur appui à ce programme depuis 2015 (International Crisis Group, *Burundi: l'armée dans la crise,* Rapport Afrique de Crisis Group N°247, 5 avril 2017, note 58), tout comme celui de l'aide direct au gouvernement du Burundi.

le renforcement des relations de coopération avec la Chine,[28] l'Inde, l'Iran,[29] la Russie, et la Turquie,[30] principalement.

2.3 Un contexte d'allégations de violations des droits de l'homme, y compris de commission de crimes relevant de la compétence de la CPI

La crise liée au troisième mandat contesté de Pierre Nkurunziza à la tête du Burundi a été caractérisée par des violations de droits de l'homme, à grande échelle. Le *Rapport de l'enquête indépendante des Nations Unies sur le Burundi* (EINUB), établie conformément à la résolution S-24/1 du Conseil des droits de l'homme déclare que

> Selon certaines estimations, plus d'un millier de personnes ont été tuées dans le cadre de la crise. Des milliers auraient été torturé, un nombre inconnu de femmes victimes de diverses formes de crimes sexuels, des centaines de personnes auraient disparu, et des milliers auraient été illégalement détenus.[31]

Dans ses conclusions, l'EINUB déclare avoir

> trouvé d'abondantes preuves de graves violations ainsi que d'abus des droits de l'homme par le Gouvernement et des personnes dont l'action peut être attribuée au Gouvernement. Des abus des droits de l'homme par des tiers ont également eu lieu.[32]

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28 En mars 2017, une délégation de haut niveau du Parti Communiste Chinois PCC en sigle, est arrivée à Bujumbura pour une visite de quatre jours. Du 10 au 12 mai 2017, et une première pour une autorité de son rang, le vice-président Chinois, Li Yuanchao, a effectué une visite officielle au Burundi au cours de laquelle il a déclaré que 'les relations sino-burundaises se trouvent dans la meilleure période de leur histoire et l'amitié entre les deux peuples est un reflet de l'amitié sino-africaine' *(Publication de presse Burundaise* (PPB), https://www.ppbdi.com/index.php/extras/politique-cooperation-actualite-internationales/7006-burundi-chine-bons-amis-bons-partenaires-et-bons-freres-la-chine-et-le-burundi-avancent-ensemble: consulté le 30 mai 2017. Dans une lettre datée du 28 juin 2017 et signée XI Jinping, adressé à son homologue du Burundi *«à l'occasion du 55eme anniversaire de l'indépendance du Burundi»,* le président de la République populaire de Chine rappelle qu' 'au cours de l'année passée [2016], la Chine et le Burundi ont vu leur confiance politique mutuelle se renforcer chaque jour davantage, et leurs échanges et coopérations aboutir à des résultats positifs dans les domaines des infrastructures, de l'agriculture, de la culture et autres'.

29 En août 2015, le minister iranien des affaires étrangères, Mohammad Javad Zarif déclarait à la presse: 'The Islamic Republic of Iran supports political stability in Burundi and is ready to expand cooperation with this country in science, education, energy and agriculture' (*IRNA*, 15 August 2016).

30 En 2017, le parlement burundais a adopté, à l'unanimité, l'Accord de Coopération Commerciale et Economique entre le Burundi et la Turquie, signé à Ankara en Turquie, le 27 août 2015; Voy aussi; Bayo Jr I, 'En crise avec l'UE, le Burundi se tourne vers la Turquie', *La tribune Afrique*, 28 juillet 2017.

31 Haut-Commissariat aux droits de l'homme, *Rapport de l'enquête indépendante des Nations Unies sur le Burundi (EINUB) établie conformément à la résolution S-24/1 du Conseil des droits de l'homme* (traduction non officielle), document des Nations Unies A/HRC/33/37, 20 septembre 2016 [Rapport EINUB], para. 35.

32 Haut-Commissariat aux droits de l'homme, *Rapport de l'enquête indépendante des Nations Unies sur le Burundi,* para. 125.

Les rapporteurs de l'EINUB ont recommand**é** la création d'une commission d'enquête dont le mandat serait de

> déterminer les responsabilités individuelles et partager ses résultats avec le Conseil de sécurité pour des sanctions ciblées et avec des procédures judiciaires, une fois mises en place[33].[34]

L'établissement de cette commission a été décidé par le Conseil des droits de l'homme le 30 septembre 2016,[35] trois jours après la notification du retrait du Burundi au Secrétaire général de l'ONU, dépositaire du traité de Rome de la CPI. Cette commission a confirmé les principales violations documentées par l'EINUB.[36]

D'après son rapport de 2017 'La Commission a des motifs raisonnables de croire que des crimes contre l'humanité ont été commis depuis avril 2015 au Burundi'. Des membres du service national de renseignement, de la police, de l'armée et de la ligue des jeunes du parti au pouvoir, communément appelés les *Imbonerakure* sont indexés comme étant les auteurs de la plupart des violations constitutives de ces crimes. Enfin, la Commission recommande à la CPI d'ouvrir dans les plus brefs délais une enquête sur les crimes commis au Burundi au vu des conclusions contenues dans le présent rapport et d'autres informations à sa disposition.[37]

2.4 Un contexte qui, à certains égards, en rappelle bien d'autres

La CPI a vécu un sale temps au quatrième trimestre 2016 et au premier trimestre 2017. Après le retrait de l'Afrique du Sud, du Burundi et de la Gambie du Statut de la Cour, la Russie, simplement signataire du traité de Rome, a révoqué sa signature.[38] Si le Kenya dont le président, Uhuru Kenyatta a annoncé, en décembre

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33 Haut-Commissariat aux droits de l'homme, *Rapport de l'enquête indépendante des Nations Unies sur le Burundi*, para. 156.

34 Le 10 octobre 2016, trois semaines après la sortie de ce rapport, leurs rédacteurs, l'occurrence le colombien Pablo de Greiff, le sud-africain Christof Heyns et l'algérienne Maya Sahli-Fadel, ont été déclarés *persona non grata* sur le territoire burundais (cf. Lettre N° 204.01/988/REF/2016 du 10 octobre 2016 adressée par ministre burundais des Relations Extérieures et de la Coopération Internationale à tous les ambassadeurs du Burundi, à tous les Chargés d'Affaires et tous les Consuls Généraux).

35 *A/HRC/RES/33/24,* Genève, 30 septembre 2016.

36 Ouguergouz, F. (Président de la Commission d'enquête sur le Burundi), présentation orale à la trente-cinquième session du Conseil des droits de l'homme, Genève, le 14 juin 2017: Voy. http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21760&LangID=F#sthash.JS79mgfx.dpuf

37 Conseil des droits de l'homme, Trente-sixième session, A/HRC/36/CPR.1, *Rapport final détaillé de la Commission d'enquête sur le Burundi,* 18 septembre 2017.

38 Le 16 novembre 2016, le Président russe a signé un décret 'Sur la volonté de la Fédération de Russie de ne pas prendre part au Statut de Rome de la Cour pénale internationale' (Ministry of Foreign Affairs of the Russian Federation, 'Statement by the Russian Foreign Ministry', 16 November 2016: http://www.

2016, qu'il 'réfléchira sérieusement',[39] n'a pas encore franchi le cap du retrait, il y a tout de même pensé dans le passé, une motion dans ce sens ayant été adoptée par le parlement en septembre 2013.

Dans tous ces pays, parties ou signataires du Statut de la Cour, qui, par un acte concret, ont emprunté la voie du retrait de la CPI, l'on note au moins une constante. Ces pays étaient dans la ligne de mire de la Cour. C'est en effet à quelques jours de l'ouverture du procès de William Ruto, vice-président de la République kényane, que le parlement kényan avait adopté, le 5 septembre 2013, une motion en faveur du retrait de ce pays de la CPI.[40] Curieusement, après le retrait des charges, le 5 décembre 2014, contre Uhuru Muigai Kenyatta[41] et la décision du 2 avril 2016 de mettre fin à l'affaire concernant William Samoei Ruto et Joshua Arap Sang,[42] les ardeurs du Kenya de se retirer de la Cour semblent s'être apaisées. En sens inverse, l'ouverture, *proprio motu,* par le procureur de la CPI, d'une enquête sur les crimes de guerre et les crimes contre l'humanité présumés avoir été commis en Ossétie du Sud et ses alentours, entre le 1er juillet et le 10 octobre 2008[43] serait à la base de la révocation par la Fédération de Russie de sa signature du traité de Rome.[44] En effet, cette révocation est intervenue deux jours après la publication du rapport du Procureur sur les activités menées en 2016 en matière d'examen préliminaire, un rapport qui met en cause la Fédération de Russie dans des crimes allégués dans Est de l'Ukraine et en Crimée. Dans les cas kényan et russe, comme celui du Burundi, les démarches d'éloignement de la CPI ont été initiées à la suite de démarches du Bureau du procureur en rapport avec des situations dans ces pays.

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mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 Le 30 novembre 2016, le Secrétaire général de l'ONU a été informé 'de l'intention de la Fédération de Russie de ne pas devenir partie au Statut de Rome de la Cour pénale internationale, adopté à Rome le 17 juillet 1998, et signé au nom de la Fédération de Russie le 13 septembre 2000' (Notification dépositaire: C.N.886.2016.TREATIES-XVIII.10.

39 'Kenya President: International Criminal Court not impartial', *VOA,* 12 December 2016; 'Kenya signals possible ICC withdrawal', 13 December 2016; 'Kenya giving serious thoughts to ICC withdrawal, president Kenyatta says', *Official Website of the Presidency*, 12 December 2016, http://www.president.go.ke/2016/12/12/kenya-giving-serious-thought-to-icc-withdrawal-president-kenyatta-says/

40 'Kenya MPs vote to withdraw from ICC', *Hansard National Assembly of Kenya Official Report,* 5 September 2013; *BBC News* (Africa), 5 September 2013.

41 ICC, *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V(B), 5 December 2014.

42 ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* Trial Chamber V(a), 5 April 2016.

43 CPI, Situation en Géorgie, Chambre préliminaire I, *Decision on Prosecutor's request for authorization of an investigation [Décision relative à la demande du Procureur d'autorisation d'ouverture d'une enquête],* 27 janvier 2016, ICC-01/15-12.

44 Nyawo J, *Selective enforcement and international criminal law: The International Criminal Court and Africa,* Series: Supranational Criminal Law: Capita Selecta, Intersentia, 2017, 92.

Le retrait de l'Afrique du Sud, le 19 octobre 2016 – avant qu'elle ne la réintègre à nouveau, le 17 mars 2017 – est intervenu alors qu'une visite du président du Soudan, Omar El Béchir, sous mandat d'arrêt de la CPI, aurait été prévu en décembre 2016.[45] Interprétant ce retrait, sous l'angle de ses bénéfices pour l'Afrique du Sud, J. Nyawo écrit:

> Following its withdrawal, (…), South Africa would be able to host as many AU Summits as possible and also to invite President Bashir without any concern about criticism from the Court.[46]

Enfin, la Gambie s'est retirée de la CPI à la veille des élections présidentielles du 1er décembre 2016. De là à penser à une stratégie de Yahya Jammeh, instruit de l'exemple kenyan, de s'affranchir – au cas où le processus électoral déraperait et serait entaché de crimes de la compétence de la CPI– de l'obligation de coopération avec la Cour, il n'y a qu'un pas que certains n'ont pas hésité de franchir.[47] La suite des événements en Gambie, après les élections de décembre 2016, conforte d'ailleurs cette hypothèse.[48]

3 Burexit: Enjeux au-delà du discours officiel

Bien évidemment, un discours politique a accompagné le retrait du Burundi du Statut de la CPI. Un discours qui, pour l'essentiel, se nourrit de la sempiternelle rhétorique anti-CPI (1) et souvent empreint de populisme.[49] Cependant, comme bien de discours politiques, ce discours ne dit pas tout quant aux enjeux profonds du divorce avec la CPI. Ou en tout cas, il n'est pas assez clair au sujet de l'ensemble des enjeux.

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45 Chris Maina P, 'Fighting impunity: African states and the International Criminal Court", in Ankumah EA (ed), *The International Criminal Court and Africa - one decade on*, Intersentia, Cambridge-Antwerp-Portland, 2016, 20.

46 Nyawo, *Selective enforcement and international criminal law,* 242.

47 Pour Pierre Savary et *alii*, en se retirant de la CPI, la Gambie cherchait à 'empêcher une enquête alors que se profil[aient] des éléctions et que le Chef de l'Etat, Yahya Jamme[h], en poste depuis 1994, brigu[ait] un cinquième mandat sur fond d'impopularité croissante' (Toute l'actu 2016 Sujets et chiffres de l'actualité 2016 - Concours & examens, Foucher, 2017, 21). Voy. aussi, Ssenyonjo M, 'State withdrawal notification from the Rome Statute of the International Criminal Court: South Africa, Burundi and Gambia', Jalloh CC, Bantekas I (eds)*, The International Criminal Court and Africa,* Oxford University Press, 2017, 214.

48 Alors qu'il est déclaré vaincu aux élections présidentielles du 1er décembre 2016 au profit de son challenger de l'opposition Adama Barrow et après avoir, dans un premier temps, reconnu sa défaite et félicité Barrow le vainqueur, Yahya Jammeh se ravise et tente de s'accrocher au pouvoir. Il aura fallu une démonstration de force de la CEDEAO menaçant d'installer de force le vainqueur des élections pour dissuader Yahya Jammeh de lâcher le pouvoir perdu par les urnes.

49 D'après le *Petit Larousse*, édition de 1988, le populisme désigne une 'attitude politique consistant à se réclamer du peuple, de ses aspirations profondes, de sa défense contre les divers torts qui lui sont faits'.

Au regard du contexte à l'intérieur duquel le Burundi s'est retiré de la CPI, et partant de l'hypothèse que le discours officiel ne rend pas suffisamment ou clairement compte des enjeux profonds à la base du divorce du Burundi avec la CPI, nous proposons, sous ce point, une analyse du dessous des cartes en vue de tenter de comprendre les enjeux majeurs d'un divorce qui pris de court plus d'un. Au-delà du contenu du discours officiel, nous suggérons que le retrait du Burundi de la CPI a été déterminé par des enjeux à la fois juridiques (2), politiques, diplomatiques et **économiques** (3). Pour des considérations de commodité méthodologique, nous examinerons dans un même point les trois derniers enjeux, tout en faisant remarquer, au passage, que tous ces enjeux sont, dans une certaine mesure, liés.

3.1 Un discours officiel qui se fait l'écho de la traditionnelle rhétorique anti-CPI

Les griefs autour desquels est construite la rhétorique anti-CPI, chère aux leaders des Etats, africains pour la plupart, détracteurs de cette dernière institution sont bien connus: politique de deux poids, deux mesures,[50] racisme,[51] instrument des

[50] African Union, *Withdrawal strategy document*, Draft 2, version 12 janvier 2017; AU PSC Communiqué on Al-Bashir, 21 July 2008, 142nd Meeting. Expliquant les raisons du retrait de son pays du Statut de la CPI, le ministre gambien de l'information a déclaré que la Cour était utilisée pour persécuter les Africains en ignorant les crimes commis par les occidentaux: 'persecution of Africans and especially their leaders (…). There are many western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single western war criminal has been indicted' 'Gambia is latest African nation to quit international criminal court', *The Guardian,* 26 October 2016; 'Gambia withdraws from International Criminal Court', *Al Jazeera*, 26 October 2016). Pour un survol du débat sur ce point, voy. not, Kimani M, 'Pursuit of justice or Western plot? International indictments stir angry debate in Africa', 23 *African Renewal*, 3 (2009) ; Lagot D, 'Cour pénale internationale et impunité des États puissants : la CPI, une justice à sens unique ?', in Andersson N, Lagot D (dir.), *La justice internationale aujourd'hui. Vraie justice ou justice à sens unique ?,* L'Harmattan, 137-146 ; 'African Union calls on Member States to disregard ICC arrest warrant against Paris, Libya's Gadhafi', *Associated Press*, 2 July 2011.

[51] Selon Hailemariam Desalegn, premier ministre Éthiopien, la Cour 'mène une sorte de chasse raciale en ne poursuivant que des Africains' (Cité par Vilmer JB 'Union africaine versus Cour pénale internationale: répondre aux objections et sortir de la crise', XLV *Etudes internationales*, volume 1 (2014), 13. Dans la même veine, l'Union africaine dénonce la 'chasse raciale' opérée par la Cour pénale internationale (*Agence France Presse* (AFP) et *Le Monde (Afrique),* 27 mai 2013; Seymour LJM, 'The ICC and Africa: Rhetoric, hypocrisy, and legitimacy', in Knottnerus AS, de Volder E (eds), *Africans and the ICC: Perceptions of justice*, Cambridge University Press, 2016, 117; 'African Union accuses ICC of "hunting" Africans', *BBC News*, 27 May 2013.

puissances impérialistes,[52] outil du néo-colonialisme,[53] outil d'ingérence des Etats puissants dans les affaires qui relèvent de la souveraineté des Etats faibles[54] *etc*.

Les critiques du Burundi envers la Cour ne se départissent guère fondamentalement de cette rhétorique. Pour les officiels burundais, la CPI est un outil de répression contre l'Afrique et le Burundi,[55] un moyen politique utilisé par la communauté internationale pour 'opprimer les pays africains',[56] un instrument des grandes puissances destiné à charger injustement les dirigeants burundais des crimes internationaux pour qu'ils soient poursuivis devant la CPI,[57] un 'instrument de pressions politiques sur les gouvernements des pays pauvres ou un moyen de les déstabiliser',[58] l'ingérence de la Cour [dans les affaires internes du Burundi],[59] *etc*.

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[52] En 2013, Kenyatta a déclaré: 'The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers' (*BBC*, 12 October 2013; 'ICC accused of selective justice', *The Link*, Nairobi, December 2013, Issue No.3). Dans le même sens, voy. aussi BBC Monitoring, 'Sudanese leader calls international court 'tool of imperialist forces', *Suna News Agency,* 20 August 20 2008; 'Rwanda's Kagame says ICC targeting poor, African countries', *AFP*, 31 July 2008; 'Rwandan President dismisses ICC as court meant to 'undermine' Africa, Rwanda Radio via *BBC Monitoring,* 1 August 2008; Toti F, Brou P, 'Paul Kagame s'en prend violemment à la CPI', *Cameroon Voice* (1 octobre 2013); Kezio-Musoke, 'Rwanda: Kagame tells why he is against ICC charging Bashir, *Daily Nation,* 3 August 2008; Wade A, 'La CPI donne l'impression d'être faite pour les Africains', *Jeune Afrique*, 5 mars 2009. Au sujet de l'accusation d'impérialisme, en rapport avec la CPI, voy., parmi d'autres, Mubiala M, 'Chronique de droit pénal de l'Union africaine. Vers une justice pénale régionale en Afrique', *Revue internationale de droit pénal*, 2012/3 (Vol. 83), 547-557; Mégret F, 'Cour pénale internationale et néocolonialisme: au-delà des évidences', 45 *Etudes internationales*, 1 (2014), 27-50.

[53] Voy. not:, 'Court issues Bashir arrest warrant', 5 March 2009, *Al Jazeera*; Kezio-Musoke D, 'Kagame tells why he is against ICC charging Bashir', *Daily Nation*, 3 August 2008. Sur cette allégation, voy. aussi Schuerch R, *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders,* Springer, 2017, 2-6.

[54] Museveni YK, 'Ils utilisent maintenant la CPI pour mettre en place les dirigeants de leur choix en Afrique et éliminer ceux qu'ils n'aiment pas.' (Cité par Vilmer JB, 'Union africaine versus Cour pénale internationale : répondre aux objections et sortir de la crise', 13.

[55] Sur son compte tweeter @willynyamitwe le Conseiller principal en communication du président Pierre Nkurunziza, écrivait le 30 avril 2006, qu'il venait de visiter la CPI pour en comprendre les tenants et les aboutissants. Il notait que cette Cour est un outil de répression contre l'Afrique et le Burundi.

[56] http://information.tv5monde.com/en-continu/le-burundi-en-crise-veut-quitter-la-cpi-132708 (consulté le 12 octobre 2016).

[57] Invitée pour expliquer les raisons du retrait du Burundi de la CPI à l'Assemblée Nationale, juste avant la séance de vote du projet de loi relatif à ce retrait, la ministre de la Justice s'exprima de la manière suivante: '«Nous avons compris que la Cour est l'influence des grandes puissances qui cherchent un prétexte pour que, le moment venu, cette Cour pour qu'elle se comporte, vis-à-vis du Burundi, de manière dont elle a l'habitude de le faire ailleurs'. L'original de ses propos est en kirundi.

[58] Communiqué de presse de la réunion du Conseil des Ministres du jeudi 06 octobre 2016. En visite officielle en Russie où il participait à la huitième rencontre internationale des hauts responsables des questions de sécurité, tenue à Zavidovo du 23 au 25 mai 2017, le ministre burundais de la Sécurité publique, le Commissaire de Police Chef Alain Guillaume Bunyoni, exposa sur un sujet évocateur, en donnant le Burundi pour illustration: '*The problem of the 'color revolutions' and other tools of destabilizing sovereign states: The Case of Burundi'.*

[59] Gaston Sindimwo, 1er Vice-président du Burundi, Radio Bujumbura internationale https://soundcloud.

3.2 Un retrait motivé par des raisons juridiques

L'enjeu juridique, sans doute en raison de son évidence ou de sa flagrance, a été le plus évoqué. La presse, aussi bien locale qu'étrangère, des ONGs, locales et étrangères,[60] l'opposition politique – celle qualifiée de radicale – ainsi que certains pays, ont vite interprété le retrait du Burundi de la CPI comme étant une manœuvre ou une stratégie destinée à assurer l'impunité aux auteurs de violations graves des droits de l'homme commises dans le cadre des représailles exercées contre ceux qui avaient participé aux manifestations contre le troisième mandat de Pierre Nkurunziza en avril et mai 2016. Des représailles qui se sont, par la suite, étendues aux opposants politiques et à leurs sympathisants. Dans ce contexte, la commission des violations graves des droits de l'homme a été constatée par des experts des nations unies.[61] Ces experts rapportent que

> le Gouvernement a utilisé l'appareil de sécurité - la police nationale du Burundi (PNB), le Service national de renseignement (SNR), et la Force de défense nationale (FDN), ainsi que la jeunesse du parti au pouvoir, les Imbonerakure.

Au lendemain du vote, par le parlement burundais, de la loi de retrait de CPI, le quotidien français, *La Croix*, titrait: 'Le Burundi veut s'affranchir de la justice internationale'. Le 21 octobre 2016, *Libération* publiait un article dans lequel le quotidien posait la question de savoir 'pourquoi le Burundi et l'Afrique du Sud quittent la CPI' avant de répondre, en ce qui concerne le Burundi, que c'est 'pour échapper à des poursuites'.[62] Dans la même veine, tentant une explication à la fronde africaine à l'égard de la CPI, *Le Monde Afrique* affirmait que 'certains présidents redoutent en effet une Cour qui pourrait les inculper' et que 'le président burundais, Pierre Nkurunziza, n'est pas le dernier d'entre eux'.[63] Cette explication

com/2016-octobre-radio-bujumbura-inter/avec-se-sindimwo-gaston-vice-president-du-burundi-1 .

60 Bekele D, 'Burundi has failed to hold people responsible for brutal crimes to account and has sunk to a new low by attempting to deny victims justice before the ICC', *Human Rights Watch*, 'Burundi: ICC withdrawal major loss to victims', Nairobi, 27 October 2016.

61 Haut-Commissariat aux droits de l'homme, Rapport de l'enquête indépendante des Nations Unies sur le Burundi (EINUB) établie conformément à la résolution S-24/1 du Conseil des droits de l'homme (traduction non officielle), cité plus haut.

62 Malagardis M, 'Pourquoi le Burundi et l'Afrique du Sud quittent la CPI', *Libération*, 21 octobre 2016.

63 http://www.lemonde.fr/afrique/article/2016/02/10/les-bonnes-et-mauvaises-raisons-de-la-fronde-africaine-a-l-egard-de-la-cour-penale-internationale_4862863_3212.html Consulté le 6 avril 2017.

est reprise, en substance, par de nombreux scientifiques,[64] responsables d'ONGs,[65] et analystes de tout acabit. Même l'Union africaine ne se cache pas que le retrait du Burundi de la CPI est lié à l'ouverture, en avril 2016, d'un examen préliminaire sur la situation au Burundi depuis avril 2015.[66] Enfin, prémonition, fuite sur une stratégie en germe ou simple coïncidence, l'odeur d'une crise dans les relations entre la CPI et le Burundi avait été sentie bien avant la crise de 2015. En 2013, au cours d'une émission populaire sur une radio locale, un des responsables de la jeunesse affiliée au parti au pouvoir au Burundi, CNDD-FDD,[67] après avoir indigné les auditeurs en déclarant qu''en politique on ne tue pas, [mais qu']on élimine les obstacles',[68] renchérissait en affirmant avec un ton de certitude qu''aucun jeune *imbonerakure* n'ira[it] à La Haye'.[69]

Si l'enjeu juridique est d'une évidence telle qu'il s'impose à tous ceux qui abordent la question du retrait du Burundi de la CPI, rares sont les analyses qui approchent ce retrait sous d'autres angles. C'est comme si l'enjeu juridique était le seul pouvant expliquer le retrait du Burundi du Statut de la CPI. Ce qui est loin d'être un point de vue auquel nous nous rallions. Au contraire, nous suggérons que derrière l'important et évident enjeu juridique, se cachent d'autres enjeux d'ordre politique, diplomatique voire économique.

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64 Not., Sandholtz W, 'Backlash and international human rights courts', Paper prepared for the Contracting Human Rights Workshop at the University of California, Santa Barbara, 26-28 January 2017; Africa Conflict Monitor, 'Burundi's leadership defies international law in a bid to avoid prosecution: Central Africa - regional analysis', Volume 2016, Issue 11, Nov 2016, 52–58; Colojoară R, 'Does the International Criminal Court have a future or is it just an illusion', *Journal of Eastern European Criminal Law* 54 (2016); Vandeginste S, 'The ICC Bruexit: Free at last? Burundi on its way out of the Rome Statute', *IOB Analysis and Policy Brief 20*, Institute of Development and Policy Management, 2016; Mude T, 'Demystifying the International Criminal Court (ICC) target Africa political rhetoric", *Open Journal of Political Science*, Scientific Research Publishing, 2017, 7, 178-188; Capizzi P, 'Le retrait du Burundi du Statut de la Cour pénale internationale: quelles conséquences?', *Revue des droits de l'homme*, novembre 2016, 1-10; Kersten M. 'How three words could change the ICC-Africa relationship', 9 May 2017.

65 Daniel Bekele, (directeur-Afrique de Human Rights Watch): 'Burundi has failed to hold people responsible for brutal crimes to account and has sunk to a new low by attempting to deny victims justice before the ICC', Human Rights Watch, 'Burundi: ICC withdrawal major loss to victims. Latest move shows Government's disregard for victims', Nairobi, 27 October 2017; Amnesty International, 'Retrait de la Cour pénale internationale', 12 octobre 2016: https://www.amnesty.be/infos/actualites/article/retrait-de-la-cour-penale-internationale (consulté le 28 mai 2017); FIDH, Ligue Iteka, *Burundi: Répression aux dynamiques génocidaires,* Rapport, novembre 2016 / N°685f.

66 African Union, *Withdrawal strategy document*, Draft 2, version 12 January 2017, para. 23 ('The government [of Burundi] began proceedings following the April 2016 opening of an ICC preliminary investigation of violence in Burundi').

67 *Net Press,* Bujumbura, 13 mai 2013.

68 Nsengumukiza F, 'Uterera iki?', *Radio Publique Africaine* (RPA), 12 mai 2013.

69 Nsengumukiza, 'Uterera iki?'.

3.3 Un retrait motivé par des enjeux politiques, diplomatiques et économiques

Le discours officiel qui a entouré le retrait du Burundi du Statut de la CPI ne laisse aucun doute sur le lien entre ce retrait et la situation politique [de crise] qui prévaut dans le pays. Les dirigeants dénoncent un complot[70] ourdi par certaines puissances étrangères visant le replacement des institutions démocratiques; la Cour n'étant qu'à la solde de ces puissances. Dans un *Communiqué du gouvernement du Burundi consécutif aux accusations du parlement européen du 19 janvier 2017,* daté du janvier 2017:

> Le Gouvernement du Burundi observe ces derniers jours, un regain d'une campagne active menée par certains de ses partenaires contre ses institutions républicaines, ainsi que contre le peuple burundais qui les a démocratiquement mises en place à travers des élections démocratiques, transparentes et apaisées.[71]

La Résolution du Parlement européen du 19 janvier 2017 sur la situation au Burundi (2017/2508(RSP))[72]

> observe avec une profonde inquiétude que le Burundi a officialisé son retrait du statut de Rome; rappelle que la CPI est une institution fondamentale qui contribue à ce que justice soit rendue aux citoyens victimes des crimes les plus graves, lorsque cela est impossible au niveau national[73];
>
> et
>
> invite le Conseil de sécurité des Nations unies et la CPI à ouvrir rapidement une enquête complète sur les violations des droits de l'homme qui auraient été commises au Burundi au cours de la récente crise dans le pays, y compris sur le risque d'un génocide sur son territoire.[74]

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70 Le lendemain de l'adoption, par le gouvernement du Burundi du projet de loi de retrait [du Burundi] de la CPI et faisant allusion à la Résolution A/HRC/RES/33/24 du Conseil des droits de l'homme de l'ONU (Voy. *supra*) Gaston Sindimwo, 1er vice -président de la République du Burundi déclara: 'On se rend parfaitement compte qu'il s'agit d'un complot [de la communauté internationale] qui vise à faire du mal au Burundi.' *(Jeune Afrique avec AFP, '*Burundi: un projet de loi au parlement pour quitter la CPI', 7 octobre 2016; Dans son Communiqué N° 006/2016 du 26 mars 2016, le parti au pouvoir, le CNDD-FDD rappelle qu'il a toujours insisté 'sur le rôle joué par des pays étrangers et organisations internationales dans le complot contre les institutions élues depuis l'indépendance jusqu'aujourd'hui'.

71 https://www.uantwerpen.be/images/uantwerpen/container2673/files/Burundi%20DPP/conflit/gob/250117.pdf consulté le 17 juillet 2017.

72 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0004+0+DOC+PDF+V0//FR consulté le 15 juillet 2017.

73 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0004+0+DOC+PDF+V0//FR consulté le 15 juillet 2017.

74 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0004+0+DOC+PDF+V0//FR consulté le 15 juillet 2017.

L'idée d'un complot international est explicitement ou implicitement reprise dans de nombreux discours et déclarations des autorités politiques. Comme cette déclaration, lue lors de la 15e session de l'Assemblée des Etats parties au Statut de Rome, où l'ambassadeur du Burundi aux Pays-Bas, Vestine Nahimana sort cette charge:

> Le Burundi n'a cessé d'exprimer son indignation face à l'influence flagrante exercée par l'ancienne puissance coloniale j'ai nommé la Belgique, l'Union européenne, et certaines organisations internationales dont l'Organisation de Droits de l'homme des Nations Unies dans la décision prise par le procureur concernant l'ouverture d'un examen préliminaire sur la situation au Burundi. Ces actions compromettantes violaient la lettre et l'esprit du statut de Rome.[75]

Dans le même ordre d'idées, la ministre de la Justice, Aimé- Laurentine KANYANA, devant les parlementaires réunis pour voter la loi retirant le Burundi de la CPI, déclara:

> Le Burundi constate que la Cour pénale internationale est devenue un instrument de pression sur les gouvernements des pays pauvres ou un moyen de les déstabiliser.[76]

Dans son discours, le régime burundais et ses soutiens internes, reprennent, à leur manière, l'accusation du président ougandais Yoweri Museveni vis-à-vis de la Cour:

> Ils utilisent maintenant la CPI pour mettre en place les dirigeants de leur choix en Afrique et éliminer ceux qu'ils n'aiment pas.[77]

Aux yeux du régime de Bujumbura, ce n'est pas seulement l'action de la CPI qui menace les institutions démocratiques en place au Burundi. Il y a aussi le dialogue inter-burundais, soutenu par la communauté internationale et organisé à l'extérieur du pays. Un dialogue qui se trouve dans l'impasse, les positions des protagonistes dans ce conflit peinant à se rapprocher. Si la légalité et la légitimité des institutions actuellement en place, celles issues des élections contestées de 2015, sont également contestées par l'opposition[78] et la société civile[79]; plus

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75 Nahimana V, *Déclaration de S.E Nahimana Vestine, Ambassadeur du Burundi, lors de la 15e session de l'Assemblée des Etats parties au Statut de Rome,* La Haye, 16-24 novembre 2016.

76 https://www.assemblee.bi/spip.php?page=imprimer&id_article=1297 consulté le 6 avril 2017.

77 Vilmer JB, 'Union africaine versus Cour pénale internationale. Répondre aux objections et sortir de la crise', 13; France 24, 'Uhuru Kenyatta prend officiellement ses fonctions de président du Kenya', 9 avril 2013; *BBC Afrique*, 'Kenya: Kenyatta prête serment', 9 avril 2013.

78 Dont l'essentiel des partis et autres formations politiques sont regroupés dans la plateforme CNARED-GIRITEKA.

79 En particulier celle qui regroupe plus de 300 organisations initiatrices de *la Campagne Halte au troisième mandat* et dont les principaux leaders sont en exil.

fondamentalement, c'est l'Accord d'Arusha pour la Paix et la Réconciliation au Burundi du 28 aout 2000 – ou plutôt ses acquis–, qui est en jeu. Alors que ladite opposition et ladite société civile sacralisent cet accord, considérant qu'en l'état actuel des choses, ses acquis ne peuvent pas être remis en cause, paradoxalement, le leadership du CNDD-FDD, parti au pouvoir depuis 2005 grâce précisément à cet accord, éprouverait, vis-à-vis de ce dernier, de l'aversion.[80]

Justement, la lecture du retrait de Burundi du Statut de la CPI, dans le contexte d'un dialogue inter-burundais extérieur, idéologiquement cristallisé autour d'un affrontement entre les défenseurs de l'intangibilité de l'Accord d'Arusha d'une part, les partisans de sa révision, d'autre part, pourrait être faite à la lumière de cet enjeu. Un texte dont certains principes, celui de la limitation des mandats présidentiels aux premières loges, considérés comme intangibles par certains,[81] ne sont plus d'actualités pour le CNDD-FDD[82] et ses 'satellites' au sein de l'échiquier politique et dans la société civile. La chose aurait été très simple pour le CNDD-FDD; en position de quasi-parti État,[83] monopolisant la quasi-totalité de l'espace politique,[84] contrôlant l'appareil administratif jusqu'à la plus petite entité administrative, assuré du relai idéologique de la toute puissante et très redoutée ligue des jeunes *Imbonerakure*[85] qui **écument** les collines et quadrille le pays,[86] comptant sur un 'arbitre' électoral dont l'indépendance et l'impartialité ont été

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80 Vandeginste S, 'Exit Arusha? Pathways from power-sharing in Burundi. A manuscript outline', Working Paper, Institute of Development Policy and Management, 2017 https://www.uantwerpen.be/images/uantwerpen/container2673/files/Publications/WP/2017/wp-201701.pdf consulté le 18 juillet 2017.

81 Constitution, art. 299. Sur ce point, voy. Vandeginste S, Niyonkuru C, 'Le peuple constituant et les Ingingo Ngenderwako de l'Accord d'Arusha: les limites légales et légitimes d'une révision de la Constitution du Burundi', Working paper *Institute of Development Policy and Management*, 2017 https://www.uantwerpen.be/images/uantwerpen/container2673/files/Publications/WP/2017/wp-201705.pdf, consulté le 17 mai 2017.

82 D'ailleurs, si l'on en croit la Commission Nationale de dialogue Interne (CNDI), une Commission créée en septembre 2015 (décret dont référence ci-après) pour 'conduire le processus de dialogue interburundais dans tout le pays et à tous les niveaux' (Art. 8 du Décret n° 100/34 du 23 septembre 2015: 'La majorité des burundais (*sic*) consultés ont en commun la volonté de supprimer les limites de mandats présidentiels, même si une autre partie non négligeable estime que les limites de mandats sont un gage démocratique.' (*Communiqué de presse,* Bujumbura, 12 mai 2017). Au sujet de la même volonté, Voy. aussi, CNDI, *Communiqué de presse*, 24 août 2016, 2.).

83 Plauchut A, 'Burundi: quel avenir pour les acquis d'Arusha?', *Note d'analyse,* 24 juillet 2015, 6; *mutatis mutandis*, Vandeginste S, 'Briefing: Burundi's electoral crisis – Back to power-sharing politics as usual?', *African Affairs*, August 2015, 2 et 10.

84 Plauchut A, *'Burundi : quel avenir pour les acquis d'Arusha ?'*, 6-8.

85 FIDH, Ligue Iteka, 'Les *Imbonerakure* : Fers de lance de la répression', *Le Burundi au bord du gouffre: retour sur deux années de terreur,* Rapport, Juin 2017 / N° 693f, 17-22.

86 Lepidi P, 'Dans le camp rwandais de Mahama, l'angoisse des réfugiés du Burundi', *Le Monde*, 4 juillet 2017.

souvent contestées par une partie de la classe politique burundaise. L'issue d'un référendum constitutionnel remettant en cause les principes inscrits dans l'accord d'Arusha, auxquels le CNDD-FDD est hostile, ne laisse place à aucun *suspens*. La grande crainte du CNDD-FDD est celle de la réaction de la communauté internationale, garante de l'Accord d'Arusha (les Nations Unies, l'Union africaine, les Chefs d'Etats de région,[87] l'Union européenne, *etc*.)[88] et qui a réitéré son soutien au respect de cet accord.[89]

A tous ceux qui brandissent l'intangibilité de l'Accord d'Arusha, le gouvernement burundais, dominé par le CNDD-FDD, oppose l'arme de l'égalité souveraine des Etats et son corollaire, le principe de non-intervention dans affaires intérieures des Etats. Deux principes auxquels sont particulièrement attachés de nombreux pays africains et non africains. C'est précisément au nom de la souveraineté que le Burundi a pris la décision de se retirer de la CPI, en dépit des préoccupations exprimées par certains.[90] Ce 'courage' lui aurait valu la sympathie de ceux qui

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87 A propos du rôle de la région, l'article 10 de l'Accord d'Arusha pour la Paix et la Réconciliation au Burundi du 28 août 2000, après avoir proclamé que 'les Parties exhortent les chefs d'Etat des pays de la région à continuer d'apporter leur soutien au processus de paix au Burundi', prévoit que 'les chefs d'Etat de la région servent également de garants de l'Accord'.

88 L'article 3 de la déclaration solennelle par laquelle les signataires de l'Accord d'Arusha ont exprimé être par les dispositions dudit accord stipule par exemple ce qui suit: 'L'Accord est signé par les Parties. Le Médiateur, le Président de la République de l'Ouganda, en sa qualité de Président de l'Initiative régionale de paix sur le Burundi, le Président de la République du Kenya, en tant que doyen des chefs d'Etat de la région, le Président de la République-Unie de Tanzanie, en tant que chef d'Etat du pays hôte, ainsi que les représentants de l'Organisation des Nations Unies, de l'Organisation de l'unité africaine, de l'Union européenne et de la Fondation Mwalimu Nyerere apposeront aussi leur signature en qualité de témoins et pour exprimer leur soutien moral au processus de paix'. L'article 2 de ladite déclaration évoque également les 'organisations internationales qui sont les garants de l'Accord'.

89 Ainsi par exemple, le Conseil de Sécurité de l'ONU souligne, d'une part, qu'il 'qu'il importe au plus haut point de respecter, dans la lettre et dans l'esprit, l'Accord d'Arusha qui a aidé le Burundi à connaître une décennie de paix'; et d'autre part, 'l'urgence de tenir un dialogue interburundais véritable et inclusif, fondé sur le respect de la Constitution et de l'Accord d'Arusha' (CSNU S/RES/2303 (2016) Situation au Burundi, adoptée le 29 juillet 2016). Le Conseil des droits de l'homme de l'ONU 'engage vivement tous les acteurs à créer un climat propice à la promotion d'un dialogue véritable et inclusif, (…) qui serait fondé sur le respect de l'Accord d'Arusha, afin de parvenir à une solution politique de consensus qui viserait à préserver la paix, à renforcer la démocratie et à assurer la jouissance des droits de l'homme pour tous au Burundi' et 'demande au Gouvernement burundais et aux autres parties (…) de respecter pleinement la lettre et l'esprit de l'Accord d'Arusha, fondement de la paix et de la démocratie' (Vingt-quatrième session extraordinaire, Rapport du, 17 décembre 2015). Le Conseil de Paix et de Sécurité de l'Union africaine 'réaffirme les responsabilités qui sont celles de l'UA en sa qualité de Garant de l'Accord 2000 d'Arusha pour la paix et la réconciliation au Burundi' (Union africaine, Conseil de Paix et de Sécurité, 581ème réunion, Addis Abéba, Ethiopie, 9 mars 2016, PSC/PR/COMM. (DLXXXI), Communiqué, para. 2.) ainsi que la nécessité de faire 'respecter la Constitution et l'Accord de paix et de réconciliation d'Arusha d'août 2000' (631ème réunion, Addis Abéba, Ethiopie, PSC/PR/COMM. (DCXXXI), Communiqué).

90 Après l'adoption par le Parlement burundais du projet de loi prévoyant le retrait du Burundi du Statut de la CPI, M. Sidiki Kaba 'prend acte de cette décision' mais se dit préoccupé par ce développement.

perçoivent la CPI comme le joker des puissants,[91] participant ainsi au desserrement de l'isolement diplomatique du Burundi, de la part des pays ou des organisations internationales qui, liant diplomatie et droits de l'homme, considèrent que ces derniers ne peuvent être conçus comme des 'matières qui relèvent essentiellement de la compétence nationale d'un État' au sens de la Charte des Nations unies.[92] L'on peut également considérer que la sympathie gagnée auprès des Etats hostiles à la CPI, devrait être, entre les mains du pouvoir burundais, un joker contre les velléités des organisations internationales dont le Burundi dénonce et redoute l'ingérence dans sa politique. L'hypothèse d'un benefice, pour la diplomatie burundaise, du retrait de la CPI est également évoquée par Stef Vandeginste qui écrit:

> Burundi's withdrawal may well be viewed with sympathy (and, perhaps, financially rewarded?) by those new international allies that prioritize sovereignty over globalization of human rights protection and criminal justice.[93]

Toujours d'un point de vue politique, le retrait du Burundi de la CPI pourrait être regardé comme un message de soutien adressé aux partisans du régime, en particulier ceux qui ont joué un rôle de premier plan dans la répression contre les opposants au troisième mandat de Pierre Nkurunziza et dont certains sont soupçonnés d'avoir une responsabilité dans les violations graves des droits de l'homme commis au Burundi depuis avril 2016. L'on se souviendra que l'EINUB affirme avoir

> reçu des informations de témoins, dont des noms, concernant l'existence d'un groupe bien connu de douze personnes du SNR, de la police et de l'armée qui seraient responsables de nombreux cas de disparitions forcées, et qui relèveraient directement du cercle intérieur de l'exécutif

et recommande l'établissement immédiat d'une commission d'enquête avec un mandat de

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Pour Sidiki Kaba: 'Le retrait d'un Etat Partie [constitue]un recul dans la lutte contre l'impunité et la marche résolue vers l'universalité du Statut'. Il rappelle que 'tous les Etats Parties ont la possibilité de venir devant l'assemblée des Etats parties pour exposer leurs préoccupations conformément au Statut' *(Communiqué de presse*, New-York, 14 octobre 2016); La Résolution du Parlement européen du 19 janvier 2017 sur la situation au Burundi (2017/2508(RSP)) ' observe avec une profonde inquiétude que le Burundi a officialisé son retrait du statut de Rome; rappelle que la CPI est une institution fondamentale qui contribue à ce que justice soit rendue aux citoyens victimes des crimes les plus graves, lorsque cela est impossible au niveau national'.

91 Maupas S, *Le jocker des puissants. Le grand roman de la Cour pénale internationale,* Don Quichotte éditions, Paris, 2016.

92 Article 2 (7), *Charte de l'Organisation des Nations unies*, 26 juin 1945.

93 Vandeginste, 'The ICC Burexit'.

> déterminer les responsabilités individuelles et partager ses résultats avec le Conseil de sécurité pour des sanctions ciblées et avec des procédures judiciaires, une fois mises en place.

Vu sous cet angle, le retrait de la CPI aura été une stratégie politique destinée à resserrer les rangs au sein du parti CNDD-FDD et à rassurer ceux que le rapport de l'EINUB pouvait bien inquiéter.

Enfin, les enjeux politico-diplomatiques ne doivent pas occulter les autres dividendes attendues d'un désenclavement diplomatique. Naturellement, celui-ci s'accompagne normalement d'une amélioration des échanges économiques par la diversification du partenariat économique ainsi que par le renforcement du partenariat existant avec des pays qui, comme la Chine,[94] se refusent de lier la coopération économique et le respect des droits de l'homme.

4 Appréciation critique de la stratégie de retrait du Burundi de la CPI

A titre de rappel, contrairement à certains traités qui ne comportent pas dispositions sur la dénonciation ou le retrait,[95] le statut de Rome de la CPI prévoit un mécanisme volontaire et unilatéral de retrait d'un Etat partie. L'article 127 (1) prévoit que

> Tout État Partie peut, par voie de notification écrite adressée au Secrétaire général de l'Organisation des Nations Unies, se retirer du présent Statut.

Le retrait du Burundi du Statut de la Cour s'est conformé au cadre tracé par cette disposition. Il en résulte que le droit de retrait et la procédure suivie ne soulève pratiquement pas de problème d'un point de vue juridique et cet article ne s'appesantira point sur cette question. Par contre, il tente une appréciation critique de la stratégie de retrait du Burundi de la Cour.

Qu'est-ce qui a changé depuis l'annonce, le 6 octobre 2016, de l'intention du gouvernement du Burundi de se retirer du Statut de la CPI? Avec la mise en branle du processus législatif qui a suivi et qui a abouti, le 18 octobre 2016, à la promulgation d'une loi retirant le Burundi du Statut de la CPI? Avec la notification

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[94] Judet P, *Emergence asiatique: Un modèle planétaire? Etude de cas sur plusieurs pays d'Asie et d'Afrique,* Edition Charles Léopold Mayer, Paris, 1997, 84.

[95] C'est le cas notamment de la Charte des Nations Unies, du Pacte international relatif aux droits de l'homme de 1966 et de la Charte africaine des droits de l'homme et des peuples de 1981.

au dépositaire du traité, le 27 octobre 2017, de l'instrument de retrait? Peut-on observer d'importants effets susceptibles d'être attribués audit retrait, à supposer que celui-ci fut une décision stratégique?

Afin d'évaluer l'impact de la stratégie de retrait du Burundi, il est important de partir des enjeux présumés de ce retrait et, à la lumière de ces derniers, de discuter des bénéfices et des couts de ce retrait. Le postulat de base demeure que cette importante décision n'a pas été prise sur un coup de tête. Mais qu'au contraire, il s'agit d'un acté raisonné qui répond à une stratégie (cf. *supra*). En considérant l'hypothèse selon laquelle l'enjeu juridique du retrait du Burundi de la CPI vise à assurer l'impunité des auteurs de violations constitutifs de crimes de la compétence de la Cour, commises dans le contexte de la crise consécutive au troisième mandat du président Nkurunziza à la tête du Burundi, la partie est loin d'avoir été gagnée (1). Par contre, un certain nombre d'indices confortent l'hypothèse selon laquelle le retrait aurait contribué à rompre, un tant soit peu, l'isolement diplomatique sur lequel les promoteurs d'un dialogue interburundais inclusif, les opposants et la société civile[96] avaient misé pour faire plier le gouvernement à s'engager résolument dans dialogue en vue d'un règlement pacifique de la crise. Mais même sur les plans diplomatique, politique et économique, le succès se révèle en demi-teinte (2).

4.1 Enjeu juridique: L'illusion de l'impunité

A supposer que des crimes qui relèvent de la compétence de la CPI aient été commis au Burundi avant que ce pays ne se retire de la Cour, quel peut être l'impact de ce retrait sur la répression de ces crimes? Leurs auteurs sont-ils assurés d'une impunité? L'exercice de la compétence de la CPI est-il irrémédiablement compromis? Rien n'est moins sûr. Si le retrait de Statut de la CPI était essentiellement motivé par la volonté des auteurs de ce retrait d'assurer, *ad vitae aeternam*, l'impunité aux auteurs des crimes de la compétence de la CPI commis dans le contexte décrit plus haut, il a lieu de considérer que la stratégie a été mal pensée; et que ses bénéfices sont précaires. La première faiblesse de la stratégie tient au principe de complémentarité entre la Cour et la juridiction pénale nationale quant à l'exercice de la compétence. La deuxième résulte de la survivance de la compétence de la Cour à l'égard des crimes commis depuis l'époque de l'entrée en vigueur du Statut de la Cour vis-à-vis du Burundi, jusqu'à la veille de la date à laquelle le retrait a pris effet. La troisième découle de la possibilité, pour la Cour, d'exercer sa compétence même si l'Etat dont les auteurs sont les ressortissants n'est

[96] *Cf.* note 79.

pas partie au Statut de la Cour. La quatrième est une conséquence de la nature des crimes qui sont de la compétence de la CPI.

La complémentarité est un 'principe cardinal du fonctionnement de la justice pénale internationale'.[97] D'après l'article premier du Statut de la CPI, la Cour est 'complémentaire des juridictions pénales nationales'.[98] Autrement dit, la responsabilité première en matière de répression des crimes relevant de la compétence de la CPI incombe aux juridictions nationales,[99] lesquelles ont donc la priorité de la répression mais non la primauté. Si, s'agissant du Burundi, l'impunité des auteurs des violations graves de droits de l'homme commises depuis avril 2015 et qui constituent des crimes de la compétence de la CPI, est le résultat d'un manque de volonté du Burundi, ce manque de volonté n'a rien de définitif. Un changement de donnes politiques entrainant un rabattement de cartes; un changement de régime, peuvent entrainer un renversement de situation et ceux qui sont assurés d'une impunité aujourd'hui peuvent devenir vulnérables demain. Les procès, devant les juridictions de Côte d'Ivoire, de partisans de l'ancien président Laurent Gbagbo, accusés de crimes variés dont les crimes contre l'humanité présumés commis dans le contexte des violences post-électorales de 2010-2011 sont là pour le rappeler.

S'agissant de l'effet du retrait sur l'obligation de coopération avec la Cour, il convient de relever que d'après l'article 127(2), le retrait

> ne dégage pas l'État des obligations mises à sa charge par le présent Statut alors qu'il y était Partie, (…), et n'affecte pas non plus la coopération établie avec la Cour à l'occasion des enquêtes et procédures pénales à l'égard desquelles l'État avait le devoir de coopérer et qui ont été commencées avant la date à laquelle le retrait a pris effet; le retrait n'affecte en rien la poursuite de l'examen des affaires que la Cour avait déjà commencé à examiner avant la date à laquelle il a pris effet.

Plusieurs auteurs ainsi que la pratique de la CPI ont déjà fait le point sur les notions d''enquêtes' et de 'procédures pénales' au sens de cette dernière disposition.[100] Au regard de la portée que la doctrine et la jurisprudence donnent

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97 Xavier P, Desmarest A, 'Remarques critiques relatives au projet de loi « portant adaptation du droit pénal français à l'institution de la Cour pénale internationale»: la réalité française de la lutte contre l'impunité', 81 *Revue française de droit constitutionnel,* 1 (2010), 41-65.

98 Voy. aussi, sur la base légale de la complémentarité, le préambule et l'art. 17 du *Statut de Rome*.

99 Le préambule du *Statut de Rome* rappelle 'qu'il est du devoir de chaque État de soumettre à sa juridiction criminelle les responsables de crimes internationaux'.

100 Voy. Not.: Scallia D, 'Chronique de droit international pénal' 85 *Revue de Droit International Public*, 3 (2014); Bitti G, 'Article 53. Ouverture d'une enquête', in Fernandez et Pacreau X (dir.), *Commentaire du Statut de Rome de la Cour pénale internationale,* Pedone, Paris, 2012, 1178-1198; Laucci C, *Code annoté de la Cour pénale international 2004-2006,* Martinus Nijhoff, Leiden. Boston, 2008, spéc. 408-411; CPI, Le Procureur de la Cour pénale internationale, Fatou Bensouda ouvre un examen préliminaire

à ces notions, l'on se rend compte que l'examen préliminaire ne rentre ni dans la notion d'enquête, ni dans celle de procédure pénale au sens de l'article 127 (2) du Statut de Rome. Si la CPI n'avait pas autorisé, avant le 27 octobre 2017, date de prise d'effet du retrait du Burundi de la CPI, l'ouverture d'une enquête sur la situation au Burundi, le retrait du Burundi aurait eu pour effet juridique dégager ce pays du devoir de coopération avec la Cour, relativement aux enquêtes et procédures pénales qui n'auraient pu être commencées jusqu'au 26 octobre 2017. Cette hypothèse présente peu d'intérêt dans la mesure où, le 25 octobre 2017, soit deux jours avant que le retrait du Burundi du Statut de Rome ne soit effectif, la Chambre préliminaire III a rendu, sous scellés, une décision autorisant l'ouverture d'une enquête sur la situation au Burundi. Une décision qu'elle n'a rendue publique que le 9 novembre

> expurgée de la décision par laquelle elle a autorisé le Procureur de la CPI à ouvrir une enquête sur des crimes relevant de la compétence de la Cour qui auraient été commis au Burundi ou par des ressortissants burundais à l'extérieur de leur pays depuis le 26 avril 2015 et jusqu'au 26 octobre 2017.

S'agissant de l'effet du retrait du Burundi du Statut de Rome, après l'autorisation de l'ouverture d'une enquête, la Cour a fait cette importante mise au point:

> Par conséquent, la Cour demeure compétente à l'égard de tout crime relevant de sa juridiction s'il a été commis jusqu'au 26 octobre 2017 inclus, et ce, malgré le retrait du Burundi. Elle peut donc exercer sa compétence même après que ce retrait a pris effet dès lors que l'enquête ou les poursuites portent sur les crimes qui auraient été commis à l'époque où le Burundi était un État partie au Statut de Rome. En outre, le Burundi est tenu de coopérer avec la Cour dans le cadre de cette enquête car celle-ci a été autorisée le 25 octobre 2017, avant la date à laquelle le retrait a pris effet. Cette obligation de coopérer subsiste tant que dure l'enquête, et elle s'applique à toute procédure résultant de celle-ci. Le Burundi a accepté ces obligations lorsqu'il a ratifié le Statut de Rome.[101]

Par ailleurs, nous suggérons que, en tant que telle, la compétence de la CPI n'aurait pas absolument été paralysée par le retrait du Burundi du Statut de Rome lors même que la Cour n'aurait pas autorisé l'ouverture d'une enquête préliminaire avant le 27 octobre 2017. Nous soutenons que seul le devoir de coopération du Burundi ainsi que la possibilité pour la Cour d'être saisie par un État partie ou par le Procureur lui-même (*proprio motu*) concernant la situation au Burundi, auraient été impactés. En effet, l'exercice de la compétence de la Cour demeurerait possible au

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de la situation en Palestine, *Communiqué de presse,* 10 janvier 2015.

[101] CPI, 'Les juges de la CPI autorisent l'ouverture d'une enquête sur la situation au Burundi', Communiqué de presse : 9 Novembre 2017.

cas où, par l'application de l'article 13, b) du Statut de Rome, le Conseil de sécurité des Nations unies décide de déférer au Procureur la situation au Burundi.

Les cas de la situation en Libye et au Soudan, deux pays qui ne sont pas parties au Statut de Rome, sont là pour le rappeler. Bien entendu, à l'état actuel des choses, la probabilité de l'exercice de la compétence au titre de l'article 13, b) serait très faible. Le Burundi pouvant compter sur ses amitiés avec la Chine et la Russie, toutes deux disposant d'un droit de véto au Conseil de Sécurité des Nations unies, toutes deux tierces au Statut de la CPI et aucune d'elles n'ayant critiqué la décision burundaise de se retirer du Statut de la Cour, au contraire[102]. Cependant, l'histoire des relations internationales regorge d'exemples de coups de théâtre, où les meilleurs amis d'aujourd'hui deviennent de pires ennemis de demain et *vice versa*. Et le Burundi ne saurait compter, éternellement, sur un soutien inconditionnel des deux ou de l'un ou l'autre des deux membres permanents du Conseil de Sécurité des Nations unies.

La nature des crimes de la compétence de la CPI est un autre élément de nature à rendre utopique toute promesse de garantie d'impunité à leurs auteurs, y compris devant les juridictions nationales, burundaises ou étrangères. Les crimes de la compétence de la CPI

> touchent l'ensemble de la communauté internationale ne sauraient rester impunis et que leur répression doit être effectivement assurée par des mesures prises dans le cadre national et par le renforcement de la coopération internationale.[103]

De nombreuses législations, par le mécanisme de la compétence universelle, organisent les poursuites des auteurs de ces crimes, quels que soient le lieu de leur commission, la nationalité ou la résidence de leur auteur présumé ou de la victime. C'est par la mise en œuvre de la compétence universelle que de nombreux rwandais en exil, qui avaient participé au génocide des *Tutsi* de 1994, ont été poursuivis et jugés à l'étranger (France, Allemagne, Belgique, …). En outre, ces crimes ne

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[102] Réagissant au retrait de l'Afrique du Sud, du Burundi et de la Gambie du Statut de la CPI, Lu Kang, porte-parole du ministère chinois des affaires étrangères a déclaré: 'We respect the decision of the respective countries to withdraw from the International Criminal Court… China supports the international community's efforts to combat international crime and promote peace and judicial justice. At the same time, we insist that the ICC must respect the sovereignty of separate states and other principles of the international law' (*Sputnik International,* 'China respects decision of South Africa, Gambia to leave ICC - Foreign Ministry', Moscow, 26 October 2016. Quant à la Russie, tout porte à croire qu'elle a été inspirée par la décision du Burundi; puisque peu après le retrait du Burundi de la CPI, elle a notifié son l'intention de ne pas devenir partie au Statut de Rome de la Cour pénale internationale (cf. note 33).

[103] Statut de Rome de la Cour pénale internationale, préambule.

se prescrivent pas.[104] Enfin, le génocide, les crimes de guerre et les crimes contre l'humanité ne peuvent faire l'objet d'aucune mesure d'amnistie[105] et ne sont pas graciables.[106] Tous ces caractères rendent compte de la difficulté, pour les auteurs présumés de ces crime, d'échapper définitivement à la justice.

4.2 Enjeux politico-diplomatiques et économiques: Un succès relatif

Acte de souveraineté, conforme au droit international des traités, le retrait du Burundi de la CPI n'a, pratiquement pas, soulevé de réprobation internationale. Seuls quelques pays et organisations internationales ont exprimé qui sa préoccupation,[107] qui son inquiétude,[108] qui encore sa déception,[109] sans pour autant que la réaction aille jusqu'à une condamnation explicite du retrait.[110] Par contre, le retrait a été salué

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104 Statut de la CPI, art. 29. Spécifiquement, le Code pénal burundais prévoit que 'L'action publique relative aux crimes de génocide, crimes contre l'humanité et crimes de guerre est imprescriptible' (art.150).

105 CP, art. 171, *in fine*; Rosa AM, *Juridictions pénales internationales: La procédure et la preuve*, Paris, P.U.F, 2003, 1; Union Interparlementaire, *Le rôle des parlements dans l'établissement et le fonctionnement de mécanismes propres à assurer le jugement et la condamnation des crimes de guerre, des crimes contre l'humanité, du génocide et du terrorisme, pour qu'ils ne restent pas impunis*, Avant-projet de résolution révisé établi par les Co-rapporteurs Mlle Houria Bouhired (Algérie) et M. Jorge Argüello (Argentine), 112ème Assemblée et réunions connexes, Manille, 31 mars - 8 avril 2005, Préambule § 5. Voy. aussi, Projet de code des crimes contre la paix et la sécurité de l'humanité, Rapport du Groupe de travail sur la question de la création d'une juridiction pénale internationale, Rapport de la Commission du droit international sur les travaux de sa quarante-quatrième session, document A/CN.4/L.47, *Annuaire de la CDI, 1992*, Vol.2, (2e Partie), Annexe, 78, §130, d).

106 CP, art. 170.

107 CPI (Assemblée des Etats Parties), 'Déclaration du Président de l'Assemblée des États Parties relatif au processus de retrait du Burundi du Statut de Rome', *Communiqué de presse*, 18 octobre 2016; UE (Parlement européen), *Résolution du Parlement européen du 6 juillet 2017 sur la situation au Burundi* (2017/2756(RSP)) : http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0310+0+DOC+PDF+V0//FR

108 UE (Parlement européen), *Résolution du Parlement européen du 19 janvier 2017 sur la situation au Burundi* (2017/2508(RSP)). http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0004+0+DOC+PDF+V0//FR.

109 Affaires mondiales Canada (Déclaration), 'Le Canada est profondément déçu de la décision du Burundi de se retirer de la Cour pénale internationale', Ottawa, 18 octobre 2016; O'Grady S, 'Washington is unhappy that Burundi is 'very happy' to be leaving the ICC', *Foreign Policy*, https://foreignpolicy.com/2016/10/12/washington-is-unhappy-that-burundi-is-very-happy-to-be-leaving-the-icc/amp/.

110 Il est paradoxal de compter dans le groupe resserré d'Etats mécontents du retrait du Burundi de la CPI, les Etats Unis d'Amérique. Non seulement ils ne sont pas partie au Statut de la CPI, mais encore, comme la Russie en 2016, ils ont notifié au dépositaire du traité, le 21 décembre 2003, qu'ils avaient pas l'intention de devenir partie audit statut qu'ils avaient pourtant signé le 31 décembre 2000; cet acte étant assez souvent présenté comme un retrait de signature: 'Par la présente, [les États-Unis] vous informent, eu égard au Statut de Rome de la Cour pénale internationale adopté le 17 juillet 1998, qu'ils n'ont pas l'intention de devenir Partie au traité. De ce fait, les États-Unis n'ont aucune obligation légale découlant de leur signature apposée le 31 décembre 2000. Les États-Unis requièrent que leur intention de ne pas devenir Partie, telle qu'exprimée dans cette lettre, soit reflétée dans l'état du traité du dépositaire.'

par l'Union Africaine déclarant considérer le Burundi comme un des pionniers dans la mise en œuvre de la stratégie de retrait de la CPI[111]. Cependant, nonobstant la légalité de cet acte, le retrait du Burundi n'a pas été sans conséquence sur la qualité des relations diplomatiques avec les pays occidentaux et certaines organisations internationales, telle que l'Union européenne. Pour Stef Vandeginste,

> le retrait du Burundi s'inscrivait dans un processus d'escalade de tensions et de bras de fer diplomatiques entre le Burundi et ses importants donateurs traditionnels.[112]

Sous cet angle, l'on peut estimer que le retrait de la CPI sapait tout plaidoyer en faveur du retour à la normalisation des relations entre le Burundi et ses partenaires financiers traditionnels, en particulier ceux qui, à l'instar de l'Union européenne et de la plupart des pays occidentaux, sont des supporteurs de la Cour.[113]

Paradoxalement, le retrait du Burundi de la CPI aurait, en même temps, contribué à desserrer l'étau de l'isolement diplomatique qui avait été provoqué par la crise du troisième mandat de Pierre Nkurunziza. Pendant que les principaux donateurs traditionnels – ceux du bloc occidental en particulier – suspendaient, en tout ou en totalité, leurs appuis financiers en faveur du Burundi, d'autres partenaires intensifiaient leurs relations de coopération avec le Burundi. Une analyse attentive des développements de la diplomatie burundaise de l'après *Burexit* mais dont la tendance a été amorcée bien avant la crise politique de 2015, révèle une tendance – stratégie –, non seulement vers la diversification du partenariat diplomatico-économique au-delà du cercle des partenaires traditionnels, dominés par les occidentaux, mais également un basculement de l'axe diplomatique vers l'Est ainsi qu'un regain d'intérêt pour la diplomatie régionale.

Après le 'lâchage' par les occidentaux, le Burundi s'est tourné vers l'Est, où elle a renforcé ses relations avec notamment la Chine et la Russie. C'est un fait connu que les deux pays n'ont pas, dans leurs habitudes, la subordination de leur coopération avec d'autres pays à la qualité de la gouvernance et au respect des

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(Lettre adressée par le gouvernement américain au Secrétaire général des Nations Unies, dépositaire de la Convention de Rome, le 6 mai 2002)).

111 Decision on the International Criminal Court Doc. EX.CL/1006(XXX), Assembly/AU/Draft/Dec.1(XXVIII)Rev.2 (30–31 January 2017) para 6: 'WELCOMES and FULLY SUPPORTS the sovereign decisions taken by Burundi, South Africa and The Gambia as pioneer implementers of the Withdrawal Strategy'.

112 C'est nous qui traduisons. Vandeginste écrit: 'there surely is a reputational cost vis-à-vis some important development partners (like the EU)' (Vandeginste, 'The ICC Burexit', 3).

113 D'après Vandeginste, 'The ICC Burexit', 3: 'Within those foreign administrations, the position of advocates of a return to more 'normal' (business as usual) bilateral relations with Burundi is likely to be weakened by the ICC withdrawal'.

droits de l'homme dans ces pays. En outre, ces pays sont connus pour être très –trop?– sensibles à tout ce qu'ils considèrent comme interventionnisme dans les affaires intérieures des pays.[114] Aussi l'aide extérieure chinoise a –t-elle été, par exemple, labellisée d'aide canaille – 'rogue aid'[115] – parce que guidée par les seuls intérêts du donneur.[116]

En plus de ces deux pays, membres permanents du Conseil de Sécurité de l'ONU, le Burundi a intensifié ses relations diplomatiques et économiques avec d'autres pays, comme l'Inde, l'Iran et la Turquie. Cependant les nouveaux partenaires peinent à combler, ne fut-ce que sur le plan économique, le vide créé par le retrait ou la prise d'écart des donateurs traditionnels occidentaux.[117] Par ailleurs, il n'est pas certain que le renforcement des relations diplomatiques et la diversification du partenariat diplomatique et-économique relevés ci-dessus soient des dividendes du retrait du Burundi de la CPI. C'est le cas en particulier pour la

[114] Au sujet du Burundi, l'on rappellera, par exemple, que la Russie et la Chine ont, en mai 2015, bloqué la proposition de résolution française sur le Burundi. Pour Vitali Tchourkine, représentant permanent de la Fédération de Russie auprès de l'Organisation des Nations unies: 'Si certains membres du Conseil de sécurité souhaitent discuter avec les citoyens du Burundi la façon d'interpréter la constitution de leur pays, c'est leur droit. Mais le Conseil de sécurité en lui-même n'a aucunement à intervenir dans les affaires constitutionnelles de pays souverains.' (Mikhail Gamandiy-Egorov, 'La Russie et la Chine renforcent leur unité au sein du CS de l'ONU', *Sputnik France*, 6 mai 2015); Lors l'adoption, par le Conseil de Sécurité de l'ONU, de la Résolution 2303 (2016) autorisant le déploiement au Burundi d'un effectif maximum de 228 policiers des Nations Unies, la Chine, qui s'est abstenue, a fait néanmoins cette déclaration: 'La souveraineté, l'indépendance et l'intégrité territoriale du Burundi doivent être respectées.' (Liu Jieyi, Cité par Liang Chen, 'La Chine appelle à respecter la souveraineté du Burundi', *Agence de presse Xinhua,* New York (Nations Unies), 29 juillet 2016. Enfin, lors de sa visite historique de trois jours, du 10 au 12 mai 2017, le Vice-président Chinois, Li Yuanchao déclara: 'Depuis toujours, la Chine soutient les efforts de tous les pays, notamment en voie de développement ou africains, comme le Burundi pour défendre leur souveraineté nationale et lutter contre toute ingérence extérieure' (Ndikumana E, *Agence France Presse*, Bujumbura, 11 mai 2017).

[115] Dreher A, Fuchs A, 'Rogue aid? An empirical analysis of China's aid allocation', 48 *Canadian Journal of Economics/Revue canadienne d'économique* 3, 2015, 988-1023; Tan-Mullins M, Mohan G, Power M, 'Redefining "aid" in the China–Africa context', 41 *Development and Change* 5, 2010, 857–881; Moises N, 'Rogue development aid', *International Herald Tribune*, 15 février 2007; Moises N, 'Rogue aid', *Foreign Policy*, mars-avril 2007, 96.

[116] Dreher A, Fuchs A, 'Rogue aid? An empirical analysis of China's aid allocation', 988.

[117] A Genève, lors de la 35e session du Conseil des droits de l'homme, l'émissaire du Burundi, l'ambassadeur Tabu Rénovat, a déclaré que l'UE a 'financièrement asphyxié le peuple burundais' (HCDH, 'Le Conseil des droits de l'homme débat de la situation des droits de l'homme au Burundi et au Myanmar', Genève 15 juin 2017, http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21757&LangID=F; Ndirubusa A, 'Bujumbura indexé à Genève', *Iwacu*, 19 juin 2017 (http://www.iwacu-burundi.org/bujumbura-indexe-a-geneve/). D'après la Commission économique pour l'Afrique des Nations unies, 'Les réserves de change ont diminué d'environ 41% en 2015', *Profil de pays 2016*, viii. Le parlement burundais reconnait que 'la situation socio-économique se détériore progressivement suites aux sanctions prises par l'Union européenne' (*Déclaration de la délégation du parlement de la République du Burundi à la 33ème session de l'assemblée parlementaire paritaire ACP-UE*, San Giljan, Malte, le 20 juin 2017.

Chine.[118] Mais c'est aussi, *mutatis mutandis*, le cas pour des pays émergeants qui, guidés par la *realpolitik* économique notamment, profiteraient de la brèche ouverte par les mauvaises relations entre le Burundi et ses partenaires traditionnels pour occuper chaque pouce de terrain cédé par ces derniers.[119]

Certains ont suggéré que le retrait du Burundi de la CPI aurait eu un impact bénéfique pour le régime burundais, d'un point de vue à la fois diplomatique et politique. Stef Vandeginste écrit, par exemple:

> Burundi's ICC withdrawal has reputational benefits vis-à-vis other African governments that insist on self-reliance and freedom from intervention by what is perceived as a neo-colonial political instrument.[120]

Ce point de vue nous parait défendable. En effet, au cours du dix-huitième Sommet ordinaire des chefs d'Etats de la Communauté de l'Afrique de l'Est, les deux Chefs d'Etats qui y avaient pris part, en l'occurrence les présidents Museveni et Magufuli, respectivement de l'Ouganda et du Kenya, ont exprimé leur solidarité envers le Burundi en rapport avec les sanctions prises contre ce dernier pays par l'Union européenne. Dans une virulente charge contre l'UE, le président Museveni déclara:

> Le Burundi est notre membre et aucune action ne devrait être prise contre lui sans nous demander. Notre maison est notre maison.

Il ajouta:

> C'est notre problème. C'est à nous de le résoudre. Avec l'Union européenne nous avons un souci: unilatéralement vous prenez des sanctions contre le Burundi alors que c'est un de nos membres[121];

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118 D'une part, ces relations sont antérieures à l'annonce de ce retrait. D'autre part, l'intérêt de la Chine pour le Burundi devrait davantage être resitué dans le cadre de la stratégie globale autour de laquelle sont bâties les relations sino-africaines (Voy. not. Kitissou M, (eds), *Africa in China's global strategy,* African Renaissance, Adonis & Abbey, London, 2007, en particulier au cœur de son agenda économique en Afrique (Au sujet de cet agenda, voy. not. Gazibo M, Mbabia O, 'La politique africaine de la Chine montante à l'ère de la nouvelle ruée vers l'Afrique', 41 *Etudes Internationales* 4, 2010, 521–546), plutôt que d'être envisagé comme un rapprochement d'essence idéologique. Bien évidemment, dans le cadre d'une ruée sur l'Afrique, où l'offensive chinoise se heurte à une présence de concurrents, partenaires traditionnels bien implantés, en l'occurrence les puissances occidentales, un relâchement de l'emprise de ces derniers quelque part dans leur pré-carré pouvait pas déplaire à la Chine; trouvant une belle occasion pour appliquer le principe ôte toi de la que je m'y mette.

119 D'après Alexandre Malafaye, 'si les Occidentaux trébuchent en Afrique, les Chinois ou d'autres rafleront la mise' *(Geopoly, Tome 1, Jeux chinois*, Descartes & Cie, Paris, 2008). Voy. aussi, Santander S, (dir.), *L'Afrique, nouveau terrain de jeu des émergents*, Karthala, Paris, 2014.

120 Vandeginste S, 'The ICC Burexit', 3.

121 Saizonuou S, 'Sanctions contre le Burundi: Museveni critique l'UE', *La Nouvelle Tribune*, 21 mai 2017.

avant de mettre en garde l'UE à propos des conséquences du maintien de ces sanctions sur la signature des Accord de Partenariat Economique (APE) entre l'UE et la Communauté Economique de l'Afrique de l'Est.[122] Sur la même lancée, le président Magufuli lança:

> Pour le futur, nous sommes ouverts à la discussion pour les APE. Nous devrions nous assoir ensemble avec nos collègues européens et voir si nous pouvons résoudre ces petites choses qui nous poussent à ne pas signer comme la levée de l'embargo qui pèse sur le Burundi.[123]

Mais d'un autre côté, il est également permis de supposer que le soutien affiché par les deux chefs d'Etats en faveur du Burundi pourrait procéder de la stratégie de solidarité des pays ACP lorsqu'il est question du partenariat entre ces derniers pays et l'Union européenne.

Enfin, les bénéfices diplomatiques, attribués, à tort ou à raison, au retrait du Burundi du Statut de la CPI, auront eu un impact sur la politique intérieure du régime en place. Constituant officiellement une réponse ou une réaction contre l'ingérence de la Cour[124] devenue, au service de certaines puissances étrangères, un instrument de déstabilisation du Burundi,[125] le retrait a été transformé en un instrument de propagande politique qui a beaucoup bénéficié au pouvoir en place, ressoudant derrière ses leaders, 'protecteurs de la Nation contre un complot international', une grande partie de la population. Dans le même sens Stef Vandeginste évoque une stratégie de légitimation sur le plan intérieur:

> Seen from this perspective, the withdrawal has a domestic political benefit. By finger-pointing the international community, here represented by the ICC, the government seeks

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122 Selon le Communiqué sanctionnant le Sommet, celui-ci a convenu que les sanctions de l'UE contre le Burundi devront être discutées parallèlement aux discussion sur l'APE: 'The Summit also agreed the EU sanctions on Burundi should be discussed alongside the EPA discussions' *(Joint Communiqué: 18th Ordinary Summit of Heads of State of the East African Community*, Dar es Salaam, 20 May 2017).

123 Ndirubusa A, 'Le Sommet des surprises', *Iwacu*, Bujumbura, le 25 mai 2017: http://www.iwacu-burundi.org/le-sommet-des-surprises/ consulté le 29 mai 2017.

124 Gaston Sindimwo, Interview sur radio Bujumbura internationale 1er vice-président de la République du Burundi, https://soundcloud.com/2016-octobre-radio-bujumbura-inter/avec-se-sindimwo-gaston-vice-president-du-burundi-1.

125 http://www.assemblee.bi/Analyse-et-adoption-du-Projet-de,1297; *Communiqué following the adoption of the Resolution A/HRC/33/2016*, 14 March 2016, https://www.uantwerpen.be/images/uantwerpen/container2673/files/Burundi%20DPP/conflit/gob/GOB031016E.pdf consulté le 19 juin 2017; D'après l'ambassadeur du Burundi à Genève, Rénovat Tabu, 'tous les événements depuis 2015 ne sont rien de plus qu'une mise en exécution d'un plan de déstabilisation des institutions burundaises soigneusement préparé par des éléments exogènes': http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21757&LangID=F#sthash.buFa88oR.dpuf consulté le 19 juin 2017.

> to safeguard its own legitimacy in case the strained international relations have increasingly adverse consequences on people's income and well-being.[126]

Mais tous ces bénéfices politico-diplomatiques, somme toute relatifs, ne doivent pas cacher les importants couts, essentiellement financiers que les nouveaux amis du Burundi ne sont pas encore parvenus à solder.

5 Conclusion

La contestation de la justice de la CPI,[127] par le Burundi, est allée trop loin. Face à une institution perçue comme un outil de déstabilisation de la Nation à la solde de certaines puissances étrangères, la réponse du Burundi a été aussi radicale qu'inattendue; tant le Burundi n'était pas connu pour être parmi les pays en pointe ou meneurs de la fronde anti- CPI.

Il a beau avoir étonné par sa fulgurance, ce serait cependant une grosse erreur que de conclure que ce retrait s'est fait sur un coup de tête. Au contraire, au vu du contexte au sein duquel il est intervenu, de nombreux indices concourent à accréditer l'hypothèse que le retrait a été motivé par plusieurs enjeux. L'enjeu le plus flagrant, le moins contestable, est sans doute l'enjeu juridique. Mais quel que soit son poids dans la décision du retrait du Burundi du Statut de la CPI, l'enjeu juridique ne saurait occulter d'autres enjeux, fussent-ils secondaires. En plus de l'enjeu juridique, cet article s'est penché à mettre en lumière d'autres enjeux du retrait, moins flagrants, moins exprimés dans le discours officiel mais qui n'en sont pas moins réels. Il s'agit des enjeux diplomatiques, politiques et économiques.

A la lumière de ces enjeux, l'article s'est efforcé de discuter la stratégie du retrait, d'évaluer ses bénéfices et ses couts, bref, d'en apprécier l'efficacité. Au bout du compte, il apparait qu'au regard des enjeux relevés et discutés plus haut, l'efficacité de la stratégie de retrait du Statut de la CPI est très limitée en ce qui concerne l'enjeu juridique et relative pour les autres enjeux.

Ainsi, l'impunité des auteurs de violations graves de droits de l'homme, constitutives de crimes relevant de la compétence de la CPI, commises au Burundi dans le contexte des violences liées au troisième mandat controversé du président Nkurunziza à la tête du Burundi, n'est pas assurée; du moins, à long terme. Ni devant les juridictions burundaises, du fait de l'imprescriptibilité de ces crimes et de

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126 Vandeginste, 'The ICC Burexit', 4.

127 De Vos C, Kendall S, (eds), *Contested justice. The politics and the practice of International Criminal Court interventions,* Cambridge University Press, 2015.

leur non-amnistie ; ni devant les juridictions nationales étrangères mettant en œuvre la compétence universelle; ni devant des juridictions spéciales (internationales, hybrides ou autres); ni devant une juridiction internationale *ad hoc*, le cas échéant; ni même devant la CPI. Tout au plus, le retrait de la CPI peut inciter le Burundi à refuser de fait, malgré qu'il y soit tenu d'après le statut, la coopération avec la CPI. Un refus dont personne ne peut garantir la durabilité, tant il est tributaire de contingences diverses, politiques notamment. Les spectaculaires revirements de l'Afrique du Sud et de la Gambie par rapport à leur retrait de la CPI sont des exemples éloquents. Autant dire que d'un point de vue rationnel, le retrait de la CPI, conçu en tant que stratégie pour assurer l'impunité aux auteurs des crimes de la compétence de cette Cour, est précaire.

D'un point de vue politique, le retrait du Burundi de la CPI aura eu le mérite de légitimation des institutions issues des élections controversées de 2015. En entourant le retrait d'un discours souverainiste, en le plaçant sous le signe d'une résistance patriotique à un complot international contre les institutions républicaines, le régime en place est parvenu à détourner une grande partie de la population des vrais problèmes de société auxquels il n'avait pu apporter de réponse au cours des deux mandats écoulés; ***à*** remobiliser les masses et à les rallier autour d'un 'cause existentielle'. En outre, le Burundi peut espérer, un temps, compter sur les divisions au sein des organisations internationales, en particulier l'Union africaine et l'ONU. Un bénéfice qui peut être mis sur le compte d'une sympathie, gagnée ou renforcée auprès des détracteurs de la Cour, dont certains, comme la Russie et la Chine au sein du Conseil de Sécurité des Nations unies, l'Afrique du Sud, l'Ouganda et le Kenya au sein de l'Union africaine, ont un poids ou une influence qui pèse considérablement sur les décisions prises au sein de ces organisations.

D'un point de vue économique, le retrait du Burundi de la CPI, en renforçant la crispation des relations de coopération entre le Burundi et principaux donateurs traditionnels, a éloigné, du même coup, l'espoir d'une reprise de l'aide directe au développement en faveur du Burundi. Par ailleurs, les amitiés gagnées par le Burundi ou renforcées après son retrait de la CPI n'ont pas pu résorber le vide financier laissé par la suspension de l'aide au développement fourni par les principaux partenaires traditionnels du Burundi, occidentaux pour la plupart.

CORPORATE CRIMINAL LIABILITY UNDER THE MALABO PROTOCOL: BREAKING NEW GROUND?

Evelyne Owiye Asaala

Abstract

Corporate criminal liability has a long history in national legal systems. Although mooted in numerous forums in the course of the development of international criminal law, international criminal tribunals have been hesitant to incorporate corporate criminal liability. Attempts to hold legal persons criminally liable for international crimes have been sought through the modes of 'complicit crimes'. Nonetheless, this has not been sufficient to hold corporates criminally liable as the jurisdiction of all these tribunals have been limited to natural persons. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) becomes the first international treaty to expressly incorporate the doctrine of corporate criminal liability over international and transnational crimes. This is a significant step in the history of international criminal law. It provides an avenue to effectively plug the impunity gap currently existing on the continent with respect to corporate criminal liability. This chapter evaluates the scope and potential contribution of corporate criminal liability under the Malabo Protocol and questions whether it will enhance the administration of criminal justice in Africa. The chapter briefly highlights aspects of historical developments that are relevant in the subsequent evaluation of the doctrine under the Malabo Protocol. Ultimately, the chapter argues that, if implemented, the Malabo Protocol will make a significant contribution to international criminal law through its introduction of the doctrine of corporate criminal liability in international criminal law.

RESPONSABILITÉ PÉNALE DES PERSONNES MORALES DANS LE CADRE DU PROTOCOLE DE MALABO : OUVERTURE DE NOUVEAUX HORIZONS

Evelyne Owiye Asaala

Abstrait

La responsabilité pénale des personnes morales a une longue histoire dans les systèmes juridiques nationaux. Bien qu'ils aient été évoqués dans de nombreux forums au cours du développement du droit pénal international, les tribunaux pénaux internationaux ont hésité à incorporer la responsabilité pénale des personnes morales. Les tentatives visant à rendre les personnes morales criminellement responsables de crimes internationaux ont été sollicitées par le biais des 'crimes complices'. Néanmoins, cela n'a pas été suffisant pour tenir criminellement responsables les personnes morales, car la compétence de tous ces tribunaux a été limitée aux personnes physiques. Le Protocole sur les amendements au Protocole sur le Statut de la Cour africaine de justice et des droits de l'homme (Protocole de Malabo) devient le premier traité international à incorporer expressément la doctrine de la responsabilité pénale des personnes morales sur les crimes internationaux et transnationaux. C'est une étape importante dans l'histoire du droit pénal international. Il offre une voie pour combler efficacement le fossé de l'impunité existant actuellement sur le continent en matière de responsabilité pénale des personnes morales. Ce chapitre évalue la portée et la contribution potentielle de la responsabilité pénale des personnes morales au titre du Protocole de Malabo et s'interroge sur la possibilité d'améliorer l'administration de la justice pénale en Afrique. L'article met brièvement en évidence les aspects des développements historiques qui sont pertinents dans l'évaluation ultérieure de la doctrine dans le cadre du Protocole de Malabo. En fin de compte, le chapitre fait valoir que, s'il est mis en œuvre, le Protocole de Malabo apportera une contribution significative au droit pénal international en introduisant la doctrine de la responsabilité pénale des personnes morales dans le droit pénal international.

1 Introduction

International criminal law is historically premised on the principle of individual criminal responsibility. Post World War II treaties on criminal liability have all embodied this principle. The doctrine of corporate criminal liability is, however, not new. It was first considered in national courts. Both common law and civil law systems adopted the practice, albeit with notable differences. Initially, the doctrine was limited to civil matters due to four major obstacles: key among them, were the challenges inherent in the attribution of criminal acts to an inanimate entity.[1] The second obstacle was that legal thinkers

> did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent. The third obstacle was the *ultra vires* doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters. Finally, the fourth obstacle was courts' literal understanding of criminal procedure; for example, judges required the accused person to be brought physically before the court.[2]

An important aspect of this discussion was the inability to apportion criminal acts and the mental element of intent.

Despite these challenges, corporate criminal liability was later transformed in to national criminal law practice. It was rationalised that since corporations could benefit from human skills, they should also bear the burden arising from the criminal conduct of those individuals.[3]

International criminal law has, however, been reluctant to embrace this doctrine. The International Military Tribunals of Post World War II, for example, did not embrace this practice. The International Military Tribunal at Nuremberg (Nuremberg Tribunal) nonetheless adopted an innovative approach that has laid the foundation of the modern-day doctrine of corporate criminal liability in international criminal law. It is also noteworthy that subsequent *ad hoc* tribunals in Yugoslavia, Rwanda and the hybrid court of Sierra Leone did not particularly pursue the criminal liability of corporations despite the latter's alleged involvement in the commission of atrocities. Similarly, the Rome Statute does not expressly

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1 Williams G *Criminal law: The general part,* 2 ed, Stevens & Sons, London, 1961, 856; Khanna VS, 'Corporate criminal liability: What purpose does it serve?' 109 Harvard Law Review, 7 (1996), 1479.

2 Khanna VS, 'Corporate criminal liability', 1480.

3 Pinto QC and Evans M, *Corporate criminal liability,* 2 ed, Sweet and Maxwell, 2008, 39 cited in Nwafor AO, 'Corporate criminal responsibility: A comparative analysis' 57(1) *Journal of African Law* (2013), 83.

provide for the doctrine of corporate criminal liability. Although it can be argued that corporate criminal liability applied in these tribunals under the principle of 'organisational complicity', this approach is very limiting since the jurisdiction of these tribunals is limited to natural persons.

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) becomes the first international treaty to expressly incorporate the doctrine of corporate criminal liability. This is a significant step towards narrowing down the gap of impunity for crimes committed by corporations. The essence of this study is to evaluate the contribution under the Malabo Protocol and whether this will enhance effective administration of criminal justice in Africa. The chapter briefly highlights aspects of historical developments that are relevant in the subsequent evaluation of the doctrine under the Malabo Protocol. Ultimately, the chapter argues that if implemented effectively, the Malabo Protocol will make a significant contribution to international criminal law through its provision for the doctrine of corporate criminal liability in international criminal law.

2 Key historical developments of corporate criminal liability for international crimes

This section argues that the history of corporate criminal liability for international crimes originates from the practice of national courts, particularly, the two western legal families of civil law and common law. Initially, the doctrine was only limited to cases of civil nature. Later, the criminal jurisdiction of national common law courts applied the doctrine by deriving the criminal liability of a corporation from the *actus reus* and *mens rea* of its employees. At the international level, the practice of the Nuremberg Tribunal underscored individual criminal liability. There were instances, however, when organisations or groups could be declared criminal in nature. The Law of the Allied Control Council of occupied Germany gives specific instances where sanctions could directly be imposed against corporations. Subsequent ad hoc tribunals and the Rome Statute have completely failed to expressly recognise the doctrine of corporate criminal liability for international crimes. Some international conventions, nonetheless, call on their member states to impose corporate criminal liability for the crimes of corruption and abuse of office.

2.1 National practices

The doctrine of corporate criminal liability was first articulated in domestic justice systems, particularly through the development of common law and civil law. Traditionally, common law shied away from apportioning criminal liability to inanimate entities. This is mainly due to the difficulty inherent in apportioning the mental element of the guilty mind to corporations, given their inanimate nature.[4] The revolution to hold corporations criminally liable began at the domestic level and within the realm of civil cases. It was rationalised that if corporations could benefit from the skills of their human elements, they should also bear the burden arising from the criminal conduct of those individuals, not just on the basis that they acted for the company (which imputes vicarious liability), but that they acted as the company.[5]

Liability was, however, not imposed on every employee. A distinction was drawn between those who made the company decisions and those who executed the decisions. The former category of persons was deemed to be the mind, while the latter were mere hands that executed the decisions of the former.[6] It was the agent's criminal intent that was imputed on the corporation and only if the agent was the 'alter ego' of the corporation (high up in the corporations hierarchy).[7] Lord Denning captures this in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* as follows:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or the will. Others are directors and managers who represent the mind and directing will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[8]

The Appeal Court of England further argued as follows:

> A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing mind and will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be

4 Williams G, *Criminal law: The general part,* 856.

5 Pinto QC and Evans M, *Corporate criminal liability*, p 39, Sweet & Maxwell, London, 2013.

6 Nwafor AO, 'Corporate criminal responsibility: A comparative analysis', 57, Journal of African Law, 1 (2013), 83.

7 Khanna VS, 'Corporate criminal liability: What purpose does it serve?', 1491.

8 [1957] 1 QB 159 at 172 CA.

> the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.[9]

This practice was later adopted into domestic criminal law.[10] According to Macnaghten J,

> [i]t is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate.[11]

At this early stage of development, common law national courts adopted a derivative approach in the manner in which they apportioned the mental element of the corporation. Thus, those who were regarded as the masterminds of the corporations - those who initiate policies - are the ones whose blameworthy state of mind were imputed to the corporation and were held criminally liable as if they were the company itself, thus fulfilling the *actus reus* and the *mens rea* elements for corporate criminal liability. This approach can be compared with that of the US.

Like England, the US first imposed corporate criminal liability to cases involving public nuisance, in which private enforcement was unlikely.[12] With increased growth of corporations and their importance, corporate criminal liability was expanded to all criminal offences that did not require criminal intent.[13] In holding the corporation criminally liable for the criminal acts, US courts imputed the conduct of the agents to the corporation through the common law principle of respondeat superior.[14] The latter entails three requirements: a corporate agent, regardless of rank, must commit the illegal act, with the necessary state of mind (*mens rea*) or the employees may possess 'collective knowledge' even though none of them may have sufficient information to know that the crime was being committed. Second the agent must have acted within the scope of employment and finally, the agent must have intended to benefit the corporation.[15]

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9 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd,* (1915) AC 705 p 713.

10 *Director of Public Prosecutions v Kent and Sussex Contractors Ltd,* [1944] KB 146 p 156

11 *Lennard's Carrying case*.

12 *The Queen v Great North of England Railway Co,* US Eng Rep. 1294 (QB 1846), was the first English case to decide that corporations cold be criminally liable to all crimes not requiring intent. US courts followed this approach; *Lennard's Carrying Case*, 1481.

13 *Lennard's Carrying Case*, 1481.

14 Khanna VS, 'Corporate criminal liability: What purpose does it serve?', 1482.

15 Khanna VS, 'Corporate criminal liability: What purpose does it serve?', 1488-1490.

It was not until 1909, that the US Supreme Court first held a corporation criminally liable for a crime of intent.[16] Subsequently, courts were more willing to enforce corporate criminal liability for almost all wrongs except for crimes of malicious intent like murder.[17] The expansion of corporate criminal liability to crimes of intent was criticised as running contrary to the retributive aims of criminal law. It was argued that criminal law aimed at punishment of the morally blameworthy, yet corporate criminal liability relied on vicarious guilt rather than personal fault.[18] Today, the US has in place an expanded scope of corporate criminal liability. A corporation could virtually be held criminally liable for any offence except those that must be committed by a human person like rape. Corporate criminal liability relies on imputing of an agent's conduct to a corporation, through the application of the doctrine of respondeat superior.

Yet, as late as 2014, some US domestic courts have been still grappling with the civil-criminal dimensions of corporate criminal liability.[19] In the *Kiobel Case,* a group of Nigerian nationals residing in the US sued certain Dutch and British corporations under the Aliens Tort Statute alleging that the corporations aided and abetted the Nigerian Government in violating the law of nations in Nigeria.[20] The US Second Circuit rejected corporate liability under the US Alien Tort Statute (ATS), on the ground that 'customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations'.[21]

The US Supreme Court, however, narrowed its focus on the applicability of ATS to extraterritorial matters, making the following observations:

> The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach — such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.[22]

The US Supreme Court barred this suit while upholding the presumption

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16 *New York Central & Hudson River Railroad Co v United States,* 212 U.S 481 (1909).

17 Khanna VS, 'Corporate criminal liability: What purpose does it serve?', 1484.

18 Khanna VS, 'Corporate criminal liability: What purpose does it serve?', 1484.

19 *Esther Kiobel, individually and on behalf of her late husband, Dr Barinem Kiobel, et al v Royal Dutch Petroleum Company,* 133 Supreme Court 1659 Supreme Court 2013 (*Kiobel case*).

20 *Kiobel case*.

21 *Kiobel case* 621, 120.

22 *Kiobel case*, 1665.

against the extraterritorial application of the ATS. According to the US Supreme Court, '(c)orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.'[23] The doctrine of corporate liability was therefore not considered.

Some African countries have adopted this derivative approach in apportioning corporate criminal liability to domestic crimes.[24] Rwanda, however, provides a more progressive domestic legal framework on corporate criminal liability for international crimes. This is particularly so because the relevant law, Organic Law No 01/2012 of 2 May 2012, expressly extends Rwandan courts' jurisdiction over international and cross border crimes to all legal persons.[25] However, no corporation has been found criminally liable within the context of international and transnational crimes on the basis of this law.

2.2 The Nuremberg Tribunal and Control Council approaches to corporate liability for international crimes

The Nuremberg Tribunal maintained that international crimes 'are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[26] In this regard, the German and Japanese industrialists who supported the Nazi regime were all subjected to individual prosecution without any reference to the doctrine of corporate criminal liability of their respective entities.[27] The underlying reason at the time was noble. The purpose of this approach was to gravitate away from state responsibility, which had been the norm before. The move at the time was designed to increase accountability by holding individual government officials accountable

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23 *Kiobel case,* 6669.

24 Section 3(1), *Interpretation and General Provisions Act* (Chapter 2 of the Laws of Kenya) defines a person to include a company or association or body of persons, corporate or unincorporated; see also Section 332, *Criminal Procedure Act* (51 of 1977) of South Africa.

25 Article 15 and 33, *Organic Law No.01/2012* of 2 May 2012.

26 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Vol. I, 1947, p. 223, www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf, on 1 February 2017.

27 The trial of Bruno Tesch and Two Others (*The Zyklon B Case*) 1–8 March 1946, *Law Reports of the Trials of War Criminals*, Vol I; Trial of Friedrich Flick and Five Others, 20 April–22 December 1947, *Law Reports of the Trials of War Criminals*, Vol IX; Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, US Military Tribunal, Nuremberg, 17 November 1947–30 June 1948, *Law Reports of Trials of War Criminal*, Vol X; I G Farben Trial, Case No. 57, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of War Criminals*, Vol X; for further discussion on these cases see Chella J, 'The complicity of multinational corporations in international crimes: An examination of principles,' PhD thesis, Bond University (2012), 200-201.

instead of allowing them to hide behind the organisation of the state. Nonetheless, the failure to expressly impute corporate criminal liability not only stifled the development of corporate criminal liability but also informed the practice of subsequent international criminal tribunals.

However, articles 9 and 10 of the Charter of the International Military Tribunal (Nuremberg Charter) allowed for groups or organisations to be declared as criminal in nature.[28] In this regard, mere membership to a criminal organisation was regarded as criminal irrespective of whether one's participation in the organisation was voluntary or not. Persons who had no knowledge of the criminal purposes or acts of the organisation were excluded from criminal liability unless they were personally implicated in the commission of acts. The notion of 'criminal organisation' was understood through the aspects of 'criminal conspiracy or complicity', 'knowledge' and 'personal liability'.[29] Thus, scholars argue that these laid the foundation for the doctrine of corporate complicity in international crimes.[30]

It is also noteworthy that the Allied Control Council (governing occupied Germany at that time) — even before the trials — imposed several sanctions against legal persons for violations of international law.[31] The sanctions covered under this law include dissolution of legal personality and seizure of the assets of the corporation for reparations.[32]

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28 Article 9 states: 'At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization'. Article 10 states: ' In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned'.

29 *Trial of the Major War Criminals Before the International Military Tribunal*, Washington (1947) 262, 268, 273; Van der Wilt H, 'Joint criminal enterprise: Possibilities and limitations' 5 *Journal of International Criminal Justice* (2007), 93-95.

30 Engle E, 'Extraterritorial corporate criminal liability: A remedy for human rights violations?' 20 *St. John's Journal of Legal Commentary* (2006), 287, 291. For further reading, see Chella, 'The complicity of multinational corporations in international crimes: An examination of principles', 201.

31 This was done in accordance to Control Council Law No 10.

32 Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 306 (Dec. 20, 1945); *see also Flomo v Firestone Nat'l. Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

2.3 The practice of the ad hoc tribunals and other treaty bodies

Subsequent international criminal tribunals have failed to expressly recognise the doctrine of corporate criminal liability. The statutes establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) do not have express provisions on the applicability of the doctrine of corporate liability to international crimes. Notably, however, the jurisdiction of these tribunals is limited to natural persons.

Although treaties establishing international tribunals have lacked express provisions on corporate liability for crimes, it can be argued that the doctrine of corporate liability still applies under the principle of 'organisational complicity' embodied in the notions of aiding and abetting adopted in the statutes of most international criminal tribunals. [33] This could arguably be interpreted in favour of corporate liability, though only in a very limited sense. For criminal liability arising from complicit acts

> the physical act comprising the offence does not have its own inherent criminality, but rather, it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the principle perpetrator has consummated the crime. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.[34]

In *Khulumani v Barclay National Bank Ltd* and *Ntsebeza v Daimler Chysler Corp*, Katzmann J of the US Court of Appeals for the Second Circuit argued that

> [r]ecognizing the responsibility of private aiders and abettors merely permits private actors who substantially assist state actors to violate international law and do so for the purpose of facilitating the unlawful activity to be held accountable for their actions. It is of no moment that a private actor could be held liable as an aider and abettor of the violation of a norm requiring state action when that same person could not be held liable as a principal.[35]

The ICTY has previously held corporations criminally liable through the notions of aiding and abetting.[36] Although the ICTR brought charges against

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33 Article 7(1), *ICTY Statute;* Article 6(1) of the ICTR Statute; Article 6(1) of the SCSL Statute.

34 *Prosecutor v Akayesu*, Trial Chamber 1, Judgment, 2 September 1998, p 528.

35 *Khulumani v Barclay National Bank Ltd.*; *Ntsebeza v Daimler Chrysler Corp*, US Court of Appeals for the Second Circuit, 12 October 2007, 05-2141-cv, 05-2326-cv., at 46-47.

36 *Prosecutor v Stani˘siæ,* ICTY, Judgement, 9 December 2015, p 43-50. *Prosecutor v Vujadin Popoviæ,* ICTY, Judgement, 30 January 2015.

executive officers of a local media company, *Radio télévision libre des mille collines,* and the respective executives were found guilty of incitement to genocide, no specific orders were made with respect to the corporate entity itself.[37] Thus, although corporations were involved in Rwanda's genocide,[38] there was no attempt to hold them criminally liable.[39] Similarly, corporate involvement in the war in Sierra Leone and other regions were never pursued.

The STL, however, considered the applicability of corporate criminal liability to international crimes in *The Al-Jadeed Case*.[40] This was a contempt of court case in which Al Jadeed, a Lebanese TV broadcasting company, together with its Deputy Head of News and Political Programs, was held to be in contempt of court for publishing confidential witness information in a case before the STL and refusing to remove this information from its website following an order by the STL's pre-trial chamber.[41] Although neither the statute establishing the STL, nor its rules of procedure expressly provided for jurisdiction over legal persons, the Appeals Chamber nonetheless found that this jurisdiction existed under Rule 60 *bis* of STL's rules of procedure and evidence. Rule 60 *bis* bestowed upon the STL with inherent powers to 'hold in contempt [any *person*] who knowingly and wilfully interfere[s] with its administration of justice.' The Appeals Chamber gave a broad interpretation of the term 'person' to include both natural and legal persons. The Pre-trial judge, however, lamented the failure of the Appeals Chamber to provide clear guidance on the applicable elements in attributing corporate criminal liability.[42] Ultimately, the Pre-Trial Chamber relied on Lebanese law adopting a derivative approach to the manner in which it apportions corporate criminal liability.[43] The Pre-Trial Chamber thus concluded that Ms Al Khayat, the media company's Deputy Head of News and Political Programs could not be found guilty on the basis of the available evidence.

The anti-corruption treaties, nonetheless, specifically prescribe corporate

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37 *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* ICTR-99-52-A, Appeals Judgment, 28 November 2007, 1051, 1096, 1113–1114.

38 Jørgensen NHB, 'A reappraisal of the abandoned Nuremberg concept of criminal organisations in the context of justice in Rwanda' 12 *Criminal Law Forum,* 3 (2001), 371, 376; Chella, *'The complicity of multinational corporations in international crimes: An examination of principles'*, 201.

39 Chella, *The complicity of multinational corporations in international crimes*, 202-204.

40 In the Case Against Al-Jadeed S.A.L. & Al Khayat (*The Al-Jadeed Case*), STL-14-05/T/CJ, Judgment, 61, Special Tribunal for Lebanon, Sept. 18, 2015.

41 Special Tribunal For Lebanon, *Rules of Procedure and Evidence.*

42 The Al - Jadeed Case, p 55.

43 The Al - Jadeed Case, p 69 – 72.

criminal liability. The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), for example, urges member states to take necessary measures 'to establish the liability of legal persons for the bribery of a foreign public official'.[44] Where the legal system of its members does not apply criminal responsibility to legal persons, the OECD Convention further calls upon its members to 'ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials'.[45]

In a similar vain, Article 26 of the United Nations Convention against Corruption[46] allows criminal sanctions against legal persons, and further provides that 'such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence'. This implies that corporations should be held criminally liable independently of the individual persons who commit the crime. This would allow both the corporation *and* the individual to be held accountable for the same act. Thus far, corporations have become subjects of international criminal law, yet, ordinarily, they were not recognised as such. This is, however, limited to corporate criminal responsibility at the national level.

2.4 Corporate liability for international crimes under the Rome Statute

Like its predecessors, the Rome Statute of the International Criminal Court (Rome Statute) limits the jurisdiction of the International Criminal Court to natural persons.[47] Attempts to have an express provision providing for the criminal liability of legal persons were thwarted when Article 23(6) and (7) on criminal responsibility of legal persons, Article 76 on penalties applicable to legal persons, and Article 99 on enforcement of fines and forfeitures were all expunged from the draft statute.[48] Nonetheless, an argument can be made that under the doctrines of complicity or responsibility for superiors and commanders, an employee of a corporation could

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44 Article 2, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* 21 November 1997.

45 Article 3(2), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* 21 November 1997.

46 31 October 2014, 2139, UNTS 41,

47 Article 25 (1), *Rome Statute.*

48 United Nations, *Report of the preparatory committee on the establishment of an International Criminal Court*, United Nations diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, Rome, Italy 5 June – 17 July 1998, A/CONF.183/2/Add.1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/101/05/PDF/N9810105.pdf? on 13 September 2017.

be prosecuted for crimes committed by or on behalf of the corporation.[49]

The Office of the Prosecutor (OTP) of the ICC has also indicated its readiness to investigate cases involving businesses.[50] The OTP has thus received several Article 15 communications, for example, the offences Chevron allegedly committed in Ecuador.[51] The victims in this case are seeking remedy for crimes against humanity resulting from the pollution and contamination produced as a consequence of Chevron's exploitation of Ecuador's natural resources. The communication calls upon the ICC to exercise its jurisdiction and investigate the conduct of the Chief Executive Officer of Chevron, and any other corporate officers of this company that failed to observe court orders. The Ecuadorean National Court of Justice, Ecuador's highest court, imposed a fine of $9.5 billion on Chevron to pay Amazonian farmers, victims of its pollution.[52] The OTP, however, decided that there was no jurisdictional basis to proceed with investigations at the time.[53] With this decision, the ICC missed the opportunity to pronounce on the controversial aspect of corporate criminal responsibility as well on individual criminal responsibility of agents or employees of corporations.

In the Kenyan case of *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*,[54] the prosecutor brought charges against the executive officer of a media company, Joshua Arap Sang. On 5 April 2016, the Trial Chamber vacated the charges against Ruto and Sang.[55] This was not an acquittal as the Trial Chamber emphasised that the prosecution could reopen the case if new evidence was found.[56] Due to the premature withdrawal of this case, the issue of corporate liability of the media house was not explored, even to the extent of reparations. It should be noted, though, that the ICC has not been actively involved in investigating corporate criminal liability in either its pending cases or those already determined.

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49 Article 25(3) and 28, *Rome Statute*.

50 Jennett JH, Karmel R, Zerk J and Powles S 'Corporate responsibility for international crimes' Royal Institute of International Affairs, 19 May 2015.

51 Communication: Situation in Ecuador (2014) http://chevrontoxico.com/assets/ docs/2014-icc-complaint.pdf on 1 February 2017.

52 *Aguinda v Chevron Texaco*, Case No. 002-2003, Judgment of the Lago Agrio, Ecuadorian Provincial Court of Justice of Sucumbios 14 February 2011.

53 See OTP Letter, OTP2014/036752 (16 March 2015), http://freebeacon.com/wp-content/uploads/2015/04/ICC-letter.pdf on 19 May 2018.

54 Pre-Trial Chamber II, ICC-01/09-01/11, 23 January 2012.

55 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, (Decision on defense applications for judgments of acquittal) 15 April 2016.

56 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*.

3 Corporate liability for international crimes under the Malabo Protocol

Although no *travaux preparatoire* exist on this aspect, the contextual history of the Malabo Protocol reveals that corporate criminal responsibility was adopted in its second draft. From February 2009, the Assembly of the African Union directed the 'Commission [the Commission on the Implementation of the Assembly Decision Assembly/AU/ Dec.199(XI)], in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights], to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.'[57] This directive was interpreted not to limit the jurisdiction of the court to core international crimes.[58] Instead, a study has deemed this jurisdiction to include other crimes of international and transnational concern, including corruption.[59] A further examination of these crimes revealed the role played by corporations, thus necessitating the inclusion of corporate criminal liability in the second draft. Crimes primarily perpetrated by corporations, such as illicit exploitation of resources, money laundering, and trafficking in hazardous waste, were also included in this second draft.

Impunity of corporations in international criminal law is exhibited in a dual perspective: 'those related to the accountability challenges surrounding transnational corporate activity and those that inhere to international crimes.'[60] Although discussions under Malabo Protocol were centered on corporate liability in relation to transnational crimes, it cannot be that the drafters were only concerned with one aspect of impunity – impunity for transnational crimes and not that for core international crimes. Besides, since the Malabo Protocol does not expressly limit the application of corporate criminal liability to transnational crimes, it is certain that the African Court's criminal chamber would also apply the concept of corporate criminal liability to core international crimes.

Although Article 46B of the Malabo Protocol articulates the doctrines of complicity or responsibility for superiors, similar to those under the Rome Statute,

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57 Decision ASSEMBLY/AU/DEC.213(XII), p 9.

58 *Report of the Study on the Implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern*, p 48.

59 *Report of the Study on the Implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern*, p 48.

60 Kariakakis J, 'Corporations before international criminal courts: Implications for the international criminal justice project' 30 *Leiden Journal of International law* (2017), 223.

Article 46C goes further and explicitly adopts the doctrine of corporate criminal liability as follows:-

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act, which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.[61]

This provision clarifies the *actus reus* and the *mens rea* elements necessary to impute corporate liability. In order to prove corporate liability, the criminal elements of *actus reus* and *mens rea* must both be imputed to the corporation.

3.1 Actus reus and mens rea for corporate criminal liability

To prove *actus reus* of a corporation, one has to establish the specific elements of the crime in question. It must be proven that the acts or omissions of the corporation constituted the elements of the relevant crime.

The *mens rea* element comprises two aspects: the corporate intention to commit the crime and the corporate knowledge of the offence in question. The 'intention' part is proved once it is established that a policy of the corporation required the commission of the act that constitutes the offence. By analogy with the ICC's interpretation of a policy, such a policy need not be express but can also

61 Articles 46C, *Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* STC/Legal/Min/7(I) Rev.1 (the Malabo Protocol).

be inferred from a series of events.[62] This implies that under the Malabo Protocol, the existence of a policy could as well be construed from implied acts or omissions permitted by the corporation. Corporate knowledge, on the other hand, is proven when it is established that the actual or constructive knowledge of the relevant information of the commission of the offence was possessed within the corporation. Again, such knowledge may either be actual or constructive.[63] It is irrelevant whether such information was divided between corporate personnel.

The Malabo Protocol adopts an entirely different approach to imputing *mens rea* to corporations. Rather than following the traditional method applied by national courts, in which the state of mind of the masters of a corporation is used as the *mens rea* of the corporation, the Malabo Protocol finds a direct way of imputing *mens rea* to the corporation itself as an entity. In this case, corporate criminal liability under the Malabo Protocol is not derived from the criminal liability of natural persons within the corporation, but is purely organisation-based.[64]

After proving corporate liability for the international crime, two questions remain unanswered. First, should corporate criminal liability be extended to individual criminal liability with respect to the personnel of the corporation? The Malabo Protocol bestows jurisdiction over both natural and legal persons. This implies that individuals who commit the crimes will be held liable. The concept of vicarious liability does not arise as the Malabo Protocol does not adopt the derivative approach but directly imputes criminal liability on the corporate entity. A question, however, arises as to whether a corporation that has been found guilty of the listed crimes can pass on this criminal liability to its personnel, which persons may otherwise not have been held accountable. As cited above 'the criminal liability of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.' The significance of this provision is twofold. First, it acknowledges that corporate criminal liability does not shield the individuals involved from criminal liability. Thus, corporate criminal liability may also involve the prosecution of natural persons within that same corporation. The second significant aspect of Article 46B(6) leads us to the

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62 *Prosecutor v Germain Katanga,* (Judgment pursuant to Article 24 of the Statute) ICC 01/04-01/07, 7 March 2014, p 1109; *Prosecutor v Bla[ki]* IT-95-14-T, Trial Chamber of the ICTY, (2000) 81 p 203; Badar ME, 'From the Nuremberg Charter to the Rome Statute: Defining the elements of crimes against humanity' 5 *San Ndiego International Law Journal* (2004), 115.

63 Chesterman S, 'An all together different order: Defining the elements of crimes against humanity' 10 *Duke Journal of Comparative & International Law* (2000), 321.

64 Kyriakakis J, 'Corporate criminal liability at the African Criminal Court' Briefing Paper – ACRI Meeting, Arusha, 2016, 4.

second unanswered question concerning corporate liability in the Malabo Protocol, namely, can, and if so, how does this corporate liability translate into individual criminal liability? Once the existence of corporate liability has been proven, natural persons who are the actual perpetrators or accomplices to the offences will also be held criminally liable. Borrowing from earlier national practice this will not involve all the employees of the corporation but the policy-makers of these entities. Yet this may not always be the case. The Malabo Protocol opens itself up to actual perpetrators of, and accomplices to corporate crimes. Persons accused of international crimes are required to fulfil a very high threshold to be held criminally liable in the sense that they must be those bearing the highest criminal responsibility. The Malabo Protocol is likely to be interpreted as lowering these standards with respect to persons held criminally liable as a result of corporate criminal liability. This is so because, in the context of corporate criminal liability, the natural persons held criminally liable will either be the actual perpetrators or accomplices, in which case, not all of them might bear the highest responsibility for international crimes. It is also possible that the actual acts of the respective crimes may be committed by independent organs or groups of persons working in concert with the organisation, which independent organs or groups are neither agents of the corporation nor its personnel. Does this therefore imply that the actual perpetrators of these crimes should be brought to book under the concept of corporate criminal responsibility? It remains to be seen how the African Court of Justice and Human and Peoples' Rights (the AU Criminal Court) will interpret these controversial issues. Persons that engage in corporate or collective criminal activity will still be held individually responsible.

With respect to individual responsibility in relation to corporate liability, the prosecution has to go further and prove that the natural persons were either the actual perpetrators or accomplices in the same crimes. It is, however, not clear whether the prosecution of the natural persons will happen subsequent to or simultaneously with that of the legal person. The Malabo Protocol is not clear on this. Although this is a matter of prosecutorial discretion, it is submitted that the prosecution of the natural persons should always follow that of the corporate. It makes logical sense that once a corporate has been found criminally liable then the actual perpetrators and accomplices should be held to account for their actions. It will be absurd for actual perpetrators or accomplices to corporate crimes to be declared guilty, yet, the corporate criminal liability is found to be non-existent. Any other way of looking at this is likely to lead to duplication of resources.

The Malabo Protocol, therefore, makes a significant contribution by clarifying

how to prove corporate criminal liability as well as individual criminal liability for the actual perpetrators or accomplices of the corporate acts. Unlike the ICC, prosecution of international crimes in Africa is likely to put more emphasis on corporate criminal liability, both of national and transnational character. This has much contextual relevance, given that the majority of intra-state conflicts in Africa - Angola, Democratic Republic of Congo, Liberia and Sierra Leone - are resource-based and are fuelled by multi-national corporations (MNCs) that commit heinous crimes in the process of extracting and exporting the resources, often with impunity.[65] For example, it has been documented that most of these resources are under the control of rebel groups that commit gross human rights violations.[66] The complex nature of most MNCs poses a great challenge to national prosecutions in countries falling victim to their violations. In most instances, the countries in question are either complicit in the crimes or they lack the local institutional capacity to prosecute these entities due to the immense powers exuded by the MNCs. Corporate criminal jurisdiction over these organisations would be a big and pioneering achievement for the African region. Additionally, this regional achievement is likely to catalyse concerted national efforts towards pursuing corporate criminal liability for international crimes. African states should therefore adopt or realign their national legislation to provide for corporate criminal liability for international crimes at the national level.

Dissenting voices may argue that corporate criminal liability is not necessarily a good thing for Africa given its potential practical implications. For instance, such liability may result in indirect adverse consequences of innocent shareholders, loss of employment, and negative economic effects. It is the author's position that Africa must sanitise corporate investments in the region. It must dictate the conditions within which foreign corporations may operate in the region. Corporations must comply with local laws of the countries in which they operate. African states cannot tolerate the facilitation or commission of international crimes by corporations for mere economic gain. It is important to uphold the Malabo Protocol approach that whosoever wants to invest in Africa must abide by certain human rights standards.

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65 *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, 16 October 2002, UN Doc S/2002/1146; *Final Report of the Monitoring Mechanism on Angola Sanctions,* 21 December 2000, UN Doc S/2000/1225; *Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306,* 20 December 2000, p 19 'in relation to Sierra Leone', UN Doc S/2000/1195.

66 *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo; Final Report of the Monitoring Mechanism on Angola Sanctions*; *Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306,* 20 December 2000, p 19 'in relation to Sierra Leone'.

3.2 The defects of corporate criminal liability

The Malabo Protocol's provisions on corporate criminal liability are not above criticism. Firstly, the Malabo Protocol does not prescribe the punishment applicable to corporates found criminally liable for any international or transnational crimes, nor for the natural persons who either acted as the actual perpetrators or accomplices of the same. It is important to distinguish this latter category from the other general perpetrators of the listed international crimes. This is because the other category of offenders has to meet a very high threshold to be held criminally liable. They must be those bearing the highest criminal responsibility. As previously mentioned, in the context of corporate criminal liability, however, the natural persons held criminally liable will either be the actual perpetrators or accomplices, in which case, not all of them might carry the highest responsibility for international crimes. Thus, the Malabo Protocol must prescribe the punishments and penalties to be levied against corporate entities found to be criminally liable as well as against the categories of offenders against whom the corporate entity passes its liability.

Secondly, the Malabo Protocol offers a one-size-fits-all uniform application of corporate criminal liability to all Malabo Protocol crimes - whether international or transnational in nature. While this may pose no challenge with respect to international crimes - which embody an in-built threshold requirement to prove the crimes - it is likely to raise challenges with respect to transnational crimes.

Unlike international crimes, transnational crimes do not have criteria that can be applied to determine whether the gravity threshold has been met. Gravity is an essential factor for any court that is required to analyse the admissibility of a case. Within the Rome Statute, the notion of gravity is embedded in the contextual definitions of crimes. For example, to prove genocide, one must prove not just the listed acts but also that the listed acts were intended to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. Similarly, crimes against humanity require the prosecution not just to prove the listed acts but that the acts were committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Again, to prove war crimes, the prosecution must prove that the listed acts were 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'. Arguably, this is the test that is most likely to be followed by the AU Criminal Court in so far as the Rome Statute crimes are concerned. In this regard, the admissibility question for corporate crimes will be determined with certainty and within a clear context of the gravity question. Only when the required gravity of the listed crimes is fulfilled will

the corporate character of the legal person be held to account for its involvement. This certainty of gravity standards in determining admissibility of cases is, however, missing in the case of transnational crimes.

How should the AU Criminal Court determine which transnational cases involving legal persons to take on board and which not to? Using the crime of terrorism or piracy as examples, should the AU Criminal Court prosecute all terrorism or piracy cases referred to it? Would this therefore imply that whatever the level of involvement of legal persons in any of these cases, the AU Criminal Court will hold all the corporations criminally liable? Or what gravity test should the AU Criminal Court employ in deciding which cases to take or not to take? While it is true that a corporation can commit crimes at different thresholds of seriousness, it is important for a supranational criminal court to focus on cases where corporations bear the highest criminal responsibility. The Malabo Protocol must address itself to this reality in order to avoid opening up the AU Criminal Court to all manner of cases with a transnational character involving corporate criminal liability for any kind of involvement at whatever level. Failure to do so means that the AU Criminal Court is likely to be overwhelmed with cases, thus running the risk that it may become ineffective.

Additionally, the clause on corporate criminal responsibility applies to all corporations and only excludes states. While this is an advantage inasmuch as it subjects both private and public corporations to criminal accountability for international as well as transnational crimes, it poses a challenge to the African court, especially when it comes to investigating international crimes perpetrated by state-owned corporations or corporations in which a state holds shares. There is a risk that the AU Criminal Court may be perceived to be investigating the state in question. This may not auger well with some African states. Although the acts of these corporations do not translate to official acts of a state, the probability of state reluctance to cooperate with such investigations should be expected. This is likely to undermine the effectiveness of prosecuting corporate crimes. Moreover - judging by the regional prosecution of international crimes - while it is easy to prosecute persons out of power, it is almost impossible for states to effectively cooperate in prosecutions of persons in high office.

Another possible cooperation-related concern relates to non-member states to the Malabo Protocol. The AU Criminal Court will exercise its criminal jurisdiction where a member state to the Malabo Protocol is '[t]he State on the territory of which the conduct in question occurred' or '[e]xtraterritorial acts by non-nationals which

threaten a vital interest of that State'.[67] Given the nature of transnational crimes, it is possible that a corporation found guilty by the AU Criminal Court is registered in a state that is not party to the Malabo Protocol. This presents an area of challenge for enforcing court orders and decisions, particularly where the relevant state is a beneficiary of the acts of the guilty corporation. Nonetheless, the AU Criminal Court should adopt relevant guidelines on how to proceed in such circumstances in order to address this anomaly.

4 Conclusion

Corporate criminal responsibility has a long history, particularly at the national level. Although mooted in numerous forums in the course of the development of international criminal law, international criminal tribunals have been hesitant to incorporate corporate criminal liability. Attempts to hold legal persons criminally liable for international crimes have been exploited through the concepts of 'complicit crimes'. Nonetheless, this has not been sufficient to hold corporates criminally liable as the jurisdiction of all these tribunals have been limited to natural persons. The Malabo Protocol, however, breaks new ground by providing for criminal jurisdiction over international and transnational crimes committed by corporate entities. This is a significant step in the history of international criminal law. Although the substantive interpretation of the doctrine raises a few concerns, the AU Criminal Court, in concert with the AU, are in a position to address these concerns. In so doing, they may effectively plug the enduring impunity gap in Africa with respect to crimes committed by corporations. Unscrupulous corporations have benefitted from such impunity for too long.

67 Article 46E *bis* Malabo Protocol.

INCORPORATING THE MALABO PROTOCOL: A CRITICAL EVALUATION OF KENYA'S OPTIONS

Juliet Okoth

Abstract

The inclusion of crimes other than core international crimes in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) raises questions and challenges regarding the status and application of such crimes within state parties. This chapter considers Kenya's options in respect to incorporation of the Malabo Protocol. More specifically, it analyses the status of the crimes in the Malabo Protocol under the Constitution of Kenya (2010 Constitution) and existing statutes. The chapter concludes that while the existing laws to a great extent already recognise the crimes under the Malabo Protocol, some crimes create possible conflict with principles under the 2010 Constitution, while others may not be wholly punishable under the relevant laws. To meet its complementarity obligations, Kenya would need to enact specific laws that recognise crimes with the particular nuances that are provided for in the Malabo Protocol.

INCORPORER LE PROTOCOLE DE MALABO : UNE ÉVALUATION CRITIQUE DES OPTIONS DU KENYA

Abstrait

L'inclusion de crimes, autres que les crimes internationaux fondamentaux, dans le Protocole de Malabo soulève des questions et des défis concernant le statut et l'application de ces crimes dans les États parties. Cet article examine les options du Kenya en ce qui concerne l'incorporation du Protocole de Malabo. Plus précisément, l'article analyse l'état des crimes dans le Protocole de Malabo en vertu de la Constitution du Kenya et des lois existantes. Le document conclut que si les lois existantes reconnaissent déjà dans une large mesure les crimes du Protocole de Malabo, certains crimes peuvent créer un conflit avec les principes de la Constitution, tandis que d'autres ne sont pas punissables en vertu des lois appropriées. Pour remplir ses obligations de complémentarité, le Kenya devrait adopter des lois spécifiques reconnaissant les crimes avec les nuances particulières prévues dans le Protocole de Malabo.

1 Introduction

The coming into force of the Rome Statute of the International Criminal Court (Rome Statute) was heralded as a great moment in the history of international criminal justice. It marked the culmination of longstanding efforts to establish an international court that would ensure accountability for international crimes. Fifteen years since the establishment of the International Criminal Court (ICC), it is clear that its journey has not been without upheavals. One of its greatest challenges has been the decline in its relationship with African states that were once considered to be among the ICC's biggest supporters. The assertion that the ICC is unfairly targeting African states and its refusal to recognise immunity of heads of state has mainly contributed to the frosty relationship between some African states and the ICC.[1]

[1] Materu S, 'A strained relationship: Reflections on the African Union's stand towards the International Criminal Court from the Kenyan Experience' in Werle G, Fernandez L and Vormbaum M (eds), *Africa*

In response to the aforementioned assertion, African states have made declarations threatening to withdraw from the Rome Statute[2] and have, as an alternative through the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), extended the jurisdiction of the proposed African Court of Justice and Human Rights (ACJHR) to include international criminal jurisdiction.[3] Kenya is one of the few countries that have signed the Malabo Protocol but is yet to ratify it.[4] The Malabo Protocol will only enter into force after 15 ratifications.[5] Kenya is also a state party to the Rome Statute but its collision course with the ICC has seen it threaten to withdraw from the Rome Statute.[6] This means that, should Kenya ratify the Malabo Protocol, it might soon become the main point of reference for international criminal justice under Kenyan jurisdiction. This makes it imperative to interrogate what the Malabo Protocol has to offer in respect of accountability for international crimes. It is anticipated that the analysis in this chapter will inform both Cabinet and Parliament on the considerations they would need to take into account before ratifying the Malabo Protocol and the implications of incorporating the same.[7]

2 Status of international crimes and the challenge of domestication

While the establishment of several international criminal tribunals evidences the history of international criminal justice, the ultimate responsibility of

and the International Criminal Court, Asser Press, 2014; Murithi T, 'Between political justice and judicial politics: Charting a way forward for the African Union and the International Criminal Court' in Werle G et al, *Africa and the International Criminal Court,* 182-184.

2 Draft Decisions, Declarations, Resolution and Motion Assembly of the Union 28 Ordinary Session 30-31 January 2017, Assembly/AU/Draft/Dec 1 (XXVIII), 6 and 8; see also Carbone G and Meloni C, 'Africa vs ICC: Searching for an exit strategy', Italian Institute for International Political Studies, 28 March 2017, www.ispionline.it on 15 July 2018.

3 Article 3, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,* STC/Legal/Min/7 (1) Rev. 1, 16 May 2014, (Malabo Protocol).

4 See Status List, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 11 signatories as at 16 June 2018. https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights on 16 June 2018.

5 Article 11, *Malabo Protocol*.

6 'Smith D: Kenya MPs vote to quit International Criminal Court' *The Guardian,* 5 September 2013 https://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court on 5 July 2018; 'MPs pass motion urging Kenya to withdraw from ICC' *Reuters,* 22 December 2010 https://www.reuters.com/article/kenya-icc-idAFLDE6BL1RA20101222 on 5 July 2018.

7 *Treaty Making and Ratification* Act (Act No. 45 of 2012); among the considerations the cabinet is required to look at in Section 7, include constitutional implications, obligations arising from the treaty, national interests, legislative and policy considerations.

prosecuting international crimes rests with states.[8] States are often reluctant to cede this responsibility unless compelled to or if they consent to it. Hence, the principle of complementarity under the Rome Statute provides that the ICC will only prosecute crimes if the state with jurisdiction over the crime(s) is unwilling or unable.[9] The Malabo Protocol under Article 46H also recognises that the proposed ACJHR shall be complementary to national courts, providing for similar grounds of unwillingness or inability by the relevant state, before the ACJHR can intervene.

The Rome Statute and the Malabo Protocol may be considered sources of norms and legal standards providing a legal basis to effectively investigate and prosecute international crimes within domestic jurisdictions.[10] The domestic legislation of state parties must therefore and to a great extent conform to such norms and legal standards to facilitate accountability for international crimes within national courts. In the circumstances, it is prudent for Kenya to critically analyse the Malabo Protocol, taking into account the gaps that exist in the domestic jurisdiction and what hurdles it would need to overcome to ensure its domestic criminal jurisdiction conforms to the Malabo Protocol.

Apart from the core international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression, the Malabo Protocol introduces other crimes of international concern, including what have been characterised as transnational crimes namely, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.[11] While the traditionally recognised international crimes are considered to form part of customary international law, and thus applicable to all states regardless of domestication,[12] the challenge with treaty-based crimes is that, unless they are criminalised within the domestic jurisdictions, they cannot be punishable. The individual criminal responsibility for the traditional (core) international crimes is considered to directly emanate from international law whereas for treaty-based crimes, the international conventions that establish them do not create criminal responsibility but rather an obligation for state parties to criminalise them within domestic jurisdictions.[13] Hence it is the state parties

8 See Preamble, *Rome Statute*, 6.

9 Article 17, *Rome Statute*; also Preamble, *Rome Statute*, 10.

10 Werle G and Jessberger F, *Principles of international criminal law*, 3ed, Oxford University Press, Oxford, 2014, 146.

11 Article 28(a), *Malabo Protocol*.

12 Werle and Jessberger, *Principles of international criminal law*, 46.

13 Werle and Jessberger, *Principles of international criminal law*, 45-46; Boister N, *An introduction to transnational criminal law*, Oxford University Press, New York, 2012, 19.

that criminalise the conduct, and not international law. In this regard, the Malabo Protocol seems to create a paradigm shift by introducing direct individual criminal liability for transnational crimes for the first time at the international level.

Most conventions relating to transnational crimes set out a general standard of the conduct and states of mind to be prohibited by states sufficient to enable cooperation in enforcement, leaving it to states to set specific definitions in conformity with their domestic jurisdictions.[14] The challenge with this approach is that the broad definitions in conventions may fail to conform to the principle of legality, thereby creating some difficulty with enforcement at domestic level.[15] It may be asked whether the Malabo Protocol's definitions of the crimes overcome this problem to lay out a standard that sufficiently meets the domestic requirements according to the principle of legality.

Another issue often presented in respect of conventions dealing with transnational crimes is that not all prohibited conduct will satisfy the criminalisation threshold within particular states. The possibility of conflict with the fundamental legal principles of domestic jurisdictions allows for the inclusion of clauses within such conventions that provide states with the option of making such criminalisation subject to their domestic laws.[16] The inclusion of certain crimes in the Malabo Protocol whose criminalisation have raised issues within international conventions specifically dealing with them raises the challenge of their application in specific domestic jurisdictions in the case of conflict with fundamental legal and constitutional principles.[17]

3 Kenya's international criminal court journey

Kenya ratified the Rome Statute in June 2005 and only domesticated it in 2008 through the International Crimes Act (ICA).[18] The domestication was precipitated by the post-election violence (PEV) following the disputed 2007 presidential elections, which resulted in 1,200 murders and about 350,000 internal

14 Boister, *An introduction to transnational criminal law*, 15.

15 See discussion below on terrorism.

16 See for example Article 20, *United Nations Convention against Corruption (UNCAC)*, 31 October 2003, 2349 UNTS 41; Article 3 (1)(c), *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95.

17 See the discussion below on illicit enrichment.

18 I*nternational Crimes Act* (Act No. 16 of 2008), which became operational on 1 January 2009.

displacements.[19] Under the Constitution of Kenya 1963, which was still in force[20] when the ICA was adopted, international conventions, though ratified, still required implementation through domestic legislation.[21] Thus the need for the ICA to facilitate the prosecution of alleged perpetrators of the crimes committed during the PEV, which were classified as international crimes. The ICA was particularly useful in respect to cooperation with the ICC.

Attempts to prosecute the perpetrators of the PEV on the domestic level failed dismally, leading to the intervention of the ICC. As a result, six Kenyans were indicted before the ICC,[22] leading to the confirmation of charges against three, amongst them Uhuru Kenyatta and William Ruto.[23] Kenyatta and Ruto proceeded to be elected, respectively, as President and Deputy President of the Republic of Kenya in the 2013 election. Their political rise contributed to the creation of the legal conundrum of prosecuting a sitting head of state before the ICC.

Although the Rome Statute does not recognise official capacity as an impediment to the exercise of its duty,[24] its implementation has proved to be particularly difficult with respect to heads of states indicted before the ICC. This aspect of the Rome Statute has in particular put the ICC on a collision course with the African Union (AU). The AU subsequently called for non-cooperation with the ICC.[25] The failure by the UN Security Council (UNSC) to defer the respective cases contributed to Kenya's onslaught against the ICC. Kenya asserted that ICC's continued pursuit

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19 Republic of Kenya, *Report of the Commission of Inquiry into Post Election Violence (CIPEV)*, 2008, 345-352.

20 The 1963 Constitution underwent several radical changes, see Ojwang J, 'Constitutional trends in Africa - The Kenya case' 10 *Transnational Law and Contemporary Problems* (2000), 517-538.

21 See Kabau T and Ambani J, 'The constitution and the application of international law in Kenya: A case of migration to monism or regression to dualism?' 1 *Africa Nazarene Law Journal*, 1(2013).

22 Decision on the Prosecutor's application for summonses to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01; Decision on the Prosecutor's for summonses to appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01.

23 The *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta* and *Mohammed Hussein Ali* (Decision on the confirmation of charges) 23 Jan 2012, ICC-01/09-02/11-382-Red; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey* and *Joshua Arap Sang* (Decision on the confirmation of charges) 23 Jan 2012, ICC-01/09-01/11-373.

24 Article 27, *Rome Statute*.

25 See specific decisions and declarations of the AU Assembly on the International Criminal Court Ext/Assembly/AU/Dec. 1 (Oct. 2013); Extra Ordinary Session, 12 October 2013; Assembly/AU/Dec.397 (X-VIII)-Doc. EX.CL/710(XX), 18 Ordinary Session, 29-30 January 2012; Assembly/AU/Dec. 366 (XVII)-Doc. EX.CL/670(XIX), 17 Ordinary Session 30 June-1 July 2011; Assembly/AU/Dec.245(XIII) Rev. 1-Doc. Assembly/AU/13 (XIII) 3, 13 Ordinary Session, 1-3 July 2009.

of cases against Kenyatta and Ruto was an assault on its sovereignty.[26] The cases eventually collapsed as a result of allegations of unprecedented interference with witnesses and Kenya's failure to cooperate.[27]

Against this backdrop, Kenya's Parliament has twice voted to withdraw from the Rome Statute. It has also drafted the International Crimes (Repeal) Bill to repeal the ICA.[28] Kenya is, nonetheless, yet to file its notice of withdrawal from the ICC.[29]

4 The International Crimes Act

The ICA was enacted for two purposes: First, to enable the punishment of the crimes of genocide, crimes against humanity, and war crimes in Kenyan courts, and, second, to facilitate cooperation with the ICC. Part II provides for international crimes and offences against the administration of justice. The ICA provides for genocide, crimes against humanity, and war crimes as offences punishable in Kenya and also recognises conspiracy, attempts, accessory after the fact, and counselling to commit the aforementioned crimes as offences.[30]

The method used to incorporate the international crimes is by reference to the Rome Statute. The meaning ascribed to crimes against humanity, genocide, and war crimes is as provided in the Rome Statute.[31] The only modification is in respect of the crime against humanity, to which has been added other acts that may be defined as crimes against humanity in an international convention or under customary international law that are not dealt with in the Rome Statute.[32] This ensures that there are no gaps in relation to the Rome Statute and the Kenyan domestic criminal jurisdiction facilitating Kenya's ability to effectively prosecute the international crimes recognised in the Rome Statute, thus satisfying its complementarity obligations at least in respect to the law.

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26 Okoth J, 'Africa, the United Nations Security Council and the International Criminal Court: The question of deferrals' in Werle G et al, *Africa and the International Criminal Court,* 204-205.

27 See interview on 13 July 2016 of Fatou Bensouda, Prosecutor of the ICC carried out by Journalists for Justice 'Why Kenyan cases at the ICC collapsed' www.jfjustice.net on 13 November 2017; Dutton YM, 'Enforcing the Rome Statute: Evidence of (non) compliance from Kenya', 26 *Indiana International and Comparative Law Review*, 1(2016), 28.

28 The International Crimes (Repeal) Bill, National Assembly Bills No 61, 23 October 2015.

29 Article 127, *Rome Statute* provides the procedure to withdraw, which requires a notice of withdrawal to be written to the Secretary General of the UN and such withdrawal takes effect one year from date of receipt of the notification.

30 Section 6 (1) (2), *International Crimes Act.*

31 Section 6 (4), *International Crimes Act.*

32 Section 6(4), *International Crimes Act.*

If Kenya should proceed to repeal the ICA and withdraw from the Rome Statute, it would make it difficult for the crimes to be prosecuted in the national courts. However, it may be argued that by virtue of the Constitution of Kenya[33], the crimes as provided for in the international conventions that Kenya has ratified or those that have crystallised into customary international law may be directly applicable. The challenge that could arise from the aforementioned option is a lack of clarity concerning the definitions of crimes. This makes the Malabo Protocol the next most plausible option for accountability, should Kenya proceed with its ratification.

5 Constitutional Issues and Options for Implementation

To critically evaluate Kenya's options for incorporating the Malabo Protocol, it is important to look at its constitutional framework and the options available for implementing the Malabo Protocol. This facilitates the discussion on what aspects of its law, if any, Kenya should amend or adopt in the incorporation of the Malabo Protocol and what legal hurdles must be overcome.

Article 2(5) of the 2010 Constitution provides that general rules of international law form part of the laws of Kenya, while Article 2(6) stipulates that any treaty ratified by Kenya shall form part of its national law. Although considered an ambiguous expression, the term 'general rules of international law'[34] is considered to include customary international law.[35] The question that then needs to be answered is whether, in light of these provisions, crimes prohibited in international conventions can be directly prosecuted under Kenyan domestic law. On the face of it, the 2010 Constitution gives the impression that once Kenya ratifies the Malabo Protocol the crimes in it are directly punishable in Kenyan domestic courts, thereby dispensing with the need to enact an implementation statute or amend other laws to incorporate such crimes.[36]

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33 Article 2, *Constitution of Kenya* (2010).

34 Olouch EA, 'Incorporating transnational norms in the Constitution of Kenya: The place of international law in the legal system of Kenya' 11 *International Journal of Humanities and Social Sciences*, 3 (2013), 266, 267; Oduor M, 'Status of international law in Kenya' 2 *African Nazarene University Law Journal,* 2 (2014), 104.

35 Mbondenyi M and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, Law Africa publishers, Nairobi, 2012, 24; Oduor M, 'Status of international law in Kenya', 107, 108; Lumumba PLO and Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014, 72.

36 While this might hold true in respect to self-executing treaties a difficulty would arise if the treaty' s character is such that it is not self-executing, See Kabau T and Ambani J, 'The constitution and the application of international law in Kenya, 43-44.

There are several ways by which Kenya may choose to implement the Malabo Protocol should it proceed to ratify it. It may opt to incorporate it through the direct application of customary international law by virtue of the 2010 Constitution without implementing legislation.[37] It would be difficult in this case to incorporate crimes that have not crystallised into customary international law. This argument may be countered by article 2(6) of the 2010 Constitution, which makes ratified conventions part of the laws of Kenya. Thus, the Malabo Protocol, once ratified, would automatically apply in the Kenyan jurisdiction directly.[38] The direct application of crimes in this manner becomes a challenge where crimes or norms in the applicable conventions conflict with certain principles under the 2010 Constitution and the domestic legal system. To this extent, the 2010 Constitution provides that any law that is inconsistent with it is void to the extent of its inconsistency.[39]

Kenya could also choose to enact legislation for purposes of incorporating the Malabo Protocol. Such legislation may make direct reference to the provisions of the Malabo Protocol or adopt the definitions of the crimes *verbatim,*[40] as the ICA did. In respect to some norms, this might require modification of the definition of crimes for purposes of ensuring conformity or compatibility with domestic legal principles. Another option would be not to incorporate the Malabo Protocol at all, but instead rely on ordinary criminal law to cover the crimes provided for in the Malabo Protocol.[41] This would create a problem in instances where the crimes under domestic law do not sufficiently cover the conduct prohibited in the Protocol, thus creating a gap of criminalisation. This option might require amendment of domestic law to sufficiently incorporate the crimes in the Protocol. A review of the various crimes under the Malabo Protocol in comparison with existing provisions under Kenya's domestic criminal law will help guide the debate on what ratification of the Malabo Protocol would imply for purposes of incorporation.

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37 Werle and Jessberger, *Principles of international criminal law*, 146.

38 Article 2(6), *Constitution of Kenya* (2010). Although there is discord among scholars on whether the new constitutional dispensation has transitioned Kenya into a monist state, the current practice of ratification of treaties under the *Treaty Making and Ratification Act* which requires affirmation from the Legislature and public participation gives credence to the monist position. It effectively means that any treaty ratified by Kenya henceforth becomes part of Kenyan law. See also Lumumba PLO and Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, 72-74. See Kabau T and Ambani J, 'The constitution and the application of international law in Kenya, Nyarango AO, 'A jigsaw puzzle or a map? The role of treaties under Kenya's constitution' 62 *Journal of African Law*, 1 (2018).

39 Article 2(4), *Constitution of Kenya* (2010).

40 Werle and Jessberger, *Principles of international criminal law*, 147.

41 Werle and Jessberger, *Principles of international criminal law*, 147.

6 The Malabo option

Apart from the core international crimes, the Malabo Protocol introduces the transnational crimes of piracy, terrorism, corruption, money laundering, trafficking in persons, trafficking in drugs, and other unconventional crimes of unconstitutional change of government, mercenarism, trafficking in hazardous wastes, and illicit exploitation of natural resources. It is crucial to interrogate how Kenya will incorporate the vast number of crimes in the Malabo Protocol without violating the principle of legality and other fundamental domestic legal principles while also ensuring it adequately covers the conduct proscribed in the protocol.

The principle of legality dictates that one can only be punished for conduct that was already proscribed as criminal prior to its commission.[42] It requires that both the conduct that is prohibited and the punishment ascribed to it should be clearly defined and prohibits an extension of crimes by analogy. This principle has been a major (but necessary) hindrance to the development of international crimes.[43] States are often reluctant to endorse the criminalisation of certain conduct at the international level until they have clearly understood its nature. Thus, while it may be argued that the core crimes of genocide, crimes against humanity, war crimes, and the crime of aggression have been established under customary international law, there is reluctance for such acknowledgement in the case of other international crimes classified as treaty-based crimes. In the case of treaty-based crimes, member states may be under an obligation to criminalise certain conduct. However, such obligation is often made subject to the domestic legal system of individual states. Often the descriptions of conduct requiring criminalisation are broad and individual states then adopt definitions that are compatible with their domestic legal system.[44]

The 2010 Constitution prohibits conviction for an act or omission that was not an offence in Kenya or a crime under international law at the time of commission.[45] Kenyan courts have articulated the parameters of the principle of legality to include the need for offences to be written in a manner that gives sufficient warning regarding prohibited forms of conduct.[46] Any law criminalising certain conduct needs to be

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42 Baker DJ, *Glanville Williams, text book of criminal law*, 3ed, Sweet & Maxwell, London, 88; Ashworth A, *Principles of criminal law*, 6ed, Oxford University Press, Oxford, 57-72, he sets out three aspects of the principle of legality; non-retroactivity, maximum certainty and strict construction.

43 See Werle and Jessberger, *Principles of international criminal law*, 45-46.

44 Boister, *An introduction to transnational criminal law*, 15.

45 Article 50(2n), *Constitution of Kenya* (2010).

46 See *Geoffrey Andare v Attorney General and Others* [2016] eKLR, 79, 80; *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others* [2015] eKLR, 260, 275.

clear and precise to enable individuals to conform to it, and the words used should not be vague so that their meaning will depend on a subjective interpretation of the judicial officer dealing with the matter.[47]

By virtue of the ICA, the traditional crimes of genocide, crimes against humanity, and war crimes can be prosecuted in the Kenyan courts. Adopting the Malabo Protocol brings to the fore more crimes that are likely to fall within the jurisdiction of Kenyan courts if not already recognised within the domestic law.

6.1 The core international crimes

The Malabo Protocol reflects the Rome Statute with respect to the crimes of genocide, crimes against humanity, and war crimes albeit with some deviations. While maintaining the substance of the crimes as reflected in the Rome Statute, there is further clarification of the crimes reflecting developments in international law, but in some instances the addition only serves to create uncertainty on the particulars of the crimes.

The crime of genocide in the Malabo Protocol reflects the Rome Statute definition proscribing certain conduct aimed at the destruction in whole or in part of a national, ethnic, racial, or religious group. While recognising the traditionally prohibited conduct of killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about the groups' physical destruction, imposing measures intended to prevent birth and forcibly transferring children of the group to another, it also includes 'acts of rape or any other form of sexual violence'.[48] In this case, it specifically acknowledges or reflects the findings of the *ad hoc* tribunals that such conduct may represent a means of perpetrating genocide, but classifying it as serious bodily or mental harm[49] or imposing measures to prevent birth.[50] Since the ICA already recognises the Rome Statute definition of genocide, the Malabo option would only be introducing the new aspect of rape or sexual violence. The ICA would satisfactorily punish such conduct without particular need for amendment as has previously been done by *ad hoc* tribunals.[51] The crime of

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47 See Kenya Training Manual on Human Rights and Criminal Justice Responses to Terrorism (UNODC), 42-43.

48 Article 28B, *Malabo Protocol*.

49 *Prosecutor v Seromba (Judgment)*, ICTR-2001-66-A, 12 March 2008, 46; *Prosecutor v Akayesu* (Judgment), ICTR-96-4-T, 2 September 1998, 706, 731.

50 *Prosecutor v Akayesu* (Judgment), p 507, 508; *Prosecutor v Karadzic and Mladic*, ICTY, Trial Chamber, Decision of 11 July 1996, 94.

51 *Prosecutor v Karadzic and Mladic*. It has been argued that though this development is only marginal

genocide as provided for in the Malabo Protocol reflects in essence the crime under customary international law. Its application by virtue of the 2010 Constitution may still stand even with the repeal of the ICA.

The crime against humanity in Article 28C of the Malabo Protocol prohibits certain criminal conduct carried out as part of a 'widespread or systematic attack or enterprise directed against any civilian population, with knowledge of such attack or enterprise'. While the definition is generally identical to that in the Rome Statute, there is the addition of the term 'enterprise'. The term usually denotes a bold or complex project or undertaking.[52] It is often associated with companies. How this term adds to the definition of crimes against humanity is questionable. It will be interesting to see how the proposed ACJHR will interpret it in future. It is likely that the term 'systematic', which requires some degree of organisation and planning in the attacks carried out against the civilian population, already covers the aspect intended by the term enterprise.[53] With this in mind, the term is likely only to cause confusion in the interpretation and prosecution of the crime as well as violating the principle of legality. Apart from adopting the definition of crimes against humanity as recognised in the Rome Statute, the ICA also includes 'crime against humanity in conventional international law that is not otherwise dealt with in the Rome Statute'.[54] This definition is wide enough to accommodate the crime as provided for in the Malabo Protocol, hence there is no need for another incorporating law.

War crimes are provided for in Article 28D of the Malabo Protocol. Just as in the Rome Statute, such crimes are punishable 'when committed as part of a plan or policy or as part of large-scale commission of such crimes'. The crime largely reflects the definition in the Rome Statute with some additional 14 offences. Key among the additions is the prohibition of the use of nuclear weapons[55]; others are: intentionally launching an attack against works of installations containing dangerous forces knowing it would cause excessive loss of life, injury and destruction of civilian objects; employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering;

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it performs an essential declaratory purpose of 'explicitly naming and shaming' a phenomenon that is present in many African conflicts, see Jalloh C, 'The nature of the crimes in the African Criminal Court' 15 *Journal of International Criminal Justice*, 4 (2017), 816.

52 See: http://en.oxforddictionaries.com on 5 July 2018.

53 Ambos K, 'Genocide (Article 28B), crimes against humanity (Article 28C), war crimes (Article 28D) and the crime of aggression (Article 28M)' in Werle G and Vormbaum M (eds), *The African Criminal Court, a commentary on the Malabo Protocol*, Asser Press, 2017, 41.

54 Section 8, *International Crimes Act.*

55 Article 28B (g), *Malabo Protocol.*

unjustifiably delaying the repatriation of prisoners of war; wilfully committing practices of apartheid; attacking non-defended and demilitarised localities; slavery; collective punishments; and despoliation of wounded, sick, shipwrecked or dead.[56] The listed war crimes apply both in respect to armed conflict of an international and non-international nature. In addition, in the case of armed conflict of a non-international nature, conscripting of children under the age of 18 is an offence that has been extended to the groups involved in the armed conflict and not only armed forces.[57] Incorporating the Malabo Protocol would mean that the number of offences punishable as war crimes would increase and be applicable regardless of the nature of the armed conflict. Thus, war crimes as recognised under the ICA do not suffice to wholly capture the conducts proscribed in the Malabo Protocol, thereby creating the need for amendments.

Although the crime of aggression is provided for in the Rome Statute, it was not included in the ICA. This was very likely influenced by the fact that the elements of the crime of aggression were yet to be agreed upon by state parties to the Rome Statute. An amendment of the Rome Statute in 2010 has now clarified the elements of the crime, but is yet to come into force.[58] The crime is nonetheless legislated in the Malabo Protocol. Its ratification would mean that Kenya could potentially exercise its jurisdiction over such a crime. The crime of aggression in the Malabo Protocol is defined as:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organisation, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union in regard to the territorial integrity and human security of the population of a state party.[59]

The Malabo Protocol - while maintaining that aggression is a leadership crime - departs from customary international law by extending the crime to cover other persons apart from those acting on behalf of states. The requirement that an act of aggression may also constitute a manifest violation of the 'Constitutive Act of the African Union' widens the scope of the crime beyond acts that violate the United Nations Charter as provided in the Rome Statute. This extension only serves to increase legal uncertainty regarding the elements of the crime, causing further

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56 Article 28D (b), *Malabo Protocol.*

57 Article 28D (e) vi, *Malabo Protocol.*

58 Article 8*, Rome Statute*. Kenya is not among the state parties that have ratified the same.

59 Article 28M, *Malabo Protocol*.

problems regarding the principle of legality. It suffices to note that, despite the amendment of the Rome Statute with respect to the crime of aggression, Kenya is yet to sign or ratify it. At this stage, it is not clear whether Kenya's reluctance to ratify is a matter of principle or a political decision. Having signed the Malabo Protocol, one could only suppose that it has no problem with particulars of the crime as constituted, despite the instances of uncertainty or ambiguity. To punish aggression, Kenya would need to consider enacting a new law specifically for purposes of incorporating the Malabo Protocol or to amend either its Penal Code[60] or the ICA to include the crime. To amend the ICA would imply expanding its reach beyond that of the Rome Statute to include the Malabo Protocol.

The core international crimes as proscribed in the Malabo Protocol largely reflect customary international law and the definition in the Rome Statute. If Kenya should proceed with the ratification of the Malabo Protocol, incorporation of the core international crimes would not be difficult since most of the crimes are already provided for in the ICA. Nonetheless, Kenya would need to decide on the best way forward to incorporate the additional aspects of war crimes and the crime of aggression, which are not presently recognised by Kenyan statutes.

6.2 Transnational crimes

The inclusion of transnational crimes and other crimes of regional and international concern raises questions over the extent to which such crimes would be applicable under Kenya's domestic criminal jurisdiction. In particular, if it seems that some of the crimes are yet to be recognised under Kenyan law, and even if already punishable within the Kenyan jurisdiction, the crimes in the Malabo Protocol could introduce new elements that radically transform the nature of crimes as currently provided for. It is important for Kenya to interrogate the nature of crimes provided for within the Malabo Protocol, as well as the extent to which they are compatible with crimes presently recognised under its domestic criminal law. Also, in case of conflict between the Malabo Protocol and Kenyan law, it is necessary to consider the implications should Kenya choose to ratify the Malabo Protocol. In the sub-sections that follow, I identify some of the most pertinent issues for consideration from a domestic criminal law perspective.

60 *Penal Code* (Act No. 81 of 1948).

6.2.1 Unconstitutional change of government

The Malabo Protocol criminalises certain acts done with the aim of illegally accessing or maintaining power.[61] Among the acts are included: a coup d'état against a democratically elected government, an intervention by mercenaries to replace a democratically elected government, any replacement of democratically elected government by using armed dissidents, refusal by an incumbent government to relinquish power to the winning party of a credible election, amendment of the constitution or legal instruments which is an infringement of principles of democracy or inconsistent with the constitution and any substantial modification to the electoral laws in the last six months before elections without a majority of the political actors.

This is a new crime, the purpose of which is ostensibly to protect a legitimately and democratically elected government and to entrench democratic systems in Africa.[62] Overthrowing a democratically elected government might be covered in the Penal Code under the offence of treason. Under section 40 of the Penal Code, one who deposes the President by unlawful means or overthrows the Government by unlawful means is guilty of the offence of treason. What the crime lacks is that it does not seek to protect a democratically elected government directly. It may be argued that by virtue of the system of governance established under the 2010 Constitution, the implication is that the Penal Code refers by analogy to a democratically elected government. If Kenya ratifies the Malabo Protocol, it might consider adding the words 'democratically elected president or government' to the respective sections of the Penal Code for purposes of clarity.

The crime of treason does not, however, cover all aspects of the crime of unconstitutional change of government. The Malabo Protocol's prohibition of the amendment or revision of the constitution or legal instruments, which infringe on the principles of democratic change of government or the substantial modification of electoral laws six months prior to elections without the consent of majority of political actors, is not covered by the offence of treason.[63] Ratification of the Malabo Protocol would mean its introduction into the domestic law of Kenya by virtue of

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61 Article 28E, *Malabo Protocol*.

62 See Kemp G and Kinyunyu S, 'The crime of unconstitutional change of government (Article 28 E)' in Werle and Vormbaum (eds), *The African Criminal Court, A commentary on the Malabo Protocol*, 60, arguing that the underlying protected interests are preservation of democracy and political stability. See also Van Der Wilt H, 'Unconstitutional change of government: A new crime within the jurisdiction of the African Criminal Court' 30 *Leiden Journal of International Law*, 4 (2017), 973.

63 Article 28E 1(e) (f), *Malabo Protocol.*

the 2010 Constitution. Alternatively, there might be a need to amend the Penal Code's offence of treason to reflect the Malabo Protocol's crime of unconstitutional change of government. Given the recent happenings in the political landscape of Kenya, the criminalisation of the modification of electoral laws in the six months prior to elections without consent of the majority of political actors might prove to be a useful tool. The annulment of the presidential elections carried out on 8 August 2017[64] triggered the introduction of the 'Election Laws (Amendment) Bill 2017' with the intention of circumventing the legal requirements which the Supreme Court found to have not been met in the course of conducting the elections.[65] The Election Laws (Amendment) Bill has since become law[66] and its purpose was with respect to the presidential elections that were held on 26 October 2017, thereby clearly offending the requirements of the Malabo Protocol.[67] The conduct of amending the electoral laws also violates Article 18 of the 1969 Vienna Convention on the Law of Treaties,[68] which obliges states to refrain from acts that would defeat the object and purpose of a treaty once they have signed it. In light of the above, one may question whether Kenya genuinely intends to ratify the Malabo Protocol.

6.2.2 Piracy

The Malabo Protocol prohibits illegal acts of violence or detention, any act of depredation, committed for private ends by the crew or passengers of a private boat, ship or aircraft and directed against such similar vessels or against persons or property on board such vessels.[69] Such an attack must occur on the high seas or in a place outside the jurisdiction of any state. The drafters of the Malabo Protocol must have intended to provide the proposed ACJHR with jurisdiction in areas that domestic jurisdiction may not apply to, or have difficulty with respect to prosecution.

The definition of piracy under Kenya's Merchant Shipping Act[70] is similar to that of the Malabo Protocol, describing it as any act of violence or detention, or any act of depredation committed for private ends by the crew or passengers

64 *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, Petition 1 of 2017.

65 See 'An Advisory Opinion on the Proposed Election Laws (Amendment) Bill, 2017' presented to: The National Assembly, Kenya National Commission on Human Rights.

66 *Election Laws (Amendment)* (Act No. 1 of 2017).

67 Certain sections of this law have since been declared unconstitutional, see *Katiba Institute & 3 others v AG & 2 Others* [2018] eKLR.

68 23 May 1969, 1155 UNTS 331.

69 Article 28 F, *Malabo Protocol*.

70 *Merchant Shipping Act* (Act No. 4 of 2009).

of a private ship or aircraft, and directed against another ship or aircraft or against persons or property on board such a vessel.[71] It may also be carried out against a boat, ship, aircraft, persons, or property outside the jurisdiction of any state. Piracy is punishable by life imprisonment.[72] Thus, the crime of piracy in the Malabo Protocol is satisfactorily covered by ordinary criminal law under Kenyan domestic jurisdiction by virtue of the Merchant Shipping Act. An adoption of the Malabo Protocol might perhaps mean an extension of the Kenyan courts' jurisdiction to apply even in respect of piracy on the high seas, although it is arguable that the jurisdiction in the Merchant Shipping Act could also be extended to cover this situation.

6.2.3 Terrorism

Any act that violates the criminal laws of a state party, the laws of the AU, or a regional economic community recognised by the AU or by international law, which may endanger life, physical integrity or freedom or cause serious physical injury or death or cause damage to public or private property, natural resources, environmental or cultural heritage is considered terrorism. Such act must be done with intention to intimidate or coerce a government, an institution, the general public or a segment thereof to do or abstain from doing any act, or to disrupt public service or delivery of any essential service to the public or create a public emergency, or create general insurrection.[73] It also proscribes inchoate and participatory liability in relation to the aforementioned acts.[74]

One of the challenges with criminalising terrorism, especially at an international level, is that states have not quite agreed on its definition.[75] The Malabo Protocol does not provide clarity on the crime either. It gives a broad indication of conduct that could constitute terrorism, including any act that is a violation of criminal laws of the various state parties. This creates the potential for conflict with the legality principle. One wonders if the Malabo Protocol contemplates the inclusion of the various definitions of terrorism within the criminal laws of state parties or generally

71 Section 369, *Merchant Shipping Act*.

72 Section 371, *Merchant Shipping Act*.

73 Article 28 G, *Malabo Protocol*.

74 Article 28 G(B), *Malabo Protocol.*

75 Boister, *An introduction to transnational criminal law*, 63; Aksenova M, 'Conceptualising terrorism: International offence or domestic governance tool?' 20 *Journal of Conflict and Security Law,* 2 (2015), 278; Jessberger F, 'Piracy (Article 28 F), terrorism (Article 28 G), mercenarism (Article 28 H)' in Werle and Vormbaum (eds), *The African Criminal Court, A commentary on the Malabo Protocol*, 79.

refers to any act violating the criminal laws of states. This uncertainty is likely to complicate its incorporation within domestic jurisdictions. The act of terrorism under the Prevention of Terrorism Act[76] generally reflects crime contemplated in the Malabo Protocol, but without alluding to the violation of the laws of the AU and other regional economic bodies. A terrorist act is defined as an act or threat of action involving, among others, the use of violence against a person, which endangers the life of a person, creates a serious risk to the health or safety of the public, results in serious damage of property, involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent, or toxin in the environment, interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services.[77] Such an act shall be carried out with the aim of intimidating or causing fear amongst members of the public or compelling the government or international organisation to do or refrain from doing an act or destabilising the religious, political or social institutions of a country. Kenya could choose to restrict itself to the conduct of terrorism proscribed under its Prevention of Terrorism Act. This would avoid conflict with the principle of legality while still being able to punish conduct generally considered as terrorism under the Malabo Protocol, thus meeting its complementarity obligations.

6.2.4 Corruption

Article 281 of the Malabo Protocol proscribes acts of corruption 'if they are of a serious nature affecting the stability of a state, region or the Union'. This represents a threshold requirement for the crime of corruption. But how does one measure conduct that is serious enough to affect the stability of a state? It would probably be captured in the concept of grand corruption.[78] Grand corruption refers to cases where senior government officials acquire massive wealth through corrupt means.[79] Its key features are the large amount of wealth acquired through corrupt means and the seniority of officials involved. No particular threshold has been advanced for the amount of wealth involved; it would need to be on a scale that can threaten the

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76 *Prevention of Terrorism Act* (Act No. 30 of 2012).

77 Section 2, *Prevention of Terrorism Act*.

78 See Fernandez LD, 'Corruption (Article 28I) and money laundering (Article 28I*bis*)' in Werle and Vormbaum (eds), *The African Criminal Court, A commentary on the Malabo Protocol*, 92.

79 McNae J, 'Chapter one: Policy and jurisdiction issues' 4 *Journal of Money Laundering Control,* 2 (2000), 108; Simser J, 'Asset recovery and kleptocracy' 17 *Journal of Financial Crime*, 3 (2010), 321-323.

economic development and stability of the country.[80] The proposed ACJHR will have the discretion to determine the criteria to use concerning the threshold.

The Malabo Protocol proscribes the demand side of bribery or passive bribery which involves the solicitation or acceptance by a public officer of any goods of monetary value or other benefit in exchange for any act or omission in performance of their public function.[81] A family member or other person on behalf of the public officer may accept such benefit. The Malabo Protocol also proscribes active bribery where a public official is offered any goods of monetary value or other benefit in exchange for any act or omission in the performance of their public function.[82] Other forms of corruption include; failing to carry out a duty by a public official for purposes of illicitly obtaining a benefit,[83] diverting public property for purposes unrelated to those for which it was intended for the benefit of the public official in charge of it,[84] active and passive bribery in the private sector[85] as well as dealing in undue influence,[86] illicit enrichment[87] and the use or concealment of proceeds derived from corrupt conduct are also proscribed.[88]

Most of the conduct punishable as corruption under the Malabo Protocol is also proscribed under various Kenyan laws. In particular, the Anti-Corruption and Economic Crimes Act,[89] which in Part V proscribes various corruption offences including the offence of soliciting or accepting a benefit by a public officer to influence a tender process,[90] the crime of fraudulently misusing or acquiring public property,[91] and using one's office to confer a benefit to oneself.[92] The giving and receiving of bribes is prohibited under the Bribery Act, 2016.[93] This also applies in the case of private entities.[94] The threshold clause in the Malabo Protocol requiring only the most serious of this conduct affecting the stability of the state to

80 McNae J, 'Chapter one: Policy and jurisdiction issues', 108.
81 Article 28I I (a), *Malabo Protocol*.
82 Article 28I I (b), *Malabo Protocol.*
83 Article 28I I (c), *Malabo Protocol.*
84 Article 28I I (d), *Malabo Protocol*.
85 Article 28i I (e), *Malabo Protocol.*
86 Article 28 I (f), *Malabo Protocol.*
87 Article 28 I (g), *Malabo Protocol.*
88 Article 28 I (h), *Malabo Protocol.*
89 *Anti-Corruption and Economic Crimes Act* (Act No. 3 of 2003).
90 Section 44, *Anti-Corruption and Economic Crimes Act*.
91 Section 45, *Anti-Corruption and Economic Crimes Act.*
92 Section 46, *Anti-Corruption and Economic Crimes Act*.
93 Sections 5 and 6, *Bribery Act* (Act No. 47 of 2016).
94 Section 16, *Bribery Act*.

be punishable before the proposed ACJHR does not exist within Kenyan domestic criminal jurisdiction.

Another notable aspect of the Malabo Protocol is the inclusion of illicit enrichment, which does not feature under Kenyan law. The Malabo Protocol defines illicit enrichment as 'the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income'.[95] The definition includes other persons apart from public officers, thus extending the group to which it applies. The Public Officers Ethics Act (POEA)[96] has provisions that closely reflect the illicit enrichment offence. Under its Code of Ethics, a public officer is not to use his office to improperly enrich himself/herself or others.[97] It further clarifies that such an officer shall not, except as otherwise stipulated, accept or request a gift or favour from a person who has interests likely to be affected by such public officer in carrying out his or her duties or from a person who carries out regulated activities or has contractual dealings with the organisation in which the public officer has a role.[98] The officer is also prohibited from improperly using such public office to acquire land or other property for personal gain or using information from such an office for personal benefit.[99]

By virtue of the Public Officer Ethics Act,[100] public officials are required to submit every 2 years to the commission responsible for such officer a declaration of their wealth, assets, and liabilities, including those of their spouses and children over 18 years old.[101] Failure to file such declaration or the filling of such declaration with information that is known to be false or misleading is an offence.[102] Punishment provided for this offence is a fine not exceeding one million shillings or one-year imprisonment or both. In the case of a suspected breach of the Code of Ethics, the appropriate commission investigates the particular officer and should the contravention be confirmed appropriate disciplinary measures[103] are to be taken or the individual is to be referred to the appropriate authority to consider civil or criminal proceedings.[104] The offence herein is thus not illicit enrichment but one

95 Article 28I (2), *Malabo Protocol*.
96 *Public Officers Ethics Act* (Act No. 4 of 2003).
97 Section 11, *The Public Officers Ethics Act*.
98 Section 11 2(a), *The Public Officers Ethics Act*.
99 Section 11 2(b), *The Public Officers Ethics Act*.
100 Chapter 183, Laws of Kenya.
101 Section 26, *Public Officer Ethics Act.*
102 Section 32, *Public Officer Ethics Act.*
103 Section 37(2) (c), *Public Officer Ethics Act.*
104 Section 37, *Public Officer Ethics Act.*

of non-compliance with income and asset disclosure. The only other recourse is that, if the declarations raise the suspicion of an offence having been committed, the matter can be forwarded to other investigative authorities that may then carry out criminal proceedings on account of other offences. Such suspicion is likely to arise if, for example, there is a significant increase of wealth of an official since their coming into office, which cannot be explained in light of their income from the public office.

The challenge that incorporation of the crime of illicit enrichment is likely to have within the Kenyan jurisdiction is the legal hurdles as regards the principle of presumption of innocence[105] and the right against self-incrimination.[106] The shifting of the burden to the accused person to show that the suspicious wealth was acquired through legitimate means offends the principle of presumption of innocence, and the requirement of having to provide evidence to rebut the presumption of illegally acquired wealth is likely to expose the accused to a situation where they might disclose self-incriminating information.[107] To overcome the hurdle posed by these rights it is often advanced that the rights are not absolute and that public interest in the fight against corruption may justify certain exceptions. The courts have acknowledged that 'constitutionally guaranteed rights should not be limited except where the limitation is reasonable, justifiable and the objective of that limitation is intended to serve society'.[108] The argument that the qualification of the right against self-incrimination and the presumption of innocence are justified when weighted against public interest has mainly been advanced where the offence of illicit enrichment is restricted to public officials.[109] By holding positions of trust public officials undertake to give up some privileges or at least to have them constrained for purposes of the public good. Whether this can be justified for persons who are not public officials as provided for in the Malabo Protocol is likely to raise a challenge.

A decision to introduce the offence of illicit enrichment in the Kenyan statutes would mean introducing a limitation to the rights of presumption of innocence and against self-incrimination. This may be justified in the case of public officers who hold office in public trust,[110] but difficult to advance for 'any other person'[111].

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105 Article 50 2(a), *Constitution of Kenya.*

106 Article 50 2(l), *Constitution of Kenya.*

107 See *Robert Alai v The Hon Attorney General & Another* [2017] eKLR, 41, 42.

108 *Robert Alai v The Hon Attorney General & Another,* 50.

109 Muzila L, Morales M, Mathias M and Berger T, *On the take: Criminalizing illicit enrichment to fight corruption* (The World Bank UNODC 2012), 38.

110 See Article 73, *Constitution of Kenya.*

111 Article 28I (2), *Malabo Protocol.*

Maintaining the wealth declaration requirements in the Public Officers Ethics Act may be a less restrictive means of meeting the objectives underlying the illicit enrichment offence but would not satisfy the complementarity gap resulting from Kenya not being in a position to prosecute all the crimes within the Malabo Protocol.

6.2.5 Money laundering, trafficking in persons, and trafficking in drugs

Under the Malabo Protocol, the conversion, transfer or disposal of property knowing that such property is the proceed of corruption or related offences for purposes of concealing the illicit origin of such property or helping someone involved in the commission of the offence to evade legal consequences is punishable as money laundering.[112] The offence also includes concealment, possession, acquisition or use of such property.[113] Malabo Protocol also proscribes inchoate forms of money laundering; conspiracy, attempts, and other levels of participation that is aiding, abetting, facilitating, and counselling.[114]

Money laundering is punishable in Kenya, but unlike the Malabo Protocol, which restricts the predicate offence to corruption and related offences, any crime under Kenyan law suffices as a predicate offence. Section 3 of the Proceeds of Crime and Anti-Money Laundering Act[115] makes it an offence for any person who knows or ought reasonably to have known that property is or forms part of the proceeds of crime, to be involved in concealing or disguising such illicit derivation or to acquire or possess such property or assist an offender to evade justice. This definition closely reflects the one in the Malabo Protocol, which means a ratification of the Malabo Protocol would have no effect on the conduct currently punishable as money laundering. The mental element requirement in the Malabo Protocol for the offence of money laundering is knowledge; under Kenyan law both knowledge and wilful blindness[116] (i.e. the defendant ought to have reasonably known) forms part of the mental element. The mental element scope of the Proceeds of Crime and Anti-Money Laundering Act is therefore more extensive than that of the Malabo protocol providing for the possibility of inadvertent money laundering. The ordinary criminal law in this instance would suffice for purposes of incorporation.

Article 28J of the Malabo Protocol prohibits trafficking in persons which is

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112 Article 28I Bis (i), *Malabo Protocol*.

113 Article 28I Bis (ii) (iii), *Malabo Protocol.*

114 Article 28I Bis (iv), *Malabo Protocol.*

115 *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009).

116 On the nature of wilful blindness see Omerod D, *Smith and Hogan's criminal law*, 13ed, Oxford University Press, Oxford, 130-132.

defined as:

> [...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[117]

Exploitation includes prostitution or other forms of sexual exploitation, forced labour, slavery or similar practices, servitude or the removal of organs. Kenya's Counter-Trafficking in Persons Act[118] provides for a similar offence, thus sufficiently covering the conduct prohibited by the Malabo Protocol.[119]

In regard to trafficking in drugs, the Narcotic Drugs and Psychotropic Substances (Control) Act[120] proscribes the production, offering for sale, distribution, transportation, importation or exportation of drugs, the cultivation of opium poppy, coca bush or cannabis plant, possession or purchase of drugs with a view to carrying out any of the above-stated conduct, and also prohibits the manufacture, transport of precursors knowing they are to be used in or for the illicit production or manufacture of drugs.[121] The Malabo Protocol excludes punishment of perpetrators who may carry out the above prohibited conduct for their own personal consumption.[122] In other words, the Malabo Protocol only punishes possession for purposes of distribution, reflecting the reluctance of some states to consider possession for use as a serious crime.[123] Conduct proscribed as drug trafficking under Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act is similar to that of the Malabo Protocol, save that unlike the Malabo Protocol, Kenya also punishes possession for purposes of personal use.[124] Thus, ordinary criminal law provisions would suffice for purposes of incorporating the Malabo Protocol in this case. In fact, the Malabo Protocol might just influence Kenya to consider the decriminalisation of possession for personal use given the controversy surrounding criminalisation of such conduct and instead to pursue alternative ways of dealing with such persons.[125]

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117 Article 28J 1, *Malabo Protocol*.

118 *Counter-Trafficking in Persons Act* (Act No. 8 of 2010).

119 Section 3, *Counter-Trafficking in Persons Act.*

120 *Narcotic Drugs and Psychotropic Substances (Control)* Act (Act No. 4 of 1994).

121 Article 28K 1, *Malabo Protocol*.

122 Article 28 K 2, *Malabo Protocol*.

123 Boister, *An introduction to transnational criminal law*, 58.

124 Section 4, *Narcotic Drugs and Psychotropic Substances (Control) Act.*

125 On alternative means of dealing with drug control, see 'Charting a wiser course: Human rights & world drug problem': A Report of the Special Committee on Drugs and the Law of the New York City Bar

6.2.6 Trafficking in hazardous wastes

The crime of trafficking in hazardous wastes under the Malabo Protocol proscribes any import, transboundary movement, or export of hazardous wastes prohibited by the Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Protocol).[126] Kenya signed the Bamako Protocol on 27 December 2003.[127] It is yet to ratify the Bamako Protocol. Should Kenya choose to ratify the Malabo Protocol, it would make the Bamako Protocol applicable in Kenya at least to the extent that it provides the foundation for the offence of trafficking in hazardous waste.

Kenya's law that comes closest to proscribing trafficking in hazardous waste is section 141 of the Environmental Management and Coordination Act,[128] (EMCA) which provides for offences relating to hazardous wastes, materials, chemicals, and radioactive substances. Such offences include: failing to manage any hazardous wastes contrary to the EMCA,[129] importing any hazardous waste and materials contrary to the EMCA,[130] and aiding or abetting illegal trafficking in hazardous waste, chemicals, toxic substances and pesticides or hazardous substances.[131] The National Environment Management Authority (NEMA) determines what qualifies as hazardous waste.[132] Perhaps in terms of incorporating the Malabo Protocol, NEMA would need to recognise and recommend the list of hazardous waste provided for in the Bamako Protocol, or the EMCA would need to be amended to include in its provision on hazardous waste a reference to the Bamako Protocol. The alternative argument would be that by virtue of the 2010 Constitution, if Kenya ratifies the Bamako Protocol, the list of hazardous waste could be considered part of the laws of Kenya, and would automatically form part of the list recognised by NEMA.

6.2.7 Illicit exploitation of natural resources

Association (New York City Bar April 19, 2016), 13-32.

126 Art 28L, *Malabo Protocol.*

127 Bamako Convention on the Ban of the Import into Africa and the Control of Trans Boundary Movement and Management of Hazardous Wastes within Africa, 1991 http://kenyalaw.org/treaties/treaties/24/Bamako-Convention-on-the-Ban-of-the-Import-into-Africa on 30 Oct 2017.

128 *Environmental Management and Coordination Act* (Act No. 8 of 1999).

129 Section 141 (a), *Environmental Management and Coordination Act.*

130 Section 141 (b), *Environmental Management and Coordination Act.*

131 Section 141 (e), *Environmental Management and Coordination Act.*

132 Section 91, *Environmental Management and Coordination Act.*

The Malabo Protocol considers the concluding of an agreement to exploit resources in violation of the people's sovereignty over their natural resources, or in violation of the legal and regulatory procedures of the state, or concluding such agreement through corrupt practices, or concluding such an agreement that is clearly one-sided, exploiting natural resources without any agreement with the state concerned, or exploiting natural resources without complying with norms relating to the protection of the environment and security of the people and staff and violating the norms and standards established by the relevant natural resource certification mechanism to amount to illicit exploitation of natural resources.[133] The proposed ACJHR will have jurisdiction over this crime if it is of a serious nature and affects the stability of a state, region or the AU.

The Mining Act[134] provides for a number of offences,[135] including prospecting or mining without authority in Kenya,[136] obstructing or interfering with any authorised mining under the Mining Act,[137] contravening regulations concerning rights and obligations under the Mining Act or in reference to a mining licence obtained under the Mining Act,[138] making false returns in respect of any information required under the Mining Act,[139] disposing, exporting or importing minerals in contravention of conditions in the Mining Act or a licence issued under the Mining Act[140]. The Mining Act recognises that such offences may also be committed by a body corporate[141] and, in addition, proscribes attempts, aiding and abetting of the above-mentioned offences.[142]

Under the Mining Act, mining interests may be granted subject to certain conditions, among them protection of mineral interests, protection of environment, community development and safety of prospecting and mining operations.[143] These conditions are reflected in the terms and conditions that a mining agreement should contain.[144] Any mining carried out without the requisite agreement and

133 Art 28L Bis, *Malabo Protocol*.
134 *The Mining Act* (Act No 12 of 2016).
135 See Section 202-213, *Mining Act*.
136 Section 202, *Mining Act.*
137 Section 204, *Mining Act.*
138 Section 207, *Mining Act.*
139 Section 206, *Mining Act.*
140 Section 210, *Mining Act.*
141 Section 212, *Mining Act.*
142 Section 213, *Mining Act.*
143 Section 42, *Mining Act.*
144 Section 117, *Mining Act.*

licence, which will include the above-mentioned conditions, is punishable. This sufficiently covers illicit exploitation of natural resources as proscribed by the Malabo Protocol. Unlike the Malabo Protocol, the gravity threshold does not apply to the offences under the Mining Act. Other offences under Kenyan law would also provide for satisfactory punishment for conduct relating to 'illicit exploitation of natural resources'. For example, the conclusion of an exploration agreement through corrupt means may be covered by offences prohibiting bribery while environmental offences may cover the exploitation of natural resources without complying with norms relating to the protection of the environment and security of the people.

7 Conclusion

Ratifying the Malabo Protocol will require some serious consideration by Kenya. Although most of the crimes provided for under the Malabo Protocol are already recognised under ordinary criminal law in Kenya, there is still some conduct that may need further reflection on the best means of incorporation.

While it may be argued that by virtue of the 2010 Constitution ratification of the Malabo Protocol would make it directly applicable within Kenyan jurisdiction, the nature of some of the crimes in the Malabo Protocol might lead to conflict with certain principles under the 2010 Constitution. This means that for purposes of incorporating offences like illicit enrichment, Kenya should contemplate the best way of proscribing such an offence without offending its constitutional principles. The option of directly applying the crimes by virtue of the 2010 Constitution could lead to possible conflict with the principle of legality, due to the uncertainty presented by certain nuances in the elements of crimes such as terrorism. Other offences like trafficking in hazardous wastes and unconstitutional change of government are not sufficiently catered for under ordinary criminal statutes. This creates a gap of criminalisation between Kenyan law and the Malabo Protocol, thus the need for Kenya to consider the best method of incorporation.

Regarding crimes under international law – genocide, crimes against humanity, and war crimes – these are already punishable under Kenyan jurisdiction by virtue of the ICA. However, since the Malabo Protocol introduces other aspects to these crimes, in particular in the case of war crimes as well as the crime of aggression, which are not provided for in the ICA, Kenya might need to consider other options of incorporation. It could consider amending the ICA to also make it an incorporating statute of the Malabo Protocol, or adopt a new set of legislation to

specifically incorporate the Malabo Protocol. The advantage of the latter position is that should Kenya seriously go through with its threats to withdraw from the Rome Statute and repeal the ICA, there will still be domestic legislation satisfactorily facilitating the prosecution of these crimes in Kenyan courts.

On the one hand, the option that Kenya adopts for purposes of incorporation must reflect the value system that the Malabo Protocol seeks to protect and enhance while also being reconcilable with its underlying legal principles in order to meet its complementarity obligations under the Malabo Protocol. On the other hand, a reflection on the challenges that the ratification of the Malabo Protocol is likely to present – specifically obligations regarding criminalisation of crimes that may pose a threat to the interests of the ruling class – may lead Kenya to rethink its position on whether it really wants to be a state-party to the Malabo Protocol.

Ratification of the Malabo Protocol would be a good move for Kenya to further support its fight against impunity. It would entrench Kenya's enforcement of other crimes of international concern in addition to the core international crimes. Once ratified, specific legislation for purposes of incorporating the Malabo Protocol would clarify the particular crimes and the extent of their application within Kenyan jurisdiction. To the extent that the crimes are already sufficiently covered under existing statutes, the incorporating legislation may refer to the respective statutes. The incorporating legislation would need to set out the conduct and fault elements of crimes that are not fully covered to comply with the Malabo Protocol.

AFRICA AND US ARTICLE 98 AGREEMENTS: A THREAT TO INTERNATIONAL CRIMINAL JUSTICE?

Gatambia Ndungu and Jeanne-Mari Retief

Abstract

Africa is the most representative continent in terms of support for the International Criminal Court (ICC). Despite recent withdrawals from the ICC, Africa still boasts 34 state parties to the Rome Statute of the ICC (Rome Statute), which have obligations and responsibilities in terms of the Rome Statute, one of which is to surrender perpetrators of crimes within the jurisdiction of the ICC to the court.

The United States (US), on the other hand, is not a signatory to the Rome Statute and, therefore, the ICC has no jurisdiction over it unless a state party refers a matter involving crimes committed by a US national on its territory to the ICC. This has, however, become a remote to vestigial possibility due to political liaisons and various Article 98 agreements signed between the US and various countries. In Africa alone, the US has managed to negotiate and conclude over 23 bilateral agreements invoking Article 98 of the Rome Statue. All of these countries are state parties to the Rome Statute.

The purpose of Article 98 agreements is to ensure that the ICC will not have jurisdiction over US nationals stationed abroad. This means that countries that sign these agreements with the US agree not to surrender their citizens to the ICC despite their responsibilities under the Rome Statute to which they are signatories.

This chapter explains the nature and purpose of Article 98 agreements. It further seeks to explain the negative effect that the signing of these agreements has on international justice and how they undermine the obligations of state parties to the Rome Statute. It is further argued that Article 98 is not to be interpreted and used as a method of circumventing the ICC's jurisdiction and the obligations of states under the Rome Statute.

LES ACCORDS CONCLUS ENTRE L'AFRIQUE ET LES ÉTATS-UNIS AU TITRE DE L'ARTICLE 98 : UNE MENACE POUR LA JUSTICE PÉNALE INTERNATIONALE

Abstrait

L'Afrique est le continent le plus représentatif en termes de soutien à la Cour pénale internationale (CPI). Malgré les retraits récents de la CPI, l'Afrique compte encore 34 États parties au Statut de Rome de la CPI (Statut de Rome). Ces États parties ont des obligations et des responsabilités en vertu du Statut, dont l'une est de livrer à la Cour les auteurs de crimes relevant de la compétence de la CPI.

Par contre, les États-Unis ne sont pas signataires du Statut de Rome et, par conséquent, la CPI n'a pas compétence sur eux à moins qu'un État partie renvoie à la CPI une affaire impliquant des crimes commis par un ressortissant américain sur son territoire. Ceci est cependant devenu une possibilité aléatoire en raison de liaisons politiques et de divers accords signés entre les États-Unis et divers pays relatifs à l'article 98. Rien qu'en Afrique, les États-Unis ont réussi à négocier et à conclure plus de 23 accords bilatéraux en invoquant l'article 98 du Statut de Rome. Tous ces pays sont des États parties au Statut de Rome.

L'objectif des accords sous couvert de l'article 98 est d'assurer que la CPI n'ait pas compétence sur les ressortissants américains stationnés à l'étranger. Cela signifie que les pays qui signent ces accords avec les États-Unis acceptent de ne pas livrer leurs citoyens à la CPI en dépit de leurs responsabilités en vertu du Statut de Rome dont ils sont signataires.

Ce chapitre éclairci la nature et le but des accords basés sur l'article 98. Il cherche en outre à expliquer l'effet négatif que la signature de ces accords a sur la justice internationale et la façon dont elle sape les obligations des États parties au Statut de Rome. On soutient en plus que l'article 98 ne doit pas être interprété et utilisé comme un moyen de contourner la compétence de la CPI et les obligations des États en vertu du Statut de Rome.

1 Introduction

The very essence of the establishment of the International Criminal Court (ICC)[1] was to ensure that perpetrators of the most heinous international crimes are brought to justice. States came together in a show of solidarity and agreed to embrace this essential institution[2] through ratification of the Rome Statute of the ICC (Rome Statute).[3] State parties accepted the jurisdiction of the ICC over all crimes under the Rome Statute.

Article 98 of the Rome Statute, however, appears to create a loophole unwittingly through which the authority of the ICC can be undermined. The US, through its global spheres of influence, has abused this loophole by negotiating and concluding various bilateral immunity agreements (BIAs), or so-called 'Article 98 agreements', with state parties to the Rome Statute. The main function of these BIAs is to shield US citizens from the jurisdiction of the ICC by ensuring that state parties to the Rome Statute cannot surrender US citizens to the ICC.

Many BIAs have since been concluded with African countries. This is worrying since Africa is the region with the largest support base for the ICC with 33 of its 53 states having ratified the Rome Statute. African states have in fact been branded 'repeat customers' of the ICC due to the high incidence of human rights violations and conflicts on the continent and the general lack of credible systems to address these violations and conflicts properly.[4]

The African state parties to the Rome Statute take their obligations to the ICC so seriously that they have incorporated regional instruments to ensure these obligations have been put into the laws of the region. One of these instruments is the Constitutive Act of the African Union of 2002 (AU Act), which grants the ICC the right to intervene within the borders of member states for purposes of prosecuting international crimes under Article 4(h) of the AU Act.[5]

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1 The Court was formally established on 1 July 2002 upon the entry into force of the Rome Statute. The decision to establish the Court was made on 17 July 1998 and had been preceded by three years of intergovernmental discussions and a gruelling five-week negotiation session.

2 The People's Republic of China, Israel, and the United States voted against the Rome Statute, see Smith S, 'Definitely maybe: The outlook for U.S. relations with the International Criminal Court during the Obama administration' 22 *Florida Journal of International Law,* 155 (2010), 16.

3 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544. Burundi has withdrawn from the Rome Statute and therefore only 33 African State Parties remain. South Africa also attempted to withdraw but has not succeeded yet.

4 Jalloh C, 'Africa and the International Criminal Court: Collision course or cooperation?' 34 *North Carolina Central Law Review,* 3 (2011), 206.

5 This makes Africa the first region in the world to provide a legal basis for military intervention, Jalloh C, 'Africa and the International Criminal Court', 207.

Even though the US may be the primary instigator of BIAs, state parties that agree to enter into these agreements with the US are equally guilty of undermining the ICC. By signing BIAs, state parties act in breach of their obligations under the Rome Statute by potentially allowing perpetrators of international crimes to escape the jurisdiction of the ICC. Although many state parties have entered into BIAs with the US, this chapter will focus on BIAs with African state parties to the ICC. The chapter seeks to demonstrate that BIAs are a threat to the rule of law and promote the violation of African state parties' obligations under the Rome Statute. This violation of obligations also amounts to a direct violation of Article 18 of the Vienna Convention on the Law of Treaties (VCLT), which obliges states not to defeat the object and purpose of a treaty, which they are party to.

The chapter will first give a brief explanation and background to BIAs as provided for in the Rome Statute. To create context, a brief discussion on the use of BIAs by the US will follow. Key elements of the vesting of ICC jurisdiction over non-state parties for international crimes are discussed, before delving into instances where African states concluded Article 98 agreements notwithstanding the fact that most are state parties to the Rome Statute, and the practical effect this has on their obligations.

2 Article 98: Unpacking the basics

The Rome Conference culminated in the establishment of the first treaty-based permanent international criminal court.[6] The ICC was conferred with jurisdiction to investigate, prosecute, and try individuals charged with the most abhorrent crimes in the eyes of the international community; namely, genocide, crimes against humanity, war crimes, and the crime of aggression. Further, under the principle of complementarity, the ICC's jurisdiction can only be invoked when national courts are unwilling or unable to conduct investigations or prosecute.

The nations that negotiated the drafting of the Rome Statute did so with extensive reference to international law and took great care to address potential conflicts between the Rome Statute and existing international obligations. Article 98 was added to this end and provides as follows:

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6 Under the auspices of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which took place from 15 June to 17 July 1998 in Rome, Italy.

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 98, therefore, deals with international cooperation and judicial assistance between states and represents an effort to solve conflicts that may arise between a member-state's responsibilities in terms of international criminal justice and the its international diplomatic obligations.

This provision has proven to be controversial. A case in point is where a state party finds itself in a situation where an obligation under an international agreement is in direct conflict with its obligations to cooperate with the ICC.[7] Article 98 seems to give state parties an opportunity to rank their international obligations higher than those directing their cooperation with the ICC.[8] Should an African state party therefore be under an obligation to surrender an alleged criminal to the ICC in terms of its obligations under the Rome Statute, it could still escape this obligation by relying on an international agreement signed with a non-state party such as the US, which precludes it from delivering the individual to the ICC. This is the main purpose of most Article 98 agreements concluded between African state parties and the US, and is a direct contravention of state party obligations under the Rome Statute. In fact, it defeats the purpose of the Rome Statute.

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7 Schabas W, *The International Criminal Court: A commentary on the Rome Statute*, 2ed, Oxford University Press, New York, 2010, 1029.

8 Whether such a conflict exists, however, remains to be determined by the Court, and not the concerned state itself, on a case-to-case basis. Thus, it would follow that where the dilemma of obligations arises, the Court has a duty to seek cooperation with either a third state in accordance with Sub Article 1 or the sending state in the wording of Sub Article 2. See also Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article,* 3ed*,* Hart Publishing, London, 2008, 1063.

The ICC[9] and domestic courts[10] shed light on the proper interpretation and application of Article 98 when African state parties failed to arrest Sudanese President, Omar Al Bashir, and surrender him to the ICC.[11] Courts have consistently held that this failure to cooperate per state party obligations under the Rome Statute was contrary to its objects. In *Prosecutor v Omar Al Bashir*, the Pre-Trial Chamber concluded that a state party to the ICC must cooperate by arresting and surrendering President Al Bashir.[12] The Pre-Trial Chamber further held that a state party to the ICC provides instrumental support to the ICC by assisting it in establishing its right to punish offenders.[13] In other words, a state party that receives a request for cooperation does not use its own domestic jurisdiction when enforcing that request but rather the international jurisdiction of the ICC.

Article 98(2) of the Rome Statute specifically refers to 'international obligations.' It requires the ICC to refrain from requesting the surrender of an individual from a state if to do so would require that requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that State to the Court, unless consent from that sending state can be obtained. This clause is upon which the US concludes Article 98 Agreements. The US has actually contended that:

> [T]he Rome Statute does not impose any obligation on States Parties to refrain from entering into non surrender agreements that cover all their persons, while those who insist upon a narrower interpretation must, in effect, read language into Article 98(2) that is not contained within the text of that provision.[14]

However, contrary to this assertion by the US, Article 98(2) appears to protect states from acting in breach of their existing international obligations at the time

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9 *Prosecutor v Omar Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, PTC I, 4 March 2009; *Prosecutor v Omar Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139, PTC I, 12 December 2011; *Prosecutor v Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-7, PTC I, 6 March 2009.

10 *International Commission of Jurists-Kenya v Attorney General & 2 Others*, [2011] eKLR; *The South Africa Litigation Centre v The Minister of Justice and Constitutional Development & 11 Others* [2015] ZAGPPHC, 402.

11 See also Gaeta P, 'Does President Al Bashir enjoy immunity from arrest?' 7 *Journal of International Criminal Justice* (2009), 315-332.

12 *Prosecutor v Omar Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute).

13 *Prosecutor v Omar Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute), 46.

14 'Bolton J: American Justice and the International Criminal Court remarks by under secretary for arms control and international security at the enterprise institute' 3 November 2003 https://2001-2009.state.gov/t/us/rm/25818.htm on 5 July 2018.

of the Rome Statute coming into force. Therefore, should international agreements be signed after ratification of the Rome Statute, it can be argued that to sign such an agreement would be to contravene the spirit and purpose of the Rome Statute.

Opponents of the US position argue that Article 98(2) only applies to Status of Forces Agreements (SOFAs),[15] or, at best, only to US nationals sent to the relevant state.[16] Furthermore, critics contend that these agreements are only valid and will only apply until a state becomes party to the Rome Statute.[17]

3 US arguments against the ICC and subsequent use of BIAs

Since Article 98(2) was included in the Rome Statute at the behest of the US, it seems as if the US[18] insisted upon the insertion to ensure that two sets of rules in international criminal justice exist: one to apply to US nationals and the other to the rest of the world.[19]

The US signed the Rome Statute on 31 December 2000 but opted out two years later.[20] It thereafter embarked on enacting anti-ICC legislation under the deceptive title of the American Service-Members Protection Act (ASPA), which came into force on 1 July 2002. This law empowered the US Government to suspend military assistance and developmental funding to countries (including in Africa) that

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15 SOFAs are concluded when one State (the 'host State') is hosting military forces of another State (the 'sending State'). Such agreements govern the division of jurisdiction between the sending and host States when armed forces personnel engage in criminal conduct. See Bassiouni M, *International Criminal Law,* 2ed, Transnational Publishers, Leiden, 216. Kenya has such agreements with the UK. These agreements are known as Defence Cooperation Agreements (DCA) and give the UK a right of first refusal in dealing with any disciplinary issues of their forces, including those of a criminal nature. While the DCA required British troops to abide by Kenyan law, the UK prefers to try its soldiers abroad behind the veil of UK military law. See 'Ahmed K: Britain's secret killing fields*' The Guardian,* 1 July 2001 https://www.theguardian.com/uk/2001/jul/01/politics.world on 5 July 2018.

16 Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes,* August 2002, https://www.amnesty.org/download/Documents/120000/ior400252002en.pdf on 5 July 2018.

17 Prost K and Schlunck A, 'Article 98 cooperation with respect to waiver of immunity and consent to surrender' in Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article*.

18 Slaughter A, 'The partial rule of law: America's opposition to the ICC is self-defeating and hypocritical*' 15 The American Prospect,* 10 (2004).

19 Kirsch P and Robinson D, *Reaching Agreement at the Rome Conference in the Rome Statute of the International Criminal Court: A Commentary* (2002).

20 Bassiouni M, *Introduction to international criminal law*, 533. The US says that their foreign affairs will be affected if the state in which the national is stationed is a state party or consents to the jurisdiction of the court Broomhall B, *International justice and the International Criminal Court: Between sovereignty and the rule of law,* Oxford University Press, New York, 2003, 166.

refused to grant US citizens immunity from the jurisdiction of the ICC. In fact, it is reported that the Bush Administration withdrew military aid earmarked to 35 countries unless Article 98 Agreements were signed.[21] The BIAs were designed to prohibit the transfer of US nationals to the jurisdiction of the ICC[22] as part of the Bush Administration's campaign of non-support to the ICC.[23] Nonetheless, the US failed to take into account that this particular Article of the Rome Statute was meant to apply only to SOFAs.[24] The US position also violates the state parties' obligations to co-operate with the ICC under Article 86[25] of the Rome Statute in investigating and prosecuting offenders.[26]

States that entered into the agreements with the US argue that this is not a violation of their obligations to the ICC since Article 98(2) of the Rome Statute specifically makes provision for this and states that they cannot do anything contrary to their treaty obligations. This argument is fallacious as Article 98 only applies to SOFAs.[27] States entering into BIAs are also acting in bad faith by signing treaties that force them to violate their obligations under the Rome Statute after they had already become parties to it. Therefore, the US uses Article 98 to shield

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21 'Again, America and the ICC', 30 November 2003 http://www.thisdayonline.com/archive/2003/07/25/20030725edi01.html on 25 June 2018.

22 The US applied economic sanctions to those nations that did not want to enter into these agreements with them. See Paust J, 'The US and the ICC: No more excuses' 12 *Washington University Global Studies Law Review* (2013), 569.

23 Article 98(2), *Rome Statute*: 'The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.' See Bassiouni M, *Introduction to international criminal law*, 533. Some of these countries include Romania, Tajikistan and Israel. See also Amnesty International, *International Criminal Court,* in which Amnesty International expressed severe concern over these agreements: 'Amnesty International is deeply concerned by the current worldwide campaign by one state, the United States of America (USA), to persuade states to enter into impunity agreements which seek to prevent US nationals accused of genocide, crimes against humanity or war crimes from being surrendered to the International Criminal Court. These impunity agreements do not require the USA or the other state concerned to investigate and, if there is sufficient admissible evidence, to prosecute the US national accused by the International Criminal Court of such horrendous crimes. The organization is dismayed that two states parties, Romania and Tajikistan, have signed such an agreement with the USA. Both states parties will violate their obligations under Article 86 of the Rome Statute to arrest and surrender persons accused of such crimes to the International Criminal Court if their parliaments ratify these agreements.'

24 Bassiouni M, *Introduction to international criminal law*, 535.

25 In terms of Article 86 there is an obligation on state parties to cooperate with the ICC and not so for non-state parties unless they consent to it by way of *ad hoc* declaration, see Bantekas I and Nash S, *International criminal law*, 2ed, Cavendish Publishing Limited, New York, 392.

26 Bantekas and Nash, *International criminal law*, 378.

27 Bantekas and Nash, *International criminal law*, 378-379.

its nationals - particularly those stationed abroad - from the jurisdiction of the ICC and simultaneously places pressure on African states to choose between honouring BIAs with the US and their commitments to the ICC.

A further argument presented by the US is that the ICC poses a threat to US sovereignty since it can have the independent power to judge and punish individuals for their official actions. This argument is further exacerbated by the fact that suspects before the ICC do not have the benefit of a trial before a jury of their peers, contrary to the US Constitution. In *United States v Balsys*, the US Supreme Court held that the US cannot participate in, or facilitate, a criminal trial under its own authority, even in part, unless the US Constitution's guarantees are preserved.[28]

The US also argues that the ICC threatens its ability to defend its interests through military action. This is justified by stating that should the ICC determine that there is sufficient evidence to support an indictment for crimes under its jurisdiction, the US President, Secretary of Defence, and any other individual who took part in the planning and/or execution of the attacks could very well be sought by the ICC and tried for these actions, regardless of whether these actions were entirely lawful under the US Constitution and other laws or not.[29] The only way to avoid this situation, they argue, is to conclude BIAs.

Despite the treaty-based jurisdictional limitations of the ICC, the US still argues that the ICC might bring 'unfounded charges' against US officials.[30] The Bush Administration argued that the ICC's jurisdictional provisions leave US officials 'subject to an unaccountable judge' and to 'unchecked judicial power.'[31] They further argued that the ICC might permit politicised prosecutions of US officials.[32] Jordan Paust has nonetheless argued that the real reason for the US rejection of ICC jurisdiction is to secure immunity from prosecution,[33] and that it is not just the ICC that is the problem but all foreign courts.[34]

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28 1998 U.S. LEXIS 4210 (S.Ct. 1998).

29 'Rivkin D and Casey L: The International Criminal Court vs. the American People' *The Heritage Foundation,* February 1999 https://www.heritage.org/report/the-international-criminal-court-vs-the-american-people on 5 July 2018.

30 Paust J, 'The US and the ICC', 563.

31 Paust J, 'The US and the ICC', 564, 570. If a US official is found guilty of such crimes and they are in a foreign country, that country will have universal and territorial jurisdiction in any way and can prosecute and who's to say that will be as fair a process as ICC.

32 Paust J, 'The US and the ICC', 565.

33 Paust J, 'The US and the ICC', 569.

34 Paust J, 'The US and the ICC', 572.

The US also took a position against the principle that non-state parties can make a declaration giving the ICC jurisdiction, arguing that treaties are only meant to be binding on contracting parties.[35] Even if the ICC exercises jurisdiction over the non-state party, it will only exercise jurisdiction over the individual of the non-state party, accused of a crime, and will have no other enforcement powers over the non-state party.[36] Yet even this argument did not appease the US.[37]

The success of the ICC depends on state support because it has no police powers of its own. The ICC also has limited resources for investigations and prosecutions. Therefore, it is the duty of the states to co-operate with the ICC.[38] The US is not very supportive of the Rome Statute, which does not help to enhance and achieve the purpose of the Rome Statute.[39] US co-operation is necessary for financial reasons (it will place less of a burden on under-developed states) and for political reasons.[40]

In a further attempt to appease the US, the UN Security Council (UNSC) signed Resolution 1244 of 2 July 2002. The Resolution provided that US peacekeeping troops stationed in Bosnia and Herzegovina at the time could not be prosecuted for any acts committed within a period of twelve months immediately following US ratification of the Rome Statute. The pacification was ostensibly done because the US threatened to pull their troops out for fear of their prosecution by the ICC under Article 12(2).[41]

The US worries that their nationals will be prosecuted before the ICC for war crimes and crimes against humanity. But the ICC can only do this if there is a reasonable basis to believe that US nationals did in fact commit these crimes, and that states with jurisdiction to do so are unwilling or unable to prosecute.[42] Still, this did not appease the US.

The US played a crucial part in the creation of the ICC and advocated for its establishment. Over 123 countries have signed the Rome Statute. It is strange then that they have themselves not ratified the Rome Statute, despite the fact that their excuses for not ratifying the treaty are no longer relevant.[43]

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35 Bantekas and Nash, *International criminal law*, 378.

36 Broomhall, *International justice and the International Criminal Court*, 81.

37 Broomhall, *International justice and the International Criminal Court*, 81.

38 Broomhall, *International justice and the International Criminal Court*, 151-155.

39 Broomhall, *International justice and the International Criminal Court*, 163.

40 Broomhall, *International justice and the International Criminal Court*, 163.

41 Bantekas and Nash, *International criminal law*, 379.

42 Broomhall, *International justice and the International Criminal Court*, 164.

43 Engle E, 'The International Criminal Court, the United States, and the domestic armed conflict in Syria' 14 *Chicago-Kent Journal of International and Comparative Law*, 1 (2013), 148.

The US, as a non-state party to the Rome Statute, is not itself subject to the ICC's jurisdiction. Essentially, unless a state party to the ICC refers a case involving a US national to the ICC, there can be no case. Yet, because of the political pressure the US exerts on foreign governments, it is safe to say that there is a very slim chance that a state will deliver US nationals to the ICC for investigation and prosecution.

4 African countries that are party to Article 98 agreements with the US

33 African countries have signed BIAs with the US. Many of these countries are state parties to the Rome Statute. The table below provides a list of African states with active BIAs with the US.[44]

Angola	Eritrea	Mauritius*
Benin*	Ethiopia	Mozambique
Botswana*	Gabon*	Nigeria*
Burkina Faso*	Gambia*	Rwanda
CAR*	Ghana*	Senegal*
Chad*	Guinea*	Seychelles*
Comoros*	Guinea-Bissau	Sierra Leone*
Congo-Brazzaville	Liberia*	Togo
DRC*	Madagascar*	Uganda*
Djibouti*	Malawi*	Zambia*
Equatorial Guinea	Mauritania	

** All states indicated with asterisk are also state parties to the Rome Statute.*

Most of the agreements seem, at face value, to be concluded in good faith. All agreements provide that African signatories may not subject US 'persons' on their soil to the jurisdiction of an international tribunal unless established by the UNSC. Upon further inspection, however, it provides that US 'persons' present in the territory of the African signatory state cannot be surrendered to any international tribunals without US consent, regardless of whether the international tribunal was duly established by the UNSC or not.[45]

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44 'Status of US bilateral immunity agreements' *Coalition for the International Criminal Court* http://iccnow.org/?mod=bia&idudctp=21&order=dateasc&show=all on 5 July 2018; Cotton DH and Odongo GO, 'The magnificent seven: Africa's response to US article 98' 7 *African Human Rights Law Journal,* 1 (2007), 3.

45 See the following agreements in general: *Agreement between the Government of the United States of America and the Government of the Republic of Benin Regarding the Surrender of Persons to Interna-*

The agreements are also very precise in their definition of 'persons'. 'Persons' are defined in such a way as to include 'all US nationals, military officers, officials and/or Government officials, and contractors,' effectively ensuring that no US nationals or contractors acting for US interests can be subjected to the jurisdiction of the ICC.

This creates a situation where African states inevitably need to choose between their obligations as state parties to the Rome Statute and those as signatories to an international agreement. Since state parties to the ICC are tasked with promoting respect for the spirit and purpose of the Rome Statute, it is difficult to argue that signing a BIA with the US would not be in direct contravention of their obligations in terms of the Rome Statute. African countries that refused to sign BIAs with the US in 2003 were subjected to severe cuts in their usual development aid funding.[46] This was without undoubtedly a means of intimidating these countries to submit to the will of the US by signing a BIA.

5 Practical implications of Article 98 agreements in undermining international criminal justice

Unlike most of the African states that have concluded BIAs with the US, the US itself is not a state party to the Rome Statute. The US has been critical of the ICC for the most part, especially with regard to the Court's jurisdiction. However, states that have become party to the Rome Statute have acknowledged and accepted the jurisdiction of the ICC. Ultimately, this leads to the promotion of respect for the ICC and the fact that it must, and should, have jurisdiction over certain crimes. The ICC has limited powers and limited jurisdiction, and heavily relies on state parties to assist in promoting respect for the ICC and its functions.[47] By signing Article 98 agreements one can argue that state parties undermine the role of the ICC and that they purposely side step their obligations as arise from the Rome Statute by allowing certain individuals to escape the jurisdiction of the Court.

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tional Tribunals of 2005; *Agreement between the Government of the United States of America and the Government of the Republic of Botswana Regarding the Surrender of Persons to International Tribunals* of 2003; *Agreement between the Government of the United States of America and the Government of Burkina Faso Regarding the Surrender of Persons to the International Criminal Court* of 2003; *Agreement between the Government of the United States of America and the Government of the CAR Regarding the Surrender of Persons to International Tribunals* of 2004. All African countries listed in the table under paragraph 4 have concluded similar agreements.

46 These countries include Namibia, South Africa, and Tanzania. See Cotton DH et al, 'The magnificent seven', 1-5.

47 Bantekas and Nash, *International criminal law*, 164.

This situation is further exacerbated when non-state parties – not subject to ICC jurisdiction unless a declaration to that effect is made[48] – use Article 98 agreements to circumvent core functions of the ICC. Ordinarily, a national of a non-state party can be subjected to ICC jurisdiction when the person commits a crime within the jurisdiction of the ICC on the territory of a state party.[49] The ICC will exercise jurisdiction over a crime after a factual situation that involves the commission of a crime within the ICC's jurisdiction if the situation is referred to the prosecutor of the ICC by a state party,[50] the matter is referred to the ICC by the UNSC acting under Chapter VII of the UN Charter,[51] referrals by non-state parties in terms of Article 12(3) of the Rome Statute, or the prosecutor initiates the investigation *proprio motu* after obtaining permission from the pre-trial chamber.[52] Therefore, should a US national who is accused of an international crime be present in the territory of an African state party, it is obligated to surrender the individual to the ICC. However, most BIAs circumvent this obligation and prohibit this kind of surrender.[53]

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48 Article 12(3), *Rome Statute*; Bantekas I and Nash S, *International criminal law*, 378.

49 Jurisdiction can also be vested when the situation is referred by the UNSC, or if the person's home state is a non-state party but accepts jurisdiction of the ICC, or where an ICC crime is committed on the territory of a non-state party and it refers it to ICC. However, in most cases the US concludes Article 98 agreements to ensure that state parties will not hand over their nationals to the ICC, even if a crime within its jurisdiction is committed. See Engle E, 'The International Criminal Court, the United States, and the domestic armed conflict in Syria', 148.

50 Article 13(a), *Rome Statute*. However, the crime had to be committed within the state party's territory or by one of its nationals. See Article 12(2) which provides: 'the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.' See Bassiouni M, *Introduction to international criminal law*, 504.
Article 12(3), *Rome Statute*: 'If the acceptance of a State which is not a Party to this Statute is required…, 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'. See Bassiouni M, *Introduction to international criminal law*, 504; Bantekas I and Nash S, *International criminal law*, 164.

51 Dealing with the UNCS powers to take action in respect of threats to the peace, breaches of the peace and acts of aggression.

52 Article 13(c), Rome Statute. See Broomhall B, *International justice and the International Criminal Court*, 78; Engle E, 'The International Criminal Court, the United States, and the domestic armed conflict in Syria', 148.

53 The ICC can also exercise jurisdiction through a UNSC referral, then the court will have jurisdiction even if the offence was committed on the territory of a non-state party or by the national of a non-state party, and in absence of the consent of the state on whose territory the offence was committed or country of which the accused is a national; see Bantekas I and Nash S, *International criminal law*, 164.

6 Conclusion

One of the principal objects of the Rome Statute is to curb impunity. Because of this, supporters of international criminal justice argue that Article 98 agreements are not valid.[54] After all, the success of the ICC is dependent on state cooperation and if state parties conclude international agreements that directly undermine their duty to cooperate, they are in breach of their obligations per the Rome Statute. This is especially so since the US never concludes these agreements with state parties in good faith, thus acting contrary to the *pacta sunt servanda* doctrine in the Vienna Convention. The sole aim of these agreements is to defeat the aims of international criminal justice as per the Rome Statute.

Various instances throughout history (Nuremberg, the former Yugoslavia, and Liberia) have proven that ending impunity and promoting justice is a just moral imperative and a stabilising force in international affairs.[55] The abundance of BIAs ensures that the ICC is unable to prosecute individuals, and, mainly, US citizens who would normally be under its jurisdiction due to their presence in the territory of an African state party to the Rome Statute. These state parties would be otherwise obligated to surrender these individuals to the ICC in terms of their obligations under the Rome Statute. On the contrary - and on account of BIAs - alleged criminals are rather turned over to US authorities by state parties, instead of surrender to the ICC. This situation is made worse by the uncertainty of the US conducting proper investigations into the alleged criminal's actions and subsequent prosecution.

The Rome Statute's drafting history confirms that Article 98 was never intended to include the present day Article 98 agreements. Indeed, any interpretation that Article 98(2) did cover such agreements would lead to the manifestly absurd and unreasonable result that a non-state party could subvert the fundamental and overarching principle of the Rome Statute: that *anyone*, regardless of nationality, committing genocide, crimes against humanity, or war crimes on the territory of a state party is subject to the jurisdiction of the ICC when states are unable or genuinely unwilling to investigate and, if there is sufficient admissible evidence, to prosecute.[56]

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[54] Rosen A and Gruner VJ, 'Article 98 agreements: Legal or not?' University of Örebro Bachelor Dissertation, 2007.

[55] 'State National Security Strategy summarizing (in part) the current US policy toward the International Criminal Court' US Department of State, May 2010 https://www.state.gov/j/gcj/icc/ on 12 April 2017.

[56] Amnesty International, *International Criminal Court*.

US BIAs signed with African state parties have the effect of altering the Rome Statute's jurisdictional regime and undermining the ICC. This ultimately opens the door to impunity. After all, the UN General Assembly has affirmed that states have a duty to cooperate with the ICC in investigating and punishing international crimes.[57] It went further to provide that state parties are precluded from undermining a call for assistance from the ICC. By signing these Article 98 Agreements with the US, African state parties to the Rome Statute thus become complicit in the undermining of their obligations in relation to the detection, arrest, extradition and punishment of suspects of genocide, war crimes and crimes against humanity.

[57] UNGA, *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, A/RES/3074/XXVIII, 3 December 1973.

LA POURSUITE DES CRIMES SEXUELS COMMIS PAR LES CASQUES BLEUS DE LA MINUSCA EN DROIT INTERNATIONAL

Eugene Bakama Bope

Résumé

Comme leur nom l'indique, la finalité des opérations de maintien de la paix est de contribuer au maintien de la paix. Mais, en pratique, ces forces peuvent également commettre des faits qui pourraient constituer de crimes de guerre et susceptibles de recevoir une réponse judiciaire appropriée. Le problème c'est que les accords de siège (Status of forces agreement (SOFA)) qui lient les Nations unies aux États hôtes des opérations de maintien de la paix ou les accords avec les Etats fournisseurs stipulent qu'en cas d'infraction commise par un casque bleu, celui-ci doit être renvoyé dans son pays d'origine pour y être jugé. Non seulement cela est en contradiction avec le principe de la compétence universelle qui s'applique aux crimes de guerre mais aussi de telles poursuites sont exceptionnellement rares, car la plupart des pays préfèrent accorder l'impunité à leurs troupes. En cas de poursuite, il n'y aurait pas une bonne prise en compte des questions relatives à la réparation due aux victimes, du fait que celles-ci sont tenues à l'écart des procédures judiciaires par lesquelles elles sont censées revendiquer leurs droits. La solution à toutes ces contradictions serait de mettre fin à l'impunité des membres des opérations de maintien de la paix – parce que ces forces ne pourraient pas avoir le mandat de violer le droit international humanitaire – et envisager la constitution de partie civile par les victimes dans toute procédure criminelle ouverte dans l'Etat dont est ressortissant le casque bleu incriminé. Mais cette hypothèse pose d'autres difficultés, notamment la prise en charge des honoraires des avocats et éventuellement le déplacement des victimes pour participer aux audiences. Voilà une problématique qui ressemble à bien des égards à une épine dans le pied des Nations unies.

THE PROSECUTION OF SEXUAL CRIMES COMMITTED BY MINUSCA PEACEKEEPERS UNDER INTERNATIONAL LAW

Abstract

As their designation suggests, the objective of peacekeeping operations is to contribute to the maintenance of peace. However, in practice these forces can also commit war crimes requiring an appropriate judicial response. The challenging issue is that the Status of forces agreements between the United Nations and host countries of peacekeeping operations or agreements between contributing states and such host countries provide that in case of offences committed by peacekeepers, the latter shall be prosecuted in their country of nationality. This not only contradicts the principle of universal jurisdiction, which applies to war crimes, but also contributes to impunity for international crimes because most contributing states prefer to indemnify their soldiers from prosecution. In case of prosecutions, questions relating to reparation owed to victims would not be properly addressed given the fact that these victims are unlikely to be involved in judicial proceedings whereby they can claim their rights.

The solution to all these contradictions may be to put an end to the impunity of members of peacekeeping operations – since these operations could not have the mandate to violate international humanitarian law – and to ensure that victims can participate in any criminal proceedings initiated by the state of nationality of the peacekeeper. However, this suggestion raises other difficulties, notably in respect of funding for lawyers and victims to attend the hearings. This is a huge problem, which is in several respects like a thorn under the foot of the United Nations.

1 Introduction

Les atrocités que l'humanité a connues à travers son histoire ont justifié, dans le concert des nations, le besoin collectif de veiller à ce que les actions de nature à fragiliser ou à mettre en péril la paix et la sécurité soient vivement combattues. Empêcher un conflit interne ou interétatique, c'est vouloir inévitablement que la communauté en soit épargnée. Ainsi, la sécurité et la paix internationales constituent le noyau dur des relations internationales. Plusieurs règles y sont consacrées pour empêcher que le monde ne bascule dans le chaos avec une kyrielle des violations des droits et libertés fondamentaux.

Au sein de l'Organisation des Nations unies (ONU), la précieuse mission de veiller à la sécurité et à la paix internationale est confiée principalement au Conseil de sécurité. D'importants pouvoirs sont reconnus à cet organe en vue de bien remplir cette mission. Se fondant sur ces pouvoirs, le Conseil de sécurité peut décider, par une résolution, de la mise en place des opérations de maintien de la paix. A ces opérations, il peut confier un mandat spécifique au nom de l'organisation en vue d'œuvre pour le maintien, le rétablissement et la consolidation de la paix au sein d'un Etat. Les opérations de maintien de la paix se sont révélées être un des outils les plus efficaces au service de l'ONU pour aider les pays hôtes sur le difficile chemin du conflit à la paix. Les opérations de maintien de la paix multidimensionnelles d'aujourd'hui ne servent pas seulement à maintenir la paix et la sécurité, mais aussi à faciliter les processus politiques, protéger les civils aider au désarmement, à la démobilisation et à la réinsertion des ex-soldats. Elles appuient aussi les processus constitutionnels et l'organisation des élections, protègent et promeuvent les droits de l'homme et aident à restaurer l'Etat de droit et à étendre l'autorité légitime de l'Etat.[1]

Si l'importance de ces opérations relève d'un truisme, il s'observe de plus en plus, dans la pratique, la possibilité pour certains casques bleus de commettre des crimes de diverse nature. Plusieurs abus leur ont été imputés dans certains pays où ils ont été positionnés. On peut notamment citer les cas d'Haiti, de la République démocratique du Congo (RDC), du Burundi et tout récemment de la République centrafricaine (RCA). En effet, de nombreux rapports publiés par les organisations de défense des droits de l'Homme sur les violations des droits de l'homme par certains membres de cette mission constituent la justification du choix sur la République Centrafricaine. Parmi ces crimes allégués, il y a le viol. Il y a lieu

[1] Nations unies, 'Maintenir la paix et la sécurité internationale', in http://www.un.org/fr/sections/what-we-do/maintain-international-peace-and-security/index.html, consulté le 20 août 2017.

de faire ici une démarcation entre le viol réprimer comme une infraction de droit commun et le viol commis dans le contexte d'un conflit armé et qui est aujourd'hui considéré comme un crime de guerre en soi. Le régime juridique qui s'applique à ces soldats de la paix ne permettant pas qu'ils soient poursuivis par les juridictions du for, la compétence de poursuivre étant réservée à leur pays d'origine. Les victimes sont souvent abandonnées à leur triste sort, l'ONU ne pouvant que prendre de mesures administratives notamment en renvoyant le soldat de la paix accusé vers son pays ou l'interdire de participer à une autre mission de maintien de la paix.

Le droit à la justice étant l'un des droits de l'homme les plus reconnus aux victimes de crimes quel que soit l'auteur ou le lieu où ces crimes se sont produits, il est recommandé que tout responsable d'un crime en réponde pénalement et que la victime accède à la réparation rapidement et adéquatement. Cet article explore la question de savoir si les crimes commis par les soldats de la paix des Nations unies en RCA seraient considérés comme des crimes en vertu du droit international ou des crimes de droit commun ? Ensuite, il examine les avantages et les inconvénients d'abandonner la responsabilité de poursuivre aux Etats contributeurs et évalue la possibilité d'autres voies de recours en dehors des procédures dans les pays contributeurs (Compétence universelle ou la Cour pénale internationale (CPI)). Enfin, l'étude entend apporter une contribution sur le renforcement des mécanismes de poursuites des soldats de la paix au service de missions de maintien de la paix en faisant tomber le voile d'impunité qui les couvre et favoriser la participation des victimes au procès pour la réparation du tort qu'elles ont subies.

Il convient de ce fait d'indiquer le fondement juridique ainsi que la justification des opérations de maintien de la paix (section 2), avant l'analyse de la mise en œuvre des forces de maintien de la paix en RCA (section 3) , les avantages et inconvénients d'abandonner la responsabilité de poursuite aux seuls Etats fournisseurs (section 4), la question de la réparation des victimes (section 5), le sentiment d'impunité (section 6) du silence à la reddition de comptes (section 7).

2 Nature juridique des opérations de maintien de la paix

Déterminer la nature juridique d'une opération de maintien de la paix, c'est chercher avant tout son assise juridique et en fixer la justification. Pour le cas de la RCA, il y a eu au départ plusieurs forces de maintien de la paix : 1) l'opération de l'Union africaine avec ses casques verts ; 2) l'opération Sangaris, une opération dite sous-traitée par l'ONU à la France ; 3) l'Opération de maintien de la paix (OMP) de l'ONU qui est venue prendre le relais des casques verts africains. Peu

importe leur appartenance ou couleur, ces soldats de la paix sont tenus de respecter le droit international. L'étude s'intéresse essentiellement aux soldats de la paix de la Mission multidimensionnelle intégrée des Nations unies pour la stabilisation en RCA (Minusca) qui a été créée le 10 avril 2014 par la Résolution 2149 du Conseil de sécurité. En effet, pour bien mener ses missions, l'ONU, doit compter sur la motivation, la rigueur et l'efficacité des personnels dont elle dispose. Elle s'est donc préoccupée de prévoir un statut spécifique à ces personnels. Concrètement, chaque opération de maintien de la paix donne lieu à la conclusion d'un accord appelé '*Status of Forces Agreement (SOFA*)' entre le Secrétaire général des Nations unies et l'Etat sur le territoire duquel la mission est appelée à se déployer.[2] Cet accord définit le Statut des forces internationales au regard du droit et des juridictions locales. Chaque accord est différent et celui qui a été signé le 2 septembre 2014 entre l'ONU et le gouvernement centrafricain concerne les questions touchant à l'identification des forces, à leur liberté de mouvement, à l'emploi du personnel civil, aux immunités d'exécution et de juridiction au profit du personnel dans l'exercice de ses missions. Y figurent également des dispositions concernant l'assistance mutuelle entre la Minusca et le gouvernement centrafricain dans la conduite d'enquêtes, la sécurité des personnels civils, policiers et des équipements et locaux des Nations unies. En outre chaque contingent relève normalement de la compétence exclusive de son Etat d'origine en ce qui concerne les infractions au droit pénal commises sur le théâtre des opérations, sauf si elles sont sans rapport avec la mission.[3]

2.1 Assise juridique

Les opérations de maintien de la paix n'ont pas un fondement juridique explicite dans la Charte. Toutefois, elles n'en sont pas formellement exclues non plus.[4] Elles se sont imposées comme un impératif de la pratique. Leur histoire est fondée sur : 1) le blocage du Chapitre VII dès le début de la guerre froide ; 2) la résolution Dean Acheson de 1950 ; 3) le Force d'urgence des Nations unies (FUNU) créée sur cette base par l'Assemblée générale des Nations unies (AGNU), et qui va rester, avec l'Opération des Nations unies au Congo (ONUC), le modèle de

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2 Thouvenin J-M, 'Statut juridique des Forces de maintien de la paix des Nations unies', *3 Int'l L.F D.Int'l,* 2001, 105.

3 Thouvenin, 'Statut juridique des Forces de maintien de la paix des Nations unies', 106.

4 Kamto M, 'Cadre juridique des opérations de maintien de la paix des Nations unies', 3 *Int'l L.F.D. Int'l*, 2001, 99.

référence de toutes opérations ultérieures de l'ONU. Tous les grands principes ont été développés à partir de là : déploiement sur consentement des parties, impartialité et neutralité, non-usage de la force, sauf en cas de légitime défense. Il est à noter que si aujourd'hui les OMP sont placées sous Chapitre VII et autorisées à faire usage de la force, c'est aussi le résultat du développement des conflits contemporains. Le cas regrettable pour l'ONU c'est le génocide rwandais en 1994 : les casques bleus n'avaient pas le mandat qu'il faut pour arrêter le drame et le massacre des civils. Depuis lors, on a développé le concept de la protection des civils par les OMP avec un mandat sous Chapitre VII. Le cadre juridique de ces OMP s'est donc construit progressivement de façon empirique, à coups de résolutions du Conseil de Sécurité et subsidiairement de l'Assemblée générale. Leur fondement juridique est donc essentiellement résolutoires.[5]

a) La Charte des Nations unies et les OMP : Selon la Charte des Nations unies,[6] le Conseil de sécurité des Nations unies (CSNU) est non seulement investi de la responsabilité principale du maintien de la paix et de la sécurité internationale mais il a une primauté en cette matière. Dans l'exercice de cette responsabilité, il peut décider de mettre en place une opération de maintien de la paix. Les opérations de maintien de la paix bien qu'elles ne soient pas expressément prévues par la Charte, sont devenues l'un des principaux instruments utilisés par l'ONU pour atteindre le but de la création de l'ONU qui est de maintenir la paix et la sécurité internationale.[7]

b) Au regard de ses missions spécifiques, l'Organisation des Nations unies entend lutter par tous les moyens contre les conflits à travers le monde. C'est à raison de cette visée qu'une place de premier ordre est confiée au Conseil de sécurité en tant qu'organe chargé du maintien de la paix dans le monde. A ce titre, il peut décider, de la mise sur pied de mission spéciale dotée de mandat précis,[8] lorsqu'il se rend compte qu'il existe un cas de menace contre la paix et la sécurité internationale. Les Nations unies ne disposant pas d'un corps d'armée, recours est fait, en vertu de la Charte, aux Etats membres qui mettent à la disposition de l'Organisation leurs citoyens pour effectuer certains devoirs au service de la paix et

5 Kamto, 'Cadre juridique des opérations de maintien de la paix des Nations unies', 99.

6 Article 24(1), *Charte des Nations unies*.

7 Voir pour plus de détails le site des opérations de maintien de la paix de l'ONU http://www.un.org/fr/peacekeeping/operations/pkmandates.shtml

8 L'article 39 de la Charte des Nations unies donne le pouvoir au CS de créer des organes subsidiaires.

de la sécurité. En décidant d'une opération de maintien de la paix, le Conseil de Sécurité[9] détermine dans sa résolution l'étendue des pouvoirs reconnus à cette mission qui est directement placée sous le contrôle du Secrétaire Général de l'Organisation. Subsidiairement à la Charte, la résolution créant les forces de maintien de la paix en constitue également une assise juridique.

c) Résolution créant les forces de maintien de la paix

Dans son fonctionnement, l'ONU prend plusieurs actes dont la portée et la nature diffèrent selon qu'ils réglementent les activités internes ou qu'ils s'adressent aux membres en vue d'adopter une conduite déterminée. Ces actes peuvent non seulement revêtir plusieurs appellations, résolution, règlement, règle, directives, mais surtout avoir des effets distincts. Dans le système de l'Organisation des Nations unies, le Conseil de Sécurité a le pouvoir d'adopter des résolutions[10] dont certaines peuvent être pourvues de caractère contraignant et d'autres pas. Les forces de maintien de la paix sont dans la plupart de cas créées par la résolution de cet organe principal des Nations unies. Dans l'acte créateur, il est spécifié la mission confiée à ces forces et l'étendue de leurs pouvoirs.[11] C'est dans ce cadre que la résolution devient une assise juridique de ces forces.

Une fois créée, la mission qu'on peut encore appelée la force de maintien de la paix, devient un organe subsidiaire de l'organisation. Ce rattachement imprime, au regard des personnes désignées comme membre de la mission, une double casquette.

d) La double casquette des membres de la mission

Les forces de maintien de la paix de l'ONU ont un statut particulier 'double statut'.[12] D'une part, il s'agit de personnel militaire international soumis au commandement et contrôle de l'ONU en tant que personnel faisant partie des organes subsidiaires de l'organisation et, d'autre part, il s'agit de personnel militaire international soumis aux règles de discipline

9 Il y a aussi des OMP non créées par le CSNU. La FUNU par exemple fut créée par l'AGNU.

10 Il y a aussi des déclarations du président du CSNU.

11 Pas nécessairement. Exemple de l'ONUC où tout fut déterminé par le SG.

12 Ntsama Balla CB, *Les opérations de maintien de la paix de l'ONU et les droits de l'homme*, Mémoire présenté en vue de l'obtention du Diplôme d'Etudes Approfondies, Université de Yaounde II, 2013, in http://www.memoireonline.com/04/15/9005/m_Les-operations-de-maintien-de-la-paix-de-lONU-et-les-droits-de-lhomme11.html, consulté le 21 août 2017.

de leurs Etats respectifs. Cette double casquette ne soustrait nullement les personnes faisant partie de la mission de leur droit national. Il appert qu'en cas d'abus ou manquements dans l'accomplissement de leur mission, ils doivent être poursuivis et sanctionnés en vertu du droit interne non pas de l'Etat sur le territoire duquel ils les ont commis, mais plutôt de leurs propres Etats conformément à l'accord entre l'ONU et l'Etat fournisseur. Il n'en demeure pas moins vrai qu'ils rentrent dans la définition des agents de l'organisation. En effet, la Cour internationale de justice qualifie d'agents de l'ONU,

> quiconque, fonctionnaire rémunéré ou non, a été chargé par un organe de l'organisation d'exercer ou aider à exercer l'une des fonctions de celle-ci. Bref, toute personne par qui l'organisation agit.[13]

Dans cette optique, ils sont appelés à se conformer aux normes de l'organisation.

2.2 Justification des opérations de maintien de la paix

Les OMP sont créées en cours d'un conflit, plus généralement après la conclusion d'un accord de paix, dont elles sont chargées de faire le suivi de l'application.

Pour rappel ; les opérations de maintien de la paix de l'ONU ont commencé en 1948, lorsque le Conseil de sécurité a autorisé le déploiement d'observateurs militaires au moyen orient. Le rôle de la mission était de surveiller l'application de l'Accord d'armistice entre Israel et ses voisins arabes, opération ultérieurement connue sous le nom d'organisme des Nations unies pour la surveillance de la trêve (ONUST). Les opérations de maintien de la paix ont évoluent avec le temps. En effet, les opérations de maintien de la paix des Nations unies traditionnelles sont déployées comme une mesure intérimaire visant à appuyer les efforts de gestion d'un conflit et à créer un environnement propice à la négociation d'un accord de paix durable.[14] Les tâches que le Conseil de sécurité confie aux opérations de maintien de la paix traditionnelles sont essentiellement militaires et peuvent comprendre les activités suivantes :

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[13] *Affaire Réparation des dommages subis au service des Nations Unies*, avis consultatif du 11 avril 1949, CIJ, Recueil, 1949, p. 177.

[14] *Opérations de maintien de la paix des Nations unies : principes et orientations,* Département des OMP, 2008, 22.

- Observer, surveiller et établir des rapports (à travers des positions statiques, des patrouilles, des survols ou d'autres moyens techniques avec l'accord des parties) ;
- Encadrer un cessez-le-feu et apporter un soutien aux mécanismes de vérifications et ;
- S'interposer dans une zone tampon et comme mesure de confiance.

Normalement, les opérations de maintien de la paix traditionnelles ne jouent pas un rôle direct dans les efforts politiques visant à résoudre le conflit. Il appartient à d'autres acteurs tels que les partenaires bilatéraux des parties, les organisations régionales ou les envoyés spéciaux des Nations unies de trouver une solution politique. Avec la fin de la guerre froide, le contexte stratégique international des OMP a changé de manière dramatique et le CSNU s'est engagé de manière plus active dans la gestion et la résolution pacifique des conflits régionaux.[15]

La transformation de l'environnement stratégique international a favorisé l'émergence d'une nouvelle génération d'opération de maintien de la paix 'multidimensionnelles'. Ces opérations se déploient dans un contexte dangereux à la suite d'un conflit interne, violent et emploient un ensemble de capacités militaires, policières et civiles pour appuyer la transition à un gouvernement légitime en l'absence d'un accord de paix. D'autres d'ailleurs, ont assumées les fonctions législatives et administratives d'un Etat de façon temporaire ou même confiées à la certification des résultats des élections. C'est ici le lieu d'indiquer la trilogie rétablissement de la paix, maintien et consolidation de la paix développé par le Secrétaire général Boutros Boutros Ghali dans 'l'agenda pour la paix'.[16]

2.2.1 Rétablissement de la paix

Rétablir la paix, sous-entend restaurer la tranquillité et la sécurité d'une société où les hommes et les femmes se promènent sans s'inquiéter d'un quelconque bruit des bottes ni de crépitement des balles.[17] Autrement dit, il vise à mettre fin à un conflit et à rapprocher les parties hostiles, essentiellement (mais pas exclusivement) par des moyens pacifiques. Il s'agit d'un processus par lequel les efforts sont

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15 *Opérations de maintien de la paix des Nations unies : principes et orientations,* 23.

16 *Agenda pour la paix*, Rapport du SGNU Boutros Boutros Ghali présenté en 1993 avec son supplément de 1995, disponible A/50/60, 1995.

17 Makaya Kiela S, 'Le droit à réparation des victimes des crimes internationaux : une condition pour une justice efficiente, l'exemple de la République démocratique du Congo', Thèse en droit, Aix Marseille Université, 2014, 76.

déployés et employés par l'ensemble des acteurs aux conflits en vue de remettre l'ordre et la tranquillité au pristin état.

2.2.2 Maintien de la paix

Il consiste à établir une présence de l'Onu sur le terrain en vue d'élargir les possibilités de prévention de conflits et de rétablissement de la paix. L'opération de maintien rime plutôt avec la prévention d'un dérèglement social. La paix qui existe tend petit à petit à être fragilisée par tel ou tel autre conflit. C'est une phase avant-coureur et ultime dans la mesure où la solution préventive mieux vaut que celle qui vise la guérison.[18]

2.2.3 Consolidation de la paix

C'est une nouvelle dans le vocabulaire des Nations unies, la consolidation de la paix après les conflits, qui est une action en vue de définir et d'étayer les structures propres à raffermir la paix afin d'éviter une reprise des hostilités.[19]

L'action de rendre plus solide, plus stable, la paix, fait appel à la mise en place des mécanismes visant à estomper toute activité susceptible de régénérer le conflit. Un Etat qui sort d'une situation belliqueuse a besoin d'une reconstruction. Il doit bénéficier des financements pour qu'il soit amené à recouvrer son image, car la stabilité politique rime avec la stabilité économique. Il existe de nombreuses définitions possibles de la paix tant il s'observe une divergence des opinions sur ce que cela recouvre. Le terme lui-même est apparu pour la première fois il y a plus de 30 ans dans les travaux de Johan GALTUNG, qui a plaidé pour la création de structures de consolidation de la paix pour promouvoir une paix durable en s'attaquant aux 'causes profondes' des conflits violents et en soutenant les capacités des autochtones à gérer la paix et à résoudre leurs conflits eux-mêmes.[20]

2.3 Opération de maintien de la paix et respect du droit international humanitaire et les droits de l'Homme

Les opérations de maintien de la paix sont-elles dans l'obligation de respecter le Droit international humanitaire (DIH) ? Telle est la question. Cette question

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18 Makaya Kiela, 'Le droit à réparation des victimes des crimes internationaux', 76.

19 *Agenda pour la paix*, 7.

20 Galtung J, *War and defense: Essays in peace research,* Vol.1, Christian Ehlers, Copenhagen, 1975 76-108, cité par Chetail V (ed.), 'La consolidation de la paix: Enjeux et ambiguïtés d'un concept en quête d'identité' in *Lexique de la consolidation de la paix,* Bruylant, 2009, 29.

n'avait jusqu'à récemment pas suscité suffisamment d'intérêt pour entrainer une profonde réflexion. On peut le comprendre dès lors que les opérations de maintien de la paix ne sont dans leur principe pas coercitives, et n'implique donc pas l'emploi de la force. Par conséquent, la question de l'application du droit des conflits armés ne se pose *a priori pas*.[21] Elle prend une toute autre dimension dès lors que les forces onusiennes sont engagées dans des actions coercitives. Elles sont alors exposées à des risques de dérapages à l'égard de la population.[22] En effet, appelés à intervenir pour le maintien, le rétablissement et la consolidation de la paix, les forces des Nations unies à qui revient cette charge n'échappent pas, loin s'en faut, à la soumission au respect du droit international humanitaire. On ne voit d'ailleurs pas comment ces forces de maintien de la paix pourraient avoir le mandat de violer le Droit international humanitaire.

La Cour internationale de justice aborde dans le même sens à travers son avis consultatitf de 1996 sur la *licéité de la menace et de l'emploi de la force.* Elle considere 'qu'un grand nombre de règles de droit humanitaire applicable dans les conflits armés sont (si) fondamentaux pour le respect de la personne humaine'. Elles s'imposent d'ailleurs à tous les Etats, qu'ils aient ou non ratifié les instruments conventionnels qui les expriment parce qu'elles constituent des principes intrasgressibles du droit international coutumier.[23] Par leurs actions, elles participent même à la promotion de ces droits avec un accent particulier sur les personnes vulnérables, à savoir, les enfants, les réfugiés, les femmes.

L'obligation de respecter les droits de l'homme découle d'une part de la Charte et de l'autre de la résolution les créant. En effet, les Nations unies accordant une place prioritaire à la protection et à la promotion des droits de l'homme y compris le droit international humanitaire, elles ne sauraient en aucun cas cautionner ni tolérer leur violation sous quelque prétexte que ce soit. Dans certaines résolutions même, il est demandé aux forces de se ranger aux côtés des organisations de défense et protection des droits de l'homme en leur apportant un appui technique ou matériel. En particulier, une attention est mise sur les enfants et les femmes et réfugiés. La résolution de Téhéran de 1968 invite aussi les Etats à respecter les droits de l'homme en période de conflit armé.[24]

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21 Thouvenin, 'Statut juridique des Forces de maintien de la paix des Nations unies', 110.

22 Thouvenin, 'Statut juridique des Forces de maintien de la paix des Nations unies', 111.

23 Rec. CIJ. 1996, par. 79, p.35. cité par Thouvenin, 'Statut juridique des Forces de maintien de la paix des Nations unies', 112.

24 Résolution XXIII adopté par la Conférence internationale des droits de l'homme, Téhéran, 12 mai 1968. On peut noter aussi l'Acte final de la Conférence de Vienne de 1993.

Cependant, la soumission de ces forces aux règles de droit international humanitaire a suscité une controverse doctrinale.

En effet, quelques auteurs écrivent à ce sujet que, la relation entre l'ONU et le droit international humanitaire se caractérise par trois tendances qui se manifestent par des logiques de 'refus', de 'tentative d'absorption', et de 'concertation et de complémentarité'. [25]

Il s'agissait pour les Nations unies d'une question de logique, car en instituant un ordre juridique basé sur le rejet de l'usage de la force, il apparaissait illogique de mettre sur pied ou d'admettre des règles régissant les hostilités. L'ONU a dû revoir sa position en raison de la diversification des tâches des forces de maintien de la paix. Dans leur déploiement, les forces de l'ONU n'utilisent plus la force seulement en cas de légitime défense, mais aussi pour mettre en œuvre leurs mandats. L'usage de la force est devenu plus adapté pour la mise en œuvre par les OMP de leurs mandats. La position traditionnelle de l'ONU sur l'inopposabilité de ce droit à ses forces engagées dans des OMP a été affaiblie par la décision de la CIJ et par l'évolution des missions.[26] Ainsi la circulaire du Secrétaire Général des Nations unies en date du 6 août 1999 marque une étape décisive dans l'application du droit international humanitaire aux forces des Nations unies, à partir de son contenu, et de sa portée.[27]

Comme le fait bien remarquer la doctrine, la circulaire de 1999 marque un tournant décisif, car elle manifeste la prise de conscience par l'ONU de la nécessité de soumettre ses forces aux normes relatives au droit humanitaire. À partir de son contenu, la circulaire est d'un apport considérable. Elle s'applique aux forces des Nations unies, qu'elles soient des opérations de maintien de la paix ou de contrainte, et dans la mesure où elles participent aux combats, dans des situations de conflits armés.[28] La circulaire ne tient pas compte de la dichotomie qui existe entre conflits armés internationaux et conflits armés non internationaux. Elle intègre la réalité des conflits mixtes qui sont des conflits auxquels participent les forces d'une

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25 Condorelli L, La Rosa AM, Sherer S, (eds), 'Introduction', in Les Nations unies et le droit international humanitaire, Actes du colloque international à l'occasion du 50e anniversaire de l'ONU, Genève, Pédone, 1995, 57.

26 Thouvenin, 'Statut juridique des Forces de maintien de la paix des Nations unies', 112.

27 Ntsama Balla Ch.-B, *Les opérations de maintien de la paix de l'ONU et les droits de l'homme*, Mémoire présenté en vue de l'obtention du Diplôme d'Etudes Approfondies, Université de Yaoundé II, 2013, in http://www.memoireonline.com/04/15/9005/m_Les-operations-de-maintien-de-la-paix-de-lONU-et-les-droits-de-lhomme11.html, consulté le 21 août 2017.

28 Circulaire du Secrétaire Général, *Respect du droit international humanitaire par les forces des Nations unies*, 6 août 1999, article 1.

organisation universelle ou régionale, ou d'une coalition d'États d'une part et des entités non Étatiques d'autre part ; et dont la caractéristique est leur déroulement à l'intérieur des États.[29] De plus, la circulaire intègre les règles de droit international humanitaire existantes.[30]

Ce texte donne la lumière sur la responsabilité des forces de maintien de la paix en reconnaissant à l'ONU la responsabilité générale du commandement et du bon ordre tandis que les Etats gardent l'obligation de poursuivre et réprimer toute infraction perpétrée par les soldats engagés dans la mission.

Dans la pratique, depuis le début des années 2000, la communauté internationale assiste à une croissance caractérisée par des dénonciations en matière d'actes d'exploitation et d'abus sexuels commis par les membres du personnel des forces de maintien de la paix des Nations unies. Il s'agit des atteintes à l'intégrité de la personne. Réagissant à ces atteintes qui sont aux antipodes de la mission confiée, les Nations unies ont mis sur pied moult mesures visant à mettre fin à ces violations. C'est dans cette optique qu'il faudra ranger la Circulaire du Secrétaire Général intitulée *Dispositions spéciales visant* à *prévenir l'exploitation et les abus sexuels*.[31] Cette circulaire institue *la politique de tolérance zéro* à l'égard des actes d'exploitation et d'abus sexuel. Ces mesures de nature administrative n'ont pas eu un impact majeur sur le processus de lutte contre l'impunité et de réparation en faveur des victimes. Comme renseigne le Secrétaire général de l'ONU dans les *dispositions spéciales visant à prévenir l'exploitation et la violence sexuelle,*[32] en 2009 une augmentation de 36% par rapport aux 83 allégations rapportée en 2008 a été constatée, ce qui infirme la tendance à la baisse amorcée en décembre 2006 et qui s'est poursuivie en 2007 et 2008. Il est également fort inquiétant de constater que 46% des allégations par le personnel du maintien de la paix rapportées en 2009 portent sur 'les pires formes d'exploitation et d'atteintes sexuelles', à savoir celles ayant pour victimes des mineurs, et notamment des viols.

De ce qui précède, il appert que les forces de maintien de la paix peuvent bien, dans l'exercice de leur mission, se rendre responsables des crimes, qui peuvent

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29 Aguirre M, 'L'émergence d'un nouveau monde', 10.

30 Condorelli L, 'Les progrès du droit international humanitaire et la circulaire du secrétaire général des Nations unies du 6 août 1999', in Boisson De Chazournes L and Gowlland-Debbas V (eds), The international legal system in quest of equity and universality, *Liber Amicorum Georges Abi-Saab*, The Hague, 2001, 499.

31 Secrétaire Général, *Dispositions spéciales visant à prévenir l'exploitation et la violence sexuelle,* Doc. A/58/777 (2004), Ordre du jour, par. 127 et 134.

32 Secrétaire Général, *Dispositions spéciales visant à prévenir l'exploitation et la violence sexuelle,* par 9 et 10.

avoir la nature de crimes de droit commun, c'est le cas des viols commis par les casques bleus sud-africains au Burundi ou des crimes de droit international, plus spécifiquement les crimes de guerre dans un contexte de conflit armé comme nous le verrons en RCA.

3 Mise en œuvre des forces de maintien de la paix en République Centrafricaine

Ce cas étant d'une extrême actualité, il permet un regard scientifique sur les différents crimes pour lesquels les éléments des forces de maintien de la paix de la Minusca ont été accusés et qui remettent en surface l'évident intérêt de savoir le sort réservé à la poursuite desdits crimes et au droit à la réparation de leurs victimes.

3.1 Contexte de la RCA

La République Centrafricaine est un pays de l'Afrique centrale déchiré par des conflits les plus dévastateurs. La nécessité de mettre fin aux dégâts engendrés par ces conflits a dicté la mise en place d'une mission de maintien de la paix de l'Organisation des Nations unies (la Minusca). Il apparait intéressant d'analyser le contexte factuel ayant conduit aux conflits et à la mise en œuvre de la Minusca avant d'examiner les questions de l'imputabilité des crimes internationaux ou des droits communs aux soldats de la paix de la Minusca et la nécessité de prendre en charge les victimes de ces crimes.

3.1.1 Du conflit à la création de la mission de l'ONU

L'histoire politique de ce pays d'environ 3,5 millions d'habitants, est caractérisé par de nombreux défis, entraînant une instabilité institutionnelle et conjoncturelle défavorable à son développement.

La République Centrafricaine couvre une superficie de 622 000 km^2, caractérisée par l'usage de la langue *sango* et ayant pour voisins, le Cameroun à l'ouest, la République du Congo et la République Démocratique du Congo au sud, le Soudan à l'Est et le Tchad au nord. Sur le plan externe, la RCA vit dans un environnement marqué par l'instabilité**,** tous ces voisins sauf le Cameroun, ayant connu un conflit armé. Sur le plan interne, elle a subi pendant une dizaine d'années des crises militaro-politiques à répétition qui ont affecté le tissu socio–économique et les forces de défense et de sécurité.

En mars 2013, la Seleka, coalition armée, renverse le président François Bozizé, déclenchant ainsi une instabilité violente en République centrafricaine. Ce coup d'État a entraîné une explosion de conflits mortels entre des groupes d'autodéfense et les soldats de la Seleka.[33] Même si l'insécurité et les violences intercommunautaires sont monnaie courante et que les tensions restent vives, une volonté politique semble désormais prête à résoudre ce conflit, considéré comme étant un conflit armé interne. Diverses troupes ont été envoyées dans le pays pour tenter de gérer la situation. En juillet 2013, le Conseil de paix et de sécurité de l'Union africaine autorise le déploiement de la Mission internationale de soutien à la Centrafrique sous conduite africaine (MISCA). Celle-ci passera ensuite le témoin à la Mission multidimensionnelle intégrée des Nations unies pour la stabilisation en Centrafrique (MINUSCA), récemment créée. Face à la poursuite sans relâche des violences, un déploiement des forces françaises de maintien de la paix, baptisé 'opération Sangaris', est autorisé en décembre 2013.

Quelques mois plus tard, la Communauté économique des États de l'Afrique centrale (CEEAC), un groupe économique régional, décide d'envoyer un contingent de 1 500 soldats supplémentaires chargés de renforcer la sécurité dans la capitale Bangui. La MINUSCA compte désormais à peu près 10 000 militaires, 1 820 policiers et 1 400 personnels civils. Causé par des années de crises cycliques et de négligence de la part de la communauté internationale, le conflit interne s'est intensifié. La vulnérabilité de la République centrafricaine aux conflits régionaux transfrontaliers et l'implication de combattants extérieurs ne font que compliquer la situation et souligner le besoin d'une solution régionale au conflit.

En 2016, des élections ont conduit à l'élection de Mr Faustin-Archange Touadéra mais le pays peine à se remettre en marche. La situation sécuritaire reste critique, et certaines parties du territoire échappent toujours à l'autorité de l'Etat.

En dépit des accords de paix signés début 2015, quatorze groupes armés non conventionnels sont toujours actifs (une partie d'entre eux sont issus de l'ex-Seleka, une coalition de mouvements rebelles crées en septembre 2012 et formée de musulmans).

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[33] La Seleka est une coalition de groupes rebelles formée en 2012 et responsable de la chute du président Bozizé en mars 2013. Elle accuse ce dernier de ne pas avoir respecté les accords de paix signés avec les groupes rebelles en 2007 et 2011. À la suite de ce coup d'État, Michel Djotodia se proclame président. Cependant les violations des droits humains se poursuivent dans le pays. En janvier 2014, Catherine Samba-Panza est élue à la tête d'un gouvernement de transition.

S'agissant de la création de la mission, c'est par sa résolution 2149 adoptée à la 7153ème séance tenue le 10 avril 2014[34] que le Conseil de sécurité a décidé du déploiement d'une mission des forces de maintien de la paix en République Centrafricaine. La création de la Mission multidimensionnelle intégrée des Nations unies pour la stabilisation en République centrafricaine (MINUSCA) s'inscrit dans le processus entamé depuis le début de la crise centrafricaine par les Nations unies à travers les résolutions précédemment adoptées[35] par le Conseil de sécurité.

La résolution prévoit que le transfert de responsabilités de la Mission internationale de soutien à la Centrafrique sous conduite africaine (MISCA) à la MINUSCA s'effectuera le 15 septembre 2014. Les missions confiées à la MINUSCA sont axées prioritairement sur la protection des civils, l'appui à la mise en œuvre de la transition, la facilitation de l'acheminement de l'aide humanitaire, la protection du personnel et des biens des Nations unies et la protection des droits de l'homme, l'action en faveur de la justice nationale et internationale et de l'Etat de droit, le désarmement, la démobilisation, la réintégration et le rapatriement des ex-combattants.

Dans sa résolution, le Conseil exige en outre de 'toutes les milices et de tous les groupes armés qu'ils déposent les armes'. Le Conseil demande également aux autorités de transition 'd'accélérer les préparatifs en vue de l'organisation d'élections présidentielle et législatives libres, régulières, transparentes et ouvertes à tous'.

3.1.2 Description des faits de viols en RCA

La RCA a été le théâtre de plusieurs viols et abus sexuels durant la guerre civile. Ces faits ont été commis non seulement par les différents groupes armés (Seleka, Les anti-balaka), mais aussi par les soldats de la paix, l'armée française y compris même les forces de l'armée nationale.

3.1.2.1 l'affaire des viols de Sangaris (Opération de l'armée française)

Sangaris (du nom d'un papillon rouge africain) est le nom donné à l'opération militaire lancée par la France le 05 décembre 2013 en RCA avec comme mandat d'aider les casques bleus africains à 'apporter la sécurité, rétablir la stabilité en Centrafrique', 'protéger la population' et éviter une 'catastrophe humanitaire'. Une

[34] S/RES/2149(2014), Conseil de sécurité 10 avril 2014.

[35] C'est notamment les résolutions S/RES/2121(2013), S/RES/2127(2013) et S/RES/2134 (2014).

force de 1600 soldats descend sur un terrain. Ils ont chargés de sécuriser l'aéroport de Bangui mais aussi un camp de réfugié, à proximité de leur base. C'est donc, dans ce camp de Mpoko que certains militaires seraient accusés de viols et d'abus sexuels sur mineurs.

L'affaire est apparue pour la première fois à la Une du journal britannique *The Guardian*, du 29 avril 2015 et a fait l'effet d'une bombe. Un ancien haut fonctionnaire de l'ONU, Anders Kompass révèle que des soldats de *Sangaris* sont visés par des accusations de viols sur plusieurs mineurs centrafricains dans le camp de Mpoko. D'autres cas seront signalés plus tard à Dekoa et Boda. En mars 2017, le Parquet de Paris demande un non-lieu dans l'affaire des accusations de viols contre les soldats français de l'opération *Sangaris.* Aucun militaire n'a été mis en examen ; l'honneur de l'armée française est lavé après 2 ans d'enquêtes. Les 41 mineurs centrafricains qui accusaient les soldats de les avoirs agressés n'auront probablement jamais droit à un procès.[36]

3.1.2.2 Les soldats de la paix face aux accusations de viols et d'abus sexuels

Dans la mise en œuvre de cette mission, plusieurs abus imputables aux membres des forces de maintien de la paix ont été dénoncés. Ces abus sont principalement liés aux violences sexuelles.[37] L'on peut également déceler à y voir de plus prêt quelques éléments qui peuvent laisser penser aux crimes de guerre. Les responsables des abus ont été renvoyés dans l'Etat fournisseur pour y être jugés et condamnés pour les faits pénaux.

Un rapport du Secrétaire général des Nations unies sur les abus des forces de maintien de la paix publié en 2015 constate que très peu des victimes d'exploitation et d'abus sexuels ont bénéficié d'une aide du fait du manque de financement spécial et de la lenteur du processus d'exécution. Human Rights Watch (HRW) note dans son rapport de 2016 qu'entre octobre et décembre 2015 plusieurs jeunes filles âgées de 14 à 18 ans ont affirmé qu'elles ont été violées par les soldats de la paix près de l'aéroport de Bambari dans le centre du pays.

Dans un pays où les groupes armés continuent de menacer les civils, les soldats de la paix doivent être des 'protecteurs et non des prédateurs' a affirmé Hillary

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36 Brabant J, Minano L, 'L'armée française et l'affaire Sangaris : Anatomie d'une non enquête', in *Impunité Zéro*.

37 Human Rights Watch, *Les soldats violent, les commandants ferment les yeux: Violences sexuelles et réforme militaire en République démocratique du Congo,* (2009), http://www.hrw.org/site; Groupe de travail du CEAH/CEPS, 'Foire aux questions sur l'exploitation et les abus sexuel commis par le personnel du maintien de la paix' (2011), www.un.orgjfrjpseataskforce/faq.shtml.

Margolis, chercheure en droits des femmes à Human Rights Watch. Renvoyés à la maison les soldats de la paix n'est pas assez. L'ONU devrait insister que les troupes renvoyées dans leurs pays soient jugés et que les victimes obtiennent le soutien dont elles ont besoin. HRW a documenté 8 cas d'exploitation et d'abus sexuel commis par les soldats de la paix durant des recherches à Bambari entre les 16 au 30 janvier 2016. Seulement une des victimes avait reçu une assistance médicale et psychologique disponible à l'Hôpital de Bambari avant de s'entretenir avec les enquêteurs de HRW. Toutes ces victimes ont affirmé que les soldats de la paix responsables viennent du Congo-Brazza ou RDC. Un bataillon d'au moins 800 soldats de la RDC avait été déployé à Bambari et d'autres villes dans la province d'Ouaka. Entre mi-septembre et mi-décembre, un petit contingent de soldats de la paix du Congo-Brazza a été déployé pour protéger temporairement l'aéroport de Bambari. Une jeune fille de 14 ans a raconté à Human Rights Watch qu'en novembre, deux soldats de la paix l'ont attaqué quand elle marchait à coter de la base de la MINUSCA qui est proche de l'aéroport de Bambari. Elle dit 'j'étais en train de marcher, soudain, un d'entre eux me prend par la main avec son arme et les autres m'ont enlevés les habits et ont commencé à me violer et j'ai commencé à crier et les deux autres ont fui'.[38] Dans tous les cas d'exploitation et d'abus sexuels Human Rights Watch a documenté que les victimes vivaient dans les camps des déplacés internes à Bambari quand les abus ont commencé. La plupart ont raconté à HRW qu'elles ont eu de relations sexuelles avec les soldats de la paix en échange de la nourriture ou de l'argent comme la situation de conflit perdure. La MINUSA avait ouverte des enquêtes après les allégations d'exploitation et d'abus sexuel.[39]

3.1.3 La nature juridique des crimes commis par les soldats de la paix en RCA

La question principale à laquelle, il faut répondre est celle de savoir les crimes commis par les soldats de la paix œuvrant dans le cadre d'une mission des Nations unies en RCA sont de quelle nature ? S'agit-il des viols comme infraction de droit commun ou viol en tant que crime de droit international ? Peut-on vraiment qualifier les faits de crimes de droit international humanitaire ?

La définition d'un crime de droit international dépend du contexte et non de la qualité de l'auteur. Si les exigences contextuelles des crimes de guerre sont réunies, la qualité de force de maintien de la paix n'a aucune incidence sur la qualification appliquée.

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[38] Rapport de Human Rights Watch, 04 février 2016, https://www.hrw.org/fr/news/2016/02/04/republique-centrafricaine-des-viols-commis-par-des-casques-bleus.

[39] Rapport de Human Rights Watch, 04 février 2016.

Pour parler de viol, en tant que crime de guerre, il faut établir 1) l'existence d'un conflit armé, et 2) le lien de connexité entre le viol et le conflit armé.

Un viol commis de manière opportuniste dans un conflit armé n'est pas un crime de guerre faute de lien de connexité suffisant avec le conflit armé. C'est sur ce point qu'il est important d'analyser la manière dont la jurisprudence internationale a circonscrit tant la notion de conflit armé que celle du lien de connexité.

3.1.3.1 La notion du conflit armé au regard du droit international humanitaire

Concernant cette notion de conflit armé, la jurisprudence des TPI considère qu'un tel conflit existe '(…) chaque fois qu'il y a recours à la force armée entre Etats ou un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes au sein d'un Etat'.[40] Il y a *conflit armé international* (*CAI),* lorsqu'il oppose *deux Etats* [41] ou lorsqu'à l'intérieur du territoire d'un Etat, les forces gouvernementales de cet Etat s'opposent aux forces dissidentes ou aux groupes armés organisés opérant sous un 'contrôle global' d'un autre Etat ; étant entendu que ce contrôle global doit aller au-delà du simple financement et de l'équipement de ces groupes armés et doit également impliquer une participation à la planification et à la supervision de leurs opérations militaires.[42] Par contre, il y a *conflit armé non international* (*CANI)* lorsque ce conflit oppose à l'intérieur du territoire d'un Etat, et de manière prolongée (i) les forces gouvernementales aux forces dissidentes ou aux groupes armés organisés, ou (ii) les groupes armés organisées entre eux.[43] En RCA, on est en présence d'un conflit armé non international (CANI).

3.1.3.2 Le lien de connexité entre les crimes et le conflit armé

Existe-t-il un lien de connexité entre les prétendus crimes commis par les soldats de la paix et le conflit armé en RCA ?

Afin d'y répondre, il faut rappeler que cette exigence de lien de connexité n'apparaît pas explicitement dans les textes créateurs des différents tribunaux internationaux, internationalisés notamment les Statuts des Tribunaux militaires de Nuremberg, les TPI ad hoc, les tribunaux mixtes y compris le Statut de Rome sur

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40 TPIY, *Le Procureur c. Tadic, Arrêt relatif à l'appel de la Défense concernant l'exception préjudicielle d'incompétence*, 2 octobre 1995, par. 70 (Ci-après, *Arrêt Tadic, exception préjudicielle*).

41 L'article 2, Commun aux quatre Conventions de Genève de 1949.

42 TPIY, *Le Procureur c. Tadic*, Arrêt du 15 juillet 1999, IT-94-1-A, par. 145.

43 Article 2 du Protocole II et art 8-2-f du Statut de Rome.

la CPI. C'est plutôt les éléments des crimes de guerre prévu à l'art 8 du Statut de Rome qui l'exige en ces termes 'le comportement a eu lieu dans le contexte et était associé à un conflit armé'. Et cette exigence apparaît aussi dans la jurisprudence de ces tribunaux internationaux cités ci-haut. Comme le souligne Jacques Mbokani, trois jurisprudences des tribunaux pénaux ad hoc méritent d'être analysé.[44]

La première concerne l'arrêt *Tadic* (exception préjudicielle de compétence) du Tribunal pénal international pour l'ex-Yougoslavie. Dans cet arrêt, la Chambre d'appel avait constaté que les crimes dont il était question avaient été 'commis dans le contexte d'un conflit armé' ; et qu'ils étaient 'étroitement liés aux hostilités'.[45]

La deuxième est l'arrêt *Kunarac* du même tribunal. Dans cet arrêt, la même chambre d'appel a explicité ce qu'elle avait énoncé dans l'arrêt *Tadic* précité en soutenant, dans un premier temps, que 'deux conditions générales doivent être réunis pour que s'applique l'art 3 du Statut, les violations des lois ou coutumes de la guerre : premièrement, il doit y avoir conflit armé et, deuxièmement, les actes de l'accusé doivent être étroitement liés au dit conflit'.[46] Selon la Chambre d'appel, ce lien de connexité ne doit pas être entendu comme 'un lien de cause à effet' entre le conflit armé et le crime perpétré, qu' 'il faut à tout le moins que l'existence du conflit armé ait considérablement pesé sur la capacité de l'auteur du crime à le commettre, sa décision de le commettre, la manière dont il l'a commis ou le but dans lequel il l'a commis'.[47]

Pour la Chambre d'appel, s'il peut être établi (…) que l'auteur du crime a agi dans l'optique de servir un conflit armé ou sous le couvert de celui-ci, cela suffit pour conclure que ses actes étaient étroitement liés au dit conflit.[48] Cependant, la Chambre d'appel a pris soin d'énumérer quelques critères non-exhaustives qui doivent être pris en compte pour établir le lien de connexité : le fait que l'auteur du crime est un combattant, le fait que la victime n'est pas un combattant, le fait que la victime appartient au camp adverse,[49] le fait que l'acte pourrait être

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44 Mbokani J, 'Le lien de connexité entre le crime et le conflit armé dans la définition des crimes de guerre', in Bernard D, Scalla D (eds), *Vingt ans de la justice pénale internationale, Les dossiers de la Revue de droit pénal et de criminologie*, éd. La Charte, Bruges, 2014, 35-46.

45 *L'arrêt Tadic,* par. 70.

46 Arrêt du 12 juin 2002, par. 55.

47 Arrêt du 12 juin 2002, par. 58.

48 Arrêt du 12 juin 2002, par. 58.

49 Sur ce point, il faut noter que l'affaire *Ntanganda*, la CPI a établi qu'on pouvait commettre un crime de guerre contre des victimes de son propre camp. Voir Affaire Ntanganda, Décision rendue en application des alinéas a) et b) de l'article 61-7 relativement aux charges portées par le Procureur à l'encontre de Bosco Ntanganda, ICC-01/04-02/06, du 09 juin 2014, par. 79, par. 80, par. 81.

considéré comme servant l'objectif ultime d'une campagne militaire, et le fait que la commission du crime participe des fonctions officiels de son auteur ou s'inscrit dans leur contexte.[50]

La troisième jurisprudence est relative à l'arrêt *Rutanganda* rendu par la Chambre d'appel du TPI pour le Rwanda (TPIR). Dans cet arrêt, la Chambre d'appel qui souscrit DANS la logique de l'arrêt *Kunarac*, a ajouté deux précisions supplémentaires : primo, elle déclare que l'expression 'sous le couvert du conflit armé' et /ou 'en toutes circonstances crées en partie par le conflit armé'.[51] Selon cette Chambre, si un non combattant profite du relâchement de l'efficacité policière dans une situation de troubles engendrées par un conflit armé afin de tuer un voisin qu'il haïssait depuis des années, cela ne constitue pas, en tant que tel, un crime de guerre (…).[52] Secundo, elle a tenu à souligner que 'la détermination de l'existence d'un lien étroit entre des infractions données et un conflit armé nécessitera, en règle générale, la prise en considération de plusieurs facteurs énumérés et qu'une prudence toute particulière est de mise lorsque la personne accusée est un non combattant'.[53]

Selon la jurisprudence de la CPI,[54] pour constituer des crimes de guerre, les crimes allégués doivent avoir été commis dans le contexte et en association avec un conflit armé ne présentant pas un caractère international.[55] A cet égard, la Chambre souscrit à l'approche de la Chambre de première instance II lorsqu'elle déclare[56] le comportement devra avoir été étroitement lié aux hostilités se déroulant dans toute partie des territoires contrôlés par les parties au conflit. Il ne s'agit donc pas de considérer le conflit armé comme étant seul à l'origine du comportement (…) ni d'exiger que ce comportement se manifeste au cours même des combats. Il demeure que le conflit armé doit, bien entendu, occuper une place majeure dans la décision prise par l'auteur du crime, dans sa capacité de commettre le crime ou encore dans la manière dont celui-ci est en définitive commis.

Pour déterminer si les crimes ont un lien suffisant avec le conflit armé, la Chambre de première instance peut prendre en considération divers facteurs, dont : le Statut de l'auteur du crime et de la victime, le fait que l'acte puisse être considéré comme servant l'objectif ultime d'une campagne militaire et le fait que la

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50 *L'arrêt Ntaganda*, par. 59.

51 TPIR, *Le Procureur c Rutanganda*, ICTR-96-3-A, arrêt du 26 mai 2003, par. 570.

52 *Le Procureur c Rutanganda,* par. 570.

53 *Le Procureur c Rutanganda,* par. 570.

54 *Affaire Bemba*, Jugement rendu en application de l'article 74 du Statut, par. 142, 143

55 Eléments des crimes, art 8-2-C-i, 8-2-e-v, et 8-2-e-vi.

56 *Jugement Katanga*, par. 1176.

commission du crime participe des fonctions officielles de son auteur ou s'inscrive dans leur contexte.[57]

La Chambre relève à cet égard que bien qu'il soit probable qu'il existe un certain lien entre l'auteur d'un crime et une partie au conflit, il n'est pas nécessaire que l'auteur d'un crime soit lui-même membre d'une partie au conflit, l'accent est à mettre sur le lien entre le crime et le conflit.[58]

La Chambre conclut de plus que l'on peut considérer qu'un crime allégué a été commis 'dans le contexte' d'un conflit armé, indépendamment du fait qu'il soit ou non contemporain de combats intenses ou commis au même endroit.[59]

L'enjeu principal des crimes de guerre commis par les casques bleus résiderait dans la démonstration du lien de connexité avec le conflit armé puisque cela dépend d'abord du mandat qu'ils ont reçu. S'il s'agit d'une force de maintien de la paix, ce lien de connexité serait difficile à établir. Mais, s'il s'agit d'une force d'imposition de la paix (chapitre VII de la Charte de l'ONU), là ce serait différent. Cependant, même lorsqu'il s'agit d'une force de maintien de la paix, qui est supposée être neutre dans le conflit, il n'est pas exclu que les casques bleu aient quelques affinités avec l'une des parties au conflit et que, sur cette base, qu'elles lui apportent leur soutien dans la commission des actes criminels. Il semble que les forces françaises de la Turquoise au Rwanda en 1994 pourraient être accusées d'avoir fermé les yeux face aux actes du régime génocidaire. Sur cette base, certains de leurs éléments peuvent être accusés de complicité dans les crimes de guerre commis au Rwanda. Mais là encore, il y a des rapports de pouvoir qui interviennent dans l'écriture de l'histoire.

Dans le cas sous examen, les soldats de la paix en RCA ont profité du contrôle territorial qu'il exerçait sur les lieux où résidaient les victimes dans le cadre des conflits armés, pour satisfaire, par la violence leurs bas instincts et que la situation de conflit armé leur a donné cet avantage. Sur cette base, les actes présentent un lien de connexité avec les conflits armés et qu'en conséquence, ils constituent des crimes de guerre. La Chambre dans l'affaire Bemba précise qu'il n'est pas nécessaire que l'auteur appartienne lui-même à l'une des parties au conflit, mais que c'est le lien entre l'acte et le conflit armé qu'il est important d'établir.[60]

Ainsi, les soldats de la paix peuvent être poursuivis et condamnés pour 'crimes internationaux' si les éléments contextuels des crimes contre l'humanité ou des

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57 TPIY, *Arrêt Kunarac*, par. 59 ; TPIR, *Rutanganda*, par. 569.

58 TPIR, *Arrêt Akayesu*, par. 444 ; voir aussi TPIY, *jugement Kunarac*, par 407 ; TPIY, *Arrêt Kunarac*, par. 58.

59 TPIY, Arrêt Kunarac, par. 57.

60 *Jugement Bemba*, par. 143.

crimes de guerre sont réunis. C'est le cas notamment si les soldats de la paix se rendent complices des crimes contre l'humanité en soutenant des groupes armés qui attaquent les populations civiles. Un crime international en effet est un fait (action ou omission), contraire au droit international et à un tel point nuisible aux intérêts ou aux biens de la communauté, protégés par ce droit, qu'il s'établit dans les rapports entre les Etats la conviction que ce fait doit être pénalement sanctionné.[61]

4 Problématique de poursuite des crimes sexuels commis par les éléments des forces de maintien de la paix en RCA

Dans l'accomplissement de leur mission, certains membres des forces de maintien de la paix peuvent se muer en responsables de crimes d'une certaine gravité. C'est ce qui est arrivé en RCA. Cependant, étant sur le territoire d'un Etat étranger, leur poursuite obéit à de règles spécifiques qui révèlent, en pratique, un certain nombre d'écueils empêchant la mise en mouvement d'une action publique à leur encontre. Au regard de l'accord signé entre les Nations unies et les pays contributeurs des forces de maintien de la paix, ces pays ont la responsabilité première de traduire en justice leurs soldats qui ont commis les actes d'exploitations et d'abus sexuels.[62] L'organisation ne peut engager de poursuites pénales contre les casques bleus ni les condamner en cas d'incoduite. C'est à chaque gouvernement de décider s'il y a lieu de punir ses ressortissants.

Les Nations unies peuvent renvoyés les troupes dans leurs pays et leur interdire de participer aux futures missions de l'ONU mais elles n'ont pas la capacité indépendante de les poursuivre. En 2015, le rapport des services de contrôle interne de l'ONU (BSCI) a évalué la capacité de l'ONU en matière d'exploitation et d'abus sexuels et a noté l'absence d'informations venant des pays contributeurs des troupes concernant les procédures disciplinaires sur les troupes renvoyées à la maison. Il était dit aussi qu'il y avait un échec de l'ONU et des pays contributeurs de rendre les commandants responsables pour exploitation et abus sexuels de leurs troupes. Des recommandations ont été faites pour la négociation des nouveaux accords avec les pays contributeurs pour s'assurer de poursuites, de la transparence et de la coopération dans le processus de reddition de comptes.[63]

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61 Glaser S, *Droit international pénal conventionnel*, vol. I, Bruxelles, Bruylant, 1970, 49.

62 Voir article 52, *l'Accord Sofa entre l'ONU et le gouvernement centrafricain*.

63 Fleshman M, *Exactions des casques bleus : L'ONU est ferme*, avril 2005, disponible sur le site http://www.un.org/africarenewal/fr/magazine/april-2005/exactions-des-casques-bleus-lonu-est-ferme.

Il est à noter qu'il n'y a pas eu en notre connaissance de procédures judiciaires à l'endroit de les troupes congolaise accusés des crimes en RCA à leur retour au pays.[64] Les soldats de la paix accusés des crimes ne doivent pas seulement être renvoyés à la maison sans que justice soit faite. L'ONU devrait utiliser son plein pouvoir avec les pays qui fournissent des contingents pour veiller à ce que ceux qui abusent des victimes et ternissent l'image de l'ONU et sa mission soient confrontés à leurs crimes. Les enquêteurs de l'ONU peuvent avoir, cependant, d'énormes difficultés à constituer des dossiers dans les zones de conflit car ils sont souvent face à des victimes et des témoins déjà traumatisés par la violence et qui craignent d'avoir à subir les conséquences de leurs collaboration avec des enquêteurs.

Dans l'affaire des viols de Sangaris, qui concerne l'opération militaire de la France (pas la Minusca) on voit une justice centrafricaine hors-jeu (suite à l'accord entre le Gouvernement français et la RCA), une justice française qui s'appuie sur des enquêteurs formés pour 'contribuer au succès des opérations que conduit la France à l'étranger' et des avocats condamnés à suivre à distance un dossier complexe, le tout des années après les faits supposés, la partie semblait perdue d'avance pour les victimes présumées'.[65]

L'on voit bien qu'il existe des préalables et questions essentielles dans la poursuite de crimes sexuels commis en RCA dont nous allons examiner rapidement.

4.1 La primauté des tribunaux des pays fournisseurs des troupes

L'accord qui lie les Nations unies aux autorités centrafricaines dispose qu'en cas d'infractions commises par un casque bleu, celui-ci doit être renvoyé dans son pays d'origine pour y être jugé. Bien que l'idée consiste à responsabiliser les Etats fournisseurs pour les faits commis par leur troupes, cette immunité de juridiction est non seulement en contradiction avec le principe de la compétence universelle qui s'applique aux crimes de guerre mais aussi des telles poursuites sont exceptionnellement rares car certains pays fournisseurs n'ont pas un cadre légal approprié ou se limitent à des sanctions purement disciplinaires et administratives sans oublier que les victimes de ces crimes ont des difficultés pour participer aux procédures qui tiennent souvent très loin, des fois avec des contraintes de la langue. L'on peut envisager les possibilités pour les autres tribunaux notamment sur base de la compétence universelle de contribuer à la poursuite de ces crimes.

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64 Pour plus détails, voir le rapport de Human Rights Watch sur l'exploitation et abus sexuel à Bambari publié en 2016.

65 Brabant J, Minano L, 'L'armée française et l'affaire Sangaris : Anatomie d'une non enquête'.

On peut aussi envisager ici l'intervention de la Cour pénale internationale dans le cas où les crimes ont été commis sur le territoire d'un Etat partie, comme c'est le cas en RCA.

4.2 Immunités et privilèges

L'accord Sofa entre l'ONU et la RCA accorde des immunités et privilèges aux forces de maintien de la paix des Nations unies. Cet accord prévoit l'immunité de juridiction pour les actes accomplis dans l'exercice des fonctions. Mais si le gouvernement centrafricain estime que les membres de la MINUSCA ont commis une infraction pénale, il en informe le *Special Representative of the Secretary-General* (SRSG) qui d'un commun accord avec le gouvernement peut décider si des poursuites pénales peuvent être engagées. Cela concerne, les civils et les membres civils de la composante militaire. Par contre, pour les militaires, c'est la juridiction exclusive du pays contributeur des troupes.[66]

Les fonctionnaires de l'Organisation jouissent également des privilèges et immunités qui leur sont nécessaires pour exercer en toute indépendance leurs fonctions en rapport avec l'Organisation. Mais ces immunités et privilèges ne couvrent pas les crimes internationaux. Cependant, il y a un risque que les soldats de la paix ne puissent pas être poursuivis pour les crimes du Statut de Rome devant les tribunaux pénaux de leur pays. Le problème ne se pose pas si les crimes sont commis sur le territoire d'un Etat partie, comme la RCA. Parce que l'intervention de la CPI n'est pas à exclure. Il se posera plus un problème de coopération si le soldat de la paix poursuivi est citoyen d'un Etat non partie au Statut de Rome. Par contre, pour les crimes commis sur le territoire d'un Etat non partie, le Conseil de sécurité peut renvoyer la situation à la CPI au cas où l'Etat fournisseur n'a pas la capacité ou la volonté de poursuivre. On peut dire qu'aujourd'hui le Statut de Rome prévoit dans la catégorie des 'crimes de guerre' des actions judiciaires contre des soldats de la paix.

4.3 Intervention du Secrétaire Général

En tant qu'agents de l'Organisation des Nations unies, les membres des forces de maintien de la paix n'échappent pas au contrôle généralement imposé à tout agent et fonctionnaire de l'organisation. Le rôle que joue le Secrétaire Général est d'une importance capitale. Il se fait représenté par un envoyé spécial qui lui rend régulièrement compte du déroulement de la mission. Du point de vue administratif,

66 Article 52, *l'Accord Sofa entre l'ONU et le gouvernement centrafricain*.

il lui donne les informations sur les comportements qu'adoptent les agents sur terrain. En réaction à ces rapports, le Secrétaire général peut diligenter une mission spéciale en vue de procéder aux enquêtes.

Dans la plupart de cas ces enquêtes n'aboutissent pas à de poursuites pénales, même si elles peuvent bien établir les éléments soupçonnés de tels ou tels autres crimes. Comme cela a été indiqué supra, ces actions du Secrétaire général ne permettent pas aux victimes d'être prises en charge et de panser leur plaie. Et en plus, aucun suivi n'est fait par l'Organisation pour savoir si les membres de la mission qui ont été soumis à la compétence pénale de leurs Etats y sont jugés et les victimes entendues. Cette situation tend de plus en plus à décrédibiliser l'organisation mondiale de la paix et de la sécurité. Il est souhaitable qu'une politique soit adoptée en renforçant les poursuites administratives internes avec possibilité de prise en charge des victimes. Ceci combattrait l'impunité et exonérait l'organisation de toute complicité.

Il faut reconnaître que certaines mesures ont été prises notamment dans la situation en RDC où des casques bleus ont été accusés d'avoir violé des jeunes filles.

En ce qui concerne la MONUC, l'ONU avait pris quelques mesures [67]:

- interdit les contacts non officiels et fraternisations du personnel de la mission avec la population locale ;
- imposé aux militaires un couvre-feu, qui les empêche de quitter leur base durant leurs heures de liberté la nuit ;
- interdit au personnel en uniforme de porter une tenue civile pour faciliter la surveillance et l'identification du personnel de l'ONU ;
- accru sa coopération avec la police congolaise afin de réduire les contacts non officiels entre le personnel de l'ONU et les femmes du pays ;
- renforcé la formation portant sur les codes de conduite de l'ONU et les règlements régissant le personnel en ce qui concerne la violence et l'exploitation sexuelles ;
- désigné certains établissements commerciaux locaux, dont des maisons closes et certains bars, comme étant interdits d'accès au personnel de l'ONU ;

[67] Quelques mesures prises par le département des Nations unies responsable des opérations de maintien de la paix pour le cas de la RDC après le scandale d'abus sexuels.

- amélioré les équipements et les installations de loisir sur la base ;
- amélioré les communications avec la population locale et les autorités civiles, et notamment créé une 'ligne directe' confidentielle permettant de signaler des abus ;
- mis en place un nouveau département au sein de la MONUC pour enquêter sur toute nouvelle allégation.

On peut regretter que ces genres de mesures n'ont pas été prises aussi pour le cas de la RCA.

4.4 Inaction des Etats fournisseurs

Il appartient aux Etats qui ont fourni les éléments composant les forces, d'engager au plan interne des poursuites contre les crimes dont se sont rendus auteurs leurs soldats. Dans la pratique lesdits Etats, dans la plupart de cas, n'engagent pas de poursuites judiciaires. L'on observe cependant des actions disciplinaires apparentes. Les Etats préfèrent couvrir leurs soldats en vue de ne pas décourager leur participation dans les opérations de maintien de la paix. Les soldats renvoyés en République du Congo après avoir été accusés de viol en République centrafricaine ne sont pas jugés jusqu'à ce jour et aucune volonté de l'Etat congolais ne laisse penser à l'ouverture même d'une action disciplinaire à l'encontre de ces militaires. Cette situation est de nature à encourager l'impunité en sapant le droit à réparation des victimes. Y-a-t-il eu un certain suivi de la part de l'ONU, notamment sur la question de la rétention des derniers soldes pour faire pression aux Etats ?

Sur ce point, les Nations unies avaient sollicité des Etats fournisseurs concernés notamment la République du Congo de prendre de mesures nécessaires. Dans l'affaire Sangaris, qui concerne l'opération de la France en RCA, l'ONU avait transmis aux autorités françaises des informations relatives aux accusations de leurs soldats en RCA plus de 10 mois avant l'annonce du journal *The Guardian*. Une enquête française avait été faite à Bangui qui a malheureusement abouti à un non-lieu. Les réactions des Etats indexés par les accusations de viols et d'abus sexuels varient selon les Etats. Certains pays comme la France était beaucoup préoccupé à laver leur image sur la scène que de vouloir aboutir à la manifestation de la vérité.[68] Et pourtant, le président Hollande affirmait 'si certains militaires se sont mal comportés, je serai implacable'.[69] S'agissants des autres pays indexés comme le

[68] Brabant J, Minano L, 'L'armée française et l'affaire Sangaris : Anatomie d'une non enquête'.

[69] Propos du Président Hollande dans les médias françaises.

Gabon, la République du Congo, ils se sont limités à faire de promesses d'intention sans mener des enquêtes sérieuses sur les accusations. On peut se demander si le blocage est simplement lié au manque de volonté politique ou aux difficultés de ce genre de procédures notamment la nécessité de documenter les crimes, réunir les preuves, les témoignages, etc.

Face à cette inertie des Etats fournisseurs, est ce que la RCA peut-elle exercer 'la protection diplomatique' et attraire l'Etat fournisseur en justice ? Peut-elle se retourner contre l'ONU en protection diplomatique ? L'accord Sofa entre l'ONU et la RCA ne réponds à ces questions mais il faut rappeler qu'il apparaît que la reconnaissance d'une certaine responsabilité de l'ONU pour les OMP ne pose pas de problèmes : elle est admise, y compris et surtout par l'organisation elle-même, sur la base d'une autonomie de la responsabilité pour ses propres actes. En revanche, c'est sa mise en œuvre qui va s'avérer délicate en raison de l'absence de procédures de règlement préétablies.[70] Il faudrait pouvoir imputer à l'organisation un crime internationalement reconnu. Se poseraient les problèmes du lien de causalité (toujours difficile à établir pour les OMP) et surtout du contrôle de légalité des actes du Conseil de sécurité en suspens.[71]

4.5 Poursuites en dehors des Etats fournisseurs et à la CPI

Face à l'inaction des Etats fournisseurs de poursuivre leur troupes accusés d'avoir commis des crimes dans le cadre de la mission de maintien de la paix en RCA et du fait que les Nations unies ne peuvent pas engager de poursuites pénales contre le casques bleus ni les condamner, ne faudrait-il pas envisager de poursuites en dehors des Etats fournisseurs sur la base notamment du principe de la compétence universelle ou principe de territorialité ?

La RCA a à travers l'accord avec les Nations unies accordé une immunité de poursuites à l'endroit de ces soldats de la paix accusés de viols ou d'abus sexuels. On est en face d'une incapacité juridique, pas une situation de manque de volonté. Le manque de volonté de la RCA est dû au manque de capacité juridique de poursuivre ces soldats de la paix. La CPI peut intervenir mais sa compétence personnelle est quelque part bloqué par les accords de l'immunité (voir article 98 §2 du Statut de Rome). Précisons que la compétence territoriale de la CPI englobe sa compétence personnelle. La CPI ne pourra lancer de mandat d'arrêt que lorsqu'il

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70 Sorel J-M, 'La responsabilité des Nations unies dans les opérations de maintien de la paix', *3 Int'l L.F.D. Int'l 127* (2001), 128.

71 Sorel, 'La responsabilité des Nations unies dans les opérations de maintien de la paix, 138.

n'y a pas de procédures nationales dans l'Etat fournisseur des troupes ou lorsque ces procédures nationales tendent à soustraire au soldat de la paix de poursuites judiciaires. Il se posera un problème de coopération si l'Etat de la nationalité du soldat poursuivi est un Etat non partie au Statut de Rome. La Cour pourrait alors inviter cet Etat à coopérer ou faire intervenir d'autres organes comme le Conseil de sécurité des Nations unies pour exercer une pression. La situation serait différente si l'Etat fournisseur est aussi un Etat partie au Statut de Rome au même titre que la RCA. Dans ce cas d'espèce, faute de poursuite, cet Etat à l'obligation de coopérer avec la CPI. A défaut de l'intervention de la CPI, il y a la compétence universelle si le soldat en question se retrouve sur le territoire d'un Etat tiers parce que l'accord Sofa ne lie pas les autres Etats.

Ça serait illogique d'un coter de ne pas reconnaitre les immunités des officiels d'un Etat partie accusés de crimes internationaux et de l'autre de faire échapper les soldats de la paix de poursuites de la CPI.

La RCA étant un Etat partie, rien n'empêche à notre avis, la Cour de connaître de ces crimes commis par les soldats de la paix si les juridictions nationales de l'Etat fournisseur n'ont pas la volonté ou la capacité de poursuivre. Il est utile de rappeler qu'en 2002, au moment de l'entrée en vigueur du Statut de Rome, un accord est intervenu entre les USA et les membres du Conseil de Sécurité de l'ONU : les ressortissants américains avaient obtenu l'immunité devant la CPI et en échange, le mandat de la mission des Nations unies en Bosnie fut prolongé. Les américains avaient menacé de ne plus participer aux missions onusiennes de maintien de la paix dans le monde. Le donnant-donnant auquel on est finalement parvenu accordait l'immunité devant la CPI aux personnels, casques bleus ou autres, des pays qui n'ont signé pas le traité instaurant la Cour et cela pour une durée d'un an. En contrepartie, le mandat de la MINUBH (Mission des Nations unies en Bosnie) était prolongé jusqu'au 31 décembre 2002.

On peut bien comprendre qu'un tel accord n'est plus possible devant la Cour. Déjà en renvoyant la situation d'un Etat non partie devant la Cour sans tenir compte des immunités des officielles, le Conseil de Sécurité ne peut pas admettre l'immunité pour les crimes internationaux à l'endroit des soldats de la paix.

5 La nécessité de prise en charge des victimes

Il ne s'agit pas simplement de rapatrier les soldats de la paix coupable, il faut tenir compte du fait qu'un crime a été commis et doit être punis et réparé. Dans le

cas des abus commis par les éléments des forces de maintien de la paix en RCA, les cris de détresse des victimes ne sont pas entendus ni dans l'affaire Sangaris ni dans les affaires impliquant les soldats de la paix. Du fait de leur vulnérabilité, les victimes constituées des jeunes filles voient leur avenir hypothéquer par ceux-là même qui sont artisans de la paix et du respect des droits de l'homme. Le droit à la réparation est un droit secondaire, c'est-à-dire qu'il ne se concrétise qu'à la suite d'une série d'éléments préalables.[72]

Les victimes d'infractions sont prises en charge judiciairement. Selon le système, elles peuvent participer activement au procès pénal en se constituant partie-civile et postuler les dommages-intérêts devant le juge saisi de l'action pénale, ou encore, être considérées comme simple témoin au procès. Dans les deux cas, l'accent est mis sur la nécessité d'entendre la victime et assouvir sa soif de justice. Dans d'autres pays, la réparation des victimes d'infraction a connu une grande évolution. En partant du principe de l'égalité de tous, il est reconnu à un membre de la communauté victime d'une infraction, le droit d'accéder au fond de garantie, ce en attendant que la suite du procès soit connue. Le fond qu'il reçoit n'est pas conditionné par des exigences juridiques très complexes.

La victime doit prouver qu'elle a été touchée injustement et qu'elle n'est plus sur le même pied que les autres membres de la communauté, que l'auteur de l'acte soit connu ou pas. Il est souhaitable qu'un fonds au profit des victimes à l'interne, soit au sein de l'Organisation des Nations unies soit créé pour prendre en charge les victimes des abus de forces de maintien de la paix. Une action récursoire devra être reconnue à l'organisation contre l'Etat fournisseur appelé à assurer la discipline et le respect de règlement à ses éléments. Quant aux individus, ils ne disposent donc d'aucun recours judiciaire devant l'ONU. Cette dernière est toutefois tenue de prévoir des modes de règlement appropriés pour les différends de droit privé dans lesquels elle serait partie et pour 'les différends dans lesquels serait impliqué un fonctionnaire de l'organisation qui, du fait de sa situation officielle, jouit de l'immunité, si cette immunité n'a pas été levée par le secrétaire général' (art 8 de la Convention sur les privilèges et immunités des Nations unies de 1946).

C'est pourquoi, pour chaque opération de maintien de la paix, elle a mis en place un système non judiciaire ad hoc : les commissions de réclammations. C'est le seul recours dont dispose un individu contre les Nations unies. Il est ouvert également aux personnes morales, donc aux ONG. L'accord passé entre l'ONU et

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72 Rondeau S, 'La réparation individuelle en application des mécanismes prévus par le droit international humanitaire', in *Canadian Perspectives on International Humanitarian Law*, 3.

la RCA prévoit ainsi que tout différend ou toute réclamation relevant du droit privé auquel l'opération des Nations unies est partie soit soumis à cette commission. A l'issue de la procédure devant cette commission, la victime se voit verser une indemnité. Rappelons, qu'en RDC, le gouvernement congolais et l'ONU avait mis sur pied un projet commun visant à aider les personnes qui ont été victimes d'exploitations et d'abus sexuels. Ce projet porte essentiellement sur : l'octroi de soins médicaux, un changement de lieu de résidence et une réinsertion, un soutien et des soins psychologiques et la protection et l'éducation des enfants. Cela est envisageable pour la RCA.

6 Sentiment d'impunité

Le déploiement des forces pour le maintien de la paix emporte un soulagement moral et psychologique aux populations victimes des conflits. Pour elles, le retour de la paix est une assurance par la présence de ces forces neutres. Cependant, il est un paradoxe lorsque ces personnes censées de veiller à la paix et au respect des droits de l'homme dans la zone abusent de ces populations notamment par les actes de viol.

En devenant bourreaux, les membres des forces onusiennes trahissent la précieuse mission reçue de l'organisation et contribuent de ce fait à la déstabilisation des populations déjà touchées par les violations de leurs droits et libertés. La situation devient plus que préoccupante lorsque les victimes ne savent pas par quel mécanisme accéder à la réparation. Dans leur pays, les auteurs des abus sont couverts par les immunités de juridiction à travers les accords de SOFA. La seule voie c'est les poursuites dans le pays fournisseur, très loin des victimes. A l'interne, aucune prise en charge n'est envisagée pour elles. Cette situation crée non seulement un sentiment d'impunité mais aussi met en branle les objectifs assignés à une mission qui intervient pour maintenir la paix ou la reconstruire.

7 Du silence à la reddition de comptes

Dans le monde entier et notamment en RCA, les missions de maintien de la paix se sont accompagnées d'une épidémie de violences sexuelles dans des zones de conflit. Le comportement de quelques membres de contingents ternit l'image des tous les contingents de tous les pays contributeurs de troupes.

Le déni de justice dont jouissent les casques bleus auteurs de violence sexuelle semble faire partie prenante du système. Roméo Dallaire, ancien représentant de

l'ONU pendant le génocide au Rwanda parlait de culture de silence et d'une impunité quasi totale pour les casques bleus.[73] Des lois de leur pays, qui fréquemment ne leur adjoignent aucune responsabilité juridique. Du côté de l'ONU, rien ou presque n'a été fait pour que ces pays fassent œuvre de justice. Faire œuvre de sévérité, et faire pression sur les pays d'origines des casques bleus pour qu'ils traduisent en justice leurs ressortissants, rendrait 'entièrement prévisible le refus par ces pays de contribuer à la poursuite d'autres missions'.

Les évènements en RCA ont poussé les Nations unies à réagir face à cette situation. A la suite de la publication du Rapport du groupe d'examen indépendant externe de haut niveau sur les abus et l'exploitation sexuels des forces internationales de maintien de la paix en RCA en décembre 2015, des mesures ont été prises au sein de Nations unies pour le renforcement et l'application d'une politique de 'tolérance zéro'.[74] Il y a eu aussi la nomination de Mme Jane Hall Lute (de nationalité américaine) comme coordonnatrice spéciale pour l'amélioration de la réponse des Nations unies à l'exploitation et aux abus sexuels. En outre une Résolution 1820 prie le secrétaire général des Nations unies d'établir des programmes de formation pour tous les personnels du maintien de la paix et de l'action humanitaire déployée par les Nations unies et encourage les pays contributeurs de troupes et de force de police à prendre des mesures pour accroitre la sensibilisation aux violences sexuelles dans les situations de conflit et de post-conflit et pour prévenir ces violences.

Un débat a été organisé au sein de l'Assemblée générale des Nations unies et les Etats membres ont exprimés leurs volontés de mettre un terme à ces actes commis par les soldats de la paix qui entrent en contradiction avec les objectifs des opérations de maintien de la paix. Le président de l'Assemblée générale a insisté que 'de tels actes sont inacceptables' en soulignant qu'il appartenait au secrétariat, aux pays fournisseurs de contingents et autres Etats membres de faire de la 'tolérance zéro' et de l'impunité zéro une réalité. Les pays contributeurs doivent sensibiliser leurs éléments sur cette question. Aucune impunité ne devrait être accordée aux personnels reconnus coupables de ces crimes. Ces Etats doivent jouer un rôle actif en prenant des mesures pour prévenir les exploitations et abus sexuels à travers des formations.[75]

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[73] Interviews de Roméo Dallaire, Chef de la mission de maintien de la paix au Rwanda durant le génocide de 1994 dans le journal canadien Globe and Mail, en mai 2015.

[74] Wolfe L, 'L'ONU ne prend pas les accusations de viols commis par des casques bleus au sérieux,' http://www.slate.fr/story/105807/viols-casques-bleus-onu.

[75] Déclaration du Président de l'Assemblée générale de l'ONU, disponible sur le site https://www.un.org/press/fr/2016/ag11810.doc.htm

Il est aussi indispensable que l'ONU transmette plus rapidement des informations précises sur les cas d'abus « pour que la justice nationale puisse faire son travail en garantissant les droits des victimes et de la défense. Sur ce dernier point, il y a lieu de souligner la question connexe des dossiers confidentiels des Nations unies (non-divulgation d'informations confidentielles et article 67 (2) du Statut de Rome - obligation de divulguer des éléments qui montrent l'innocence.[76]

8 Conclusion

Les soldats de la paix de l'ONU ont été accusés de viols et d'abus sexuels en RCA. Ces crimes peuvent être constitutifs de crime de guerre comme nous l'avons démontré ci-haut mais les éléments à charge sont difficiles à rassembler car dans les affaires de viols et d'abus sexuels, les témoins directs sont rares et les traces d'ADN disparaissent au-delà de quelques jours et que dans ce cas, le seul élément restant c'est les déclarations des victimes. Encore faut-il qu'elles aient la possibilité de participer à la procédure devant les juridictions des pays fournisseurs des troupes, ce qui n'est pas le cas pour le moment. La réponse judiciaire à ces crimes fait défaut. Les Etats fournisseurs se limitant juste à des sanctions disciplinaires ou administrative malgré la gravité du crime ou tout simplement ils se refusent d'engager des poursuites (cas des troupes congolaises revenues de Bangui). Et l'ONU, pour sa part, ne peut pas engager des poursuites à l'égard de ces soldats de la paix.

Il faudrait peut-être envisager des mesures préventives comme renforcement de la la formation portant sur les codes de conduite de l'ONU et les règlements régissant le personnel en ce qui concerne la violence et l'exploitation sexuelles pour que les faits de ces soldats ne se répètent plus dans le futur. L'article s'est focalisé sur le viol commis en tant que crime de droit international. En tant que tel, ce crime peut être poursuivi sans que son auteur évoque les immunités et privilèges garanties dans l'accord entre l'ONU et la RCA. La Cour pénale internationale peut ainsi juger le soldat de la paix qui a commis un crime international sur le territoire d'un Etat partie si l'Etat fournisseur des troupes n'a pas la volonté ou la capacité d'engager des poursuites. Il se posera cependant la question de la coopération de l'Etat fournisseur aux poursuites de la CPI. De même, on peut envisager l'hypothèse de la compétence universelle en cas d'inaction de l'Etat fournisseur. La RCA étant

[76] 115 ème séance plenière de la soixante-dixième session de l'Assemblée générale de l'ONU, débat sur les abus sexuels commis par les soldats de la paix de l'ONU en RCA.

dans l'incapacité juridique de connaître ces crimes compte tenu de l'accord Sofa avec les Nations unies. Les différents obstacles à l'accès à la réparation des victimes ayant été analysés, il s'offre, en termes de perspectives, que la nécessité de la mise en place d'une prise en charge judiciaire pour que les victimes puissent assouvir leur soif de justice que ca soit devant les tribunaux des pays fournisseurs ou ailleurs (compétence universelle, CPI etc.)

BIBLIOGRAPHY

Books

Ashworth A, *Principles of criminal law*, 6ed, Oxford University Press, Oxford 2016.

Baker DJ, *Glanville Williams, text book of criminal law*, 3ed, Sweet & Maxwell, London, 2015.

Bantekas I and Nash S, *International criminal law*, 2ed, Cavendish Publishing Limited, New York, 2003.

Bassiouni M, *International Criminal Law,* 2ed, Transnational Publishers, Leiden, 2013.

Bitti G, 'Article 53. Ouverture d'une enquête' dans Fernandez et Pacreau X (dir), *Commentaire du Statut de Rome de la Cour pénale internationale*, Pedone, Paris, 2012.

Boister N, *An introduction to transnational criminal law*, Oxford University Press, New York, 2012.

Cassese A, *The Oxford companion to international criminal justice*, Oxford University Press, Oxford, 2009.

De Vos C and Kendall S (eds), *Contested justice: The politics and the practice of International Criminal Court interventions*, Cambridge University Press, Cambridge, 2015.

Galtung J, *War and defense: Essays in peace research,* Vol 1, Christian Ehlers, Copenhagen, 1975.

Glaser S, *Droit international pénal conventionnel*, vol 1, Bruxelles, Bruylant, 1970.

Jalloh C and Bantekas I (eds), *The International Criminal Court and Africa*, Oxford University Press, Oxford, 2017.

Kleffner JK, *Complementarity in the Rome Statute and national criminal jurisdictions*, Oxford University Press, New York, 2008.

Kress C and Lattanzi F (eds), *The Rome Statute and domestic legal orders volume 1: Constitutional aspects and constitutional issues*, Editrice il Sirente, 2000.

Krieger H (ed), *Inducing compliance with international humanitarian law - Lessons from the african great lakes region*, Cambridge University Press, Cambridge, 2015.

Laucci C, *Code annoté de la Cour pénale international 2004-2006*, Martinus Nijhoff, Leiden, 2008.

Lumumba PLO and Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014.

Maupas S, *Le jocker des puissants. Le grand roman de la Cour pénale internationale,* Don Quichotte éditions, Paris, 2016.

Mbondenyi M and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, Law Africa publishers, Nairobi, 2012.

Nyawo J, *Selective enforcement and international criminal law: The International Criminal Court and Africa*, Intersentia, Cambridge, 2017.

Omerod D, *Smith and Hogan's criminal law*, 13 ed, Oxford University Press, Oxford, 2011.

Pinto QC and Evans M, *Corporate criminal liability*, 2 ed, Sweet and Maxwell, 2008.

Rosa AM, *Juridictions pénales internationales: La procédure et la preuve,* Presses universitaires de France, Paris, 2003.

Schabas W, *The International Criminal Court: A commentary on the Rome Statute*, 2 ed, Oxford University Press, New York, 2010.

Stigen J, *The relationship between the International Criminal Court and national jurisdictions: The principle of complementarity*, Martinus Nijhoff Publishers, Laiden, 2008.

Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article,* 3 ed*,* Hart Publishing, London, 2008.

Werle G and Jessberger F, *Principles of international criminal law*, 3 ed, Oxford University Press, Oxford, 2015.

Williams G, *Criminal law: The general part*, 2 ed, Stevens & Sons, London, 1961.

Chapters in books

Ambos K, 'Genocide (Article 28B), crimes against humanity (Article 28C), war crimes (Article 28D) and the crime of aggression (Article 28M)' in Werle G and Vormbaum M (eds), *The African Criminal Court, a commentary on the Malabo Protocol*, Asser Press, 2017.

Asin J, 'South Africa is not an accused': State (non) cooperation with the International Criminal Court and critique in the case of the arrest warrant for President Al Bashir' in Van der Merwe H and Gerhard Kemp (eds), *International criminal justice in Africa 2016,* Strathmore University Press, Nairobi, 2017.

Bassiouni MC, 'The history of universal jurisdiction and its place in international law' in Macedo S (ed), *Universal jurisdiction, national courts and the prosecution of serious crimes under international law*, University of Pennsylvania Press, Philadelphia, 2004.

Bassiouni MC, 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' in Bassiouni MC (ed), *International criminal law: International enforcement*, 3 ed, Martinus Nijhoff Publishers, Leiden, 2008.

Blattmann R, 'International criminal justice in Africa: Specific procedural aspects of the first trial judgment of the International Criminal Court' in Werle G, Fernandez L and Vormbaum M, *Africa and the International Criminal Court, Asser Press*, The Hague, 2014.

Brabant J et Minano L, 'L'armée française et l'affaire Sangaris: Anatomie d'une non enquête' dans Brabant J et Minano L (eds), *Impunité Zéro: Violences sexuelles en temps de guerre*, Autrement, 2017.

Chetail V, 'La consolidation de la paix: Enjeux et ambiguïtés d'un concept en quête d'identité' dans Chetail V (ed), *Lexique de la consolidation de la paix,* Bruylant, 2009.

Clark P, 'Law, politics and pragmatism: The ICC and case selection in the Democratic Republic of Congo and Uganda,' in Clark P and Waddell N (eds), *Courting conflict? Justice, peace and the ICC in Africa*, Royal African Society, London, 2008.

Condorelli L, La Rosa AM et Sherer S (eds), 'Introduction' dans Les Nations unies et le droit international humanitaire, *Actes du colloque international à l'occasion du 50e anniversaire de l'ONU*, Genève, Pédone, 1995.

Fernandez LD, 'Corruption (Article 28I) and money laundering (Article 28Ibis)' in

Werle G and Vormbaum M (eds), *The African Criminal Court, A commentary on the Malabo Protocol*, Springer, Berlin, 2017.

Jessberger F, 'Piracy (Article 28 F), terrorism (Article 28 G), mercenarism (Article 28 H)' in Werle and Vormbaum (eds), *The African Criminal Court, A commentary on the Malabo Protocol*.

Jessberger F, 'Universal jurisdiction' in Cassese A (ed), *Oxford companion to international criminal justice*, Oxford University Press, Oxford, 2009.

Jalloh C, 'The distinction between international and transnational crimes in the African Criminal Court,' in Wilt H and Paulussen C (eds), *Legal responses to transnational and international crimes: Towards an integrated approach*, Edward Elgar Publishing, Cheltenham, 2017.

Lagot D, 'Cour Pénale Internationale et impunité des États puissants : la CPI, une justice à sens unique ?' dans Andersson N et Lagot D (dir.), *La justice internationale aujourd'hui. Vraie justice ou justice à sens unique?,* L'Harmattan, 2009.

Kemp G and Kinyunyu S, 'The crime of unconstitutional change of government (Article 28 E)' in Werle and Vormbaum (eds), *The African Criminal Court, A commentary on the Malabo Protocol.*

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.

Kirsch P and Robinson D, 'Reaching Agreement at the Rome Conference' in Cassese A (ed), *Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford 2002.

Maina CP, 'Fighting impunity: African states and the International Criminal Court' in Ankumah EA (ed), *The International Criminal Court and Africa - one decade on*, Intersentia, Cambridge, 2016.

Materu S, 'A strained relationship: Reflections on the African Union's stand towards the International Criminal Court from the Kenyan experience' in Werle G, Fernandez L and Vormbaum M (eds), *Africa and the International Criminal Court*, Asser Press, 2014.

Mbokani J, 'Le lien de connexité entre le crime et le conflit armé dans la définition des crimes de guerre' dans Bernard D et Scalla D (eds), *Vingt ans de la justice pénale internationale, Les dossiers de la Revue de droit pénal et de criminologie*, La Charte, Bruges, 2014.

Murithi T, 'Between political justice and judicial politics: Charting a way forward for the African Union and the International Criminal Court' in Werle G et al, *Africa and the International Criminal Court.*

Ntahiraja B, 'The present and future of universal jurisdiction in Africa: Lessons from the Hissène Habré case' in Van der Merwe HJ and Kemp G (eds), *International criminal justice in Africa*, *2016*.

Prost K and Schlunck A, 'Article 98 cooperation with respect to waiver of immunity and consent to surrender' in Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article*.

Seymour LJM, 'The ICC and Africa: Rhetoric, hypocrisy, and legitimacy' in Knottnerus AS and de Volder E (eds), *Africans and the ICC: Perceptions of justice*, Cambridge University Press, Cambridge, 2016.

Sharma SP, 'Regionalism versus universalism in institutional building' in Anand RP (ed), *Asian states and the development of universal international law*, Vikas Publications, Delhi, 1972.

Soma A, 'Vers une juridiction pénale régionale pour l'Afrique' in Niang F and Bernard F (eds), *Colloque sur les droits humains: Mécanismes régionaux et mise en œuvre universelle*, Global Studies Institute, 2014.

Van der Wilt H, 'Complementarity jurisdiction (Article 46H)' in Werle G and Vormbaum M (eds), *The African Criminal Court: A commentary on the Malabo Protocol*.

Von Freiesleben J, 'Security Council reform' in von Freiesleben J, Swart L, Martinetti I and Yeboah N, *Managing Change at the United Nations*, New York, 2008.

Journal articles

Africa Conflict Monitor, 'Burundi's leadership defies international law in a bid to avoid prosecution: Central Africa - regional analysis' *Africa Conflict Monitor*, 11 (2016).

Aksenova M, 'Conceptualising terrorism: International offence or domestic governance tool?' 20 *Journal of Conflict and Security Law,* 2 (2015).

Bassiouni MC, 'The time has come for an international criminal court' 1 *Indiana International & Comparative Law Review* (1991).

Boisson de Chazournes L, 'Plurality in the fabric of international courts and tribunals: The threads of a managerial approach' 28 *European Journal of International Law*, 1 (2017).

Borella F, 'Le régionalisme africain et l'Organisation de l'unité africaine' 9 *Annuaire français de droit international* (1963).

Bruce B, 'Towards the development of an effective system of universal jurisdiction for crimes under International Law' 35 *New England Law Review*, 2 (2001).

Burke-White W, 'Regionalization of international criminal law enforcement: A preliminary exploration' *Texas International Law Journal* (2003).

Butler R, 'Reform of the United Nations Security Council' 1 *Penn State Journal of Law and International Affairs*, 1 (2012).

Capizzi P, 'Le retrait du Burundi du Statut de la Cour pénale internationale: quelles conséquences?' *Revue des droits de l'homme* (2016).

Colojoară R, 'Does the International Criminal Court have a future or is it just an illusion', 54 *Journal of Eastern European Criminal Law* (2016).

Cotton DH and Odongo GO, 'The magnificent seven: Africa's response to US article 98' 7 *African Human Rights Law Journal,* 1 (2007).

Chesterman S, 'An altogether different order: Defining the elements of crimes against humanity' 10 *Duke Journal of Comparative & International Law* (2000).

Chresterman S, 'Asia's ambivalence about international law and institutions: Past, present and future' 27 *European Journal of International Law*, 4 (2016).

De Hemptinne J, 'Trois propositions de réforme du système de la justice pénale internationale' 19 *African Yearbook of International Law* (2014).

Deya D, 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' *Openspace on International Criminal Justice* (2012).

Dreher A and Fuchs A, 'Rogue aid? An empirical analysis of China's aid allocation', 48 *Canadian Journal of Economics/Revue canadienne d'économique,* 3 (2015).

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).

Du Plessis M, 'Complementarity and Africa: The promises and problems of international criminal justice' 17 *African Security Review*, 4 (2008).

Dutton YM, 'Enforcing the Rome Statute: Evidence of (non) compliance from

Kenya' 26 *Indiana International and Comparative Law Review*, 1 (2016).

Engle E, 'The International Criminal Court, the United States, and the domestic armed conflict in Syria' 14 *Chicago-Kent Journal of International and Comparative Law*, 1 (2013).

Freeland S, 'International criminal justice in the Asia-Pacific region: The role of the International Criminal Court treaty regime' 11 *Journal of International Criminal Justice*, 5 (2013).

Ford SF, 'The International Criminal Court and proximity to the scene of the crime: Does the Rome Statute permit all of the ICC's trials to take place at local or regional chambers?' 43 *John Marshall Law Review* (2010).

Gaeta P, 'Does President Al Bashir enjoy immunity from arrest?' 7 *Journal of International Criminal Justice* (2009).

Gehring T and Fraude B, 'The dynamics of regime complexes: Microfoundations and systemic effects' 19 *Global Governance*, 1 (2013).

George JP, 'International parallel litigation - A survey of current conventions and model laws' 37 *Texas International Law Journal* (2002).

Giorgetti C, 'Horizontal and vertical relationships of international courts and tribunals - How do we address their competing jurisdiction?' 30 *ICSID Review – Foreign Investment Law Journal*, 1 (2015).

Hansungule M, 'The principle of complementarity in the Rome Statute in the context of EU-Africa-EU' 8 *The Bulletin of Fridays of the African Union Commission*, 1 (2014).

Hudson MO, 'The Central American Court of Justice' 26 *American Journal of International Law*, 4 (1932).

Jackson M, 'Regional complementarity: The Rome Statute and public international law' 14 *Journal of International Criminal Justice* (2016).

Jalloh C, 'Africa and the International Criminal Court: Collision course or cooperation?' 34 *North Carolina Central Law Review,* 3 (2011).

Jalloh C, 'The nature of the crimes in the African Criminal Court' 15 *Journal of International Criminal Justice*, 4 (2017).

Jalloh C, 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction,' 21 *Criminal Law Forum*, 1 (2010).

Joyner C, 'Arresting impunity: The case for universal jurisdiction in bringing war criminals to accountability,' 59 *Law and Contemporary Problems*, 4 (1996).

Jørgensen NHB, 'A reappraisal of the abandoned Nuremberg concept of criminal organisations in the context of justice in Rwanda' 12 *Criminal Law Forum*, 3 (2001).

Jurdi NN, 'Some lessons on complementarity for the International Criminal Court review conference' 34 *South Africa Year Book of International Law*, 1 (2009).

Kabau T and Ambani J, 'The constitution and the application of international law in Kenya: A case of migration to monism or regression to dualism?' 1 *Africa Nazarene Law Journal*, 1 (2013).

Kalron N, 'The Great Lakes of confusion' 19 *African Security Review*, 2 (2010).

Kamto M, 'Cadre juridique des opérations de maintien de la paix des Nations unies', 3 *Int'l L.F.D. Int'l* (2001).

Khanna VS, 'Corporate criminal liability: What purpose does it serve?' 109 *Harvard Law Review*, 7 (1996).

Kimani M, 'Pursuit of justice or Western plot? International indictments stir angry debate in Africa' 23 *African Renewal*, 3 (2009).

Kocken J and Van Roozendaal G, 'Constructing the Caribbean Court of Justice: How ideas inform institutional choices' 93 *European Review of Latin American and Caribbean Studies* (2012).

Lafontaine F, 'Universal jurisdiction-the realistic utopia' 10 *Journal of International Criminal Justice* (2012).

Maharajh AN, 'The Caribbean Court of Justice: A horizontally and vertically comparative study of the Caribbean's first independent and interdependent court' 47 *Cornell International Law Journal* (2014).

Manirakiza P, 'L'Afrique et le système de justice pénale internationale' 3 *African Journal of Legal Studies* (2009).

McNae J, 'Chapter one: Policy and jurisdiction issues' 4 *Journal of Money Laundering Control*, 2 (2000).

Mdximo L, 'The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes' 105 *American Journal of International Law* (2011).

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

Mude T, 'Demystifying the International Criminal Court (ICC) target Africa political rhetoric' 7 *Open Journal of Political Science*, 1 (2017).

Murungu CB, 'Towards a criminal chamber in the African Court of Justice and Human Rights' 9 *Journal of International Criminal Justice* (2011).

Nyarango AO, 'A jigsaw puzzle or a map? The role of treaties under Kenya's constitution' 62 *Journal of African Law*, 1 (2018).

Nwafor AO, 'Corporate criminal responsibility: A comparative analysis' 57 *Journal of African Law*, 1 (2013).

Oduor M, 'Status of international law in Kenya' 2 *African Nazarene University Law Journal,* 2 (2014).

O'Keefe R, 'Universal jurisdiction: Clarifying the basic concepts' 2 *Journal of International Criminal Justice* (2004).

Olouch EA, 'Incorporating transnational norms in the Constitution of Kenya: The place of international law in the legal system of Kenya' 11 *International Journal of Humanities and Social Sciences*, 3 (2013).

Omorogbe EY, 'A club of incumbents? The African Union and coups d'Etat' 44 *Vanderbilt Journal of Transnational Law* (2011).

Orenga E et Rambolamanana V, 'Retour sur les travaux de la 14e Assemblée des Etats parties de la Cour pénale internationale: Qui sont les grands gagnants?' *La Revue des droits de l'homme* (2016).

Oteng Kufuor K, 'Recent developments: The African Union and the reform of the Security Council-Some matters arising' 14 *African Journal of International and Comparative Law* (2006).

Patrick JG, 'Institutionalising democracy in Africa: A comment on the African Charter on Democracy, Elections and Governance' *African Journal of Legal Studies*, 5 (2012).

Paust J, 'The US and the ICC: No more excuses' 12 *Washington University Global Studies Law Review* (2013).

Philippe X, 'The Principles of universal jurisdiction and complementarity: How do the two principles intermesh?' 88 *International Review of the Red Cross*, 862 (2006).

Ramcharan R, 'Asean's human rights commission: Policy considerations for enhancing its capacity to protect human rights' 3 *UCL Human Rights Review* (2010).

Rau K, 'Jurisprudential innovation or accountability avoidance? The International Criminal Court and proposed expansion of the African Court of Justice and Human Rights' 97 *Minnesota Law Review* (2012).

Reydams L, 'Belgium's first application of universal jurisdiction: The Butare Four Case' 1 *Journal of International Criminal Justice*, 2 (2003).

Rondeau S, 'La réparation individuelle en application des mécanismes prévus par le droit international humanitaire' 27 *Canadian Perspectives on International Humanitarian Law*, 2 (2009).

Ryngaert C, 'The International Criminal Court and universal jurisdiction: A fraught relationship' 12 *New Criminal Law Rev*iew (2009).

Scallia D, 'Chronique de droit international pénal' 85 *Revue de Droit International Public*, 3 (2014).

Schabas WA, 'Regions, regionalism and international criminal law' 4 *New Zealand Yearbook of International Law* (2007).

Schuldt L, 'Southeast Asian hesitation: ASEAN countries and the International Criminal Court' 16 *German Law Journal*, 1 (2015).

Simser J, 'Asset recovery and kleptocracy' 17 *Journal of Financial Crime*, 3 (2010).

Sirleaf M, 'Regionalism, regime complex and the crisis in international criminal justice' 54 *Columbia Journal of Transnational Law* (2016).

Slaughter A, 'The partial rule of law: America's opposition to the ICC is self-defeating and hypocritical*'* 15 *The American Prospect,* 10 (2004).

Smith S, 'Definitely maybe: The outlook for U.S relations with the International Criminal Court during the Obama administration' 22 *Florida Journal of International Law,* 155 (2010).

Sorel J-M, 'La responsabilité des Nations unies dans les opérations de maintien de la paix' 3 *Int'l L.F.D. Int'l,* 127 (2001).

Tan-Mullins M, Mohan G and Power M, 'Redefining "aid" in the China–Africa context', 41 *Development and Change,* 5 (2010).

Tiba FK, 'Regional international criminal courts: An idea whose time has come?' 17 *Cardozo Journal of Conflict Resolution* (2016).

Thouvenin J-M, 'Statut juridique des Forces de maintien de la paix des Nations unies', 3 *Int'l L.F D.Int'l* (2001).

Vandeginste S, 'Briefing: Burundi's electoral crisis – Back to power-sharing politics as usual?' 114 *African Affairs*, 457 (2015).

Van Der Wilt H, 'Unconstitutional change of government: A new crime within the jurisdiction of the African Criminal Court' 30 *Leiden Journal of International Law*, 4 (2017).

Vilmer JB ‘Union africaine versus Cour pénale internationale: répondre aux objections et sortir de la crise’ XLV *Etudes internationales*, 1 (2014).

Weisbord N, ‘Prosecuting Aggression’ 49 *Harvard International Law Journal*, 1 (2008).

William AS, ‘Genocide trials and Gacaca Courts’ *Journal of International Criminal Justice* (2005).

Williams S, ‘The Extraordinary African Chambers in the Senegalese Courts: An African solution to an African problem?’ 11 *Journal of International Criminal Justice*, 5 (2013).

Wolfgang K, ‘From Pinochet to Rumsfeld: Universal jurisdiction in Europe 1998–2008’ 30 *Michigan Journal of International Law*, 3 (2009).

Xavier P et Desmarest A, ‘Remarques critiques relatives au projet de loi « portant adaptation du droit pénal français à l’institution de la Cour pénale internationale»: la réalité française de la lutte contre l’impunité’ 81 *Revue française de droit constitutionnel*, 1 (2010).

Theses

Chella J, ‘The complicity of multinational corporations in international crimes: An examination of principles’ PhD Thesis submitted to Law Faculty, Bond University, 2012.

Makaya Kiela S, ‘Le droit à réparation des victimes des crimes internationaux : une condition pour une justice efficiente, l’exemple de la République démocratique du Congo’, Thèse en droit, Aix Marseille Université, 2014.

Ntsama CB, ‘Les opérations de maintien de la paix de l’ONU et les droits de l’homme’ Mémoire présenté en vue de l’obtention du Diplôme d’Etudes Approfondies, Université de Yaoundé II, 2013.

Rosen A and Gruner VJ, ‘Article 98 agreements: Legal or not?’ Bachelor Dissertation, University of Örebro, 2007.

Tan Poh Heng A, ‘Advancing international criminal justice in Southeast Asia through the regionalisation of international criminal law’, PhD Thesis, University of Nottingham, 2014.

Internet sources

‘African Union accuses ICC of “hunting” Africans’ *BBC News*, 27 May 2013 https://www.bbc.com/news/world-africa-22681894 on 15 August 2018.

‘Again, America and the ICC’, 30 November 2003 http://www.thisdayonline.com/archive/2003/ 07 /25/20030725edi01.html on 25 June 2018.

‘Ahmed K: Britain’s secret killing fields*’ The Guardian,* 1 July 2001 https://www.theguardian.com/uk/2001/jul/01/politics.world on 5 July 2018.

‘Azikiwe A: Africa in review 2017 - Reinforced neo-colonialism and the imperative of continental unity’ *Global Research*, 27 December 2017 https://www.globalresearch.ca/africa-in-review-2017-reinforced-neo-colonialism-and-the-imperative-of-continental-unity/5624108 on 5 July 2018.

‘Bolton J: American Justice and the International Criminal Court remarks by undersecretary for arms control and international security at the enterprise institute’ 3 November 2003 https://2001-2009.state. gov/t/us/rm/25818.html on 5 July 2018

‘Central African Republic: Rape by Peacekeepers’ *Human Rights Watch,* 4 February 2016 https://www.hrw.org/news/2016/02/04/central-african-republic-rape-peacekeepers on 15 August 2018.

‘Fleshman M: Exactions des casques bleus : L’ONU est ferme’ *Afrique Renouveau En Ligne*, avril 2005 https://www.un.org/africarenewal/fr/magazine/april-2005/exactions-des-casques-bleus-lonu-est-ferme consulté le 15 août 2018.

‘Kersten M: How three words could change the ICC-Africa relationship’ *Justice in Conflict,* 9 May 2017 https://justiceinconflict.org/2017/05/09/how-three-words-could-change-the-icc-africa-relationship/ on 15 August 2018.

‘Lepidi P: Dans le camp rwandais de Mahama, l’angoisse des réfugiés du Burundi’ *Le Monde*, 4 juillet 2017 https://www.lemonde.fr/afrique/article/2017/07/04/dans-le-camp-rwandais-de-mahama-l-angoisse-des-refugies-du-burundi_5155474_3212.html consulté le 15 août 2018.

‘Les soldats violent, les commandants ferment les yeux: Violences sexuelles et réforme militaire en République démocratique du Congo’ *Human Rights Watch,* 2009 https://www.hrw.org/fr/report/2009/07/16/les-soldats-violent-les-commandants-ferment-les-yeux/violences-sexuelles-et consulté le 15 août 2018.

Manirakiza P, ‘Le retrait du Burundi de la Cour pénale internationale et ses

implications', 16 octobre 2016 http://www.arib.info/Le-retrait-du-Burundi-de-la-Cour-penale-internationale.pdf consulté le 05 octobre 2017.

'MPs pass motion urging Kenya to withdraw from ICC' *Reuters,* 22 December 2010 https:// www.reuters.com/article/kenya-icc-idAFLDE6BL1RA20101222 on 5 July 2018.

'Naîm M: Rogue aid', *Foreign Policy*, 15 October 2009 https://foreignpolicy.com/2009/10/15/rogue-aid/ on 15 August 2018.

'Naîm M: Rogue development aid' *The New York Times,* 15 February 2007 https://www.nytimes.com/2007/02/15/opinion/15iht-ednaim.html on 15 August 2018.

'Ntaganda case: Trial opening statements will be held at the seat of the ICC, in the Netherlands' Press Release ICC-CPI-20150615-PR1118 of 5 June 2015, https://www.icc-cpi.int/Pages/item.aspx?name=pr1118 on 20 April 2017.

Ouguergouz, F, Présentation orale à la trente-cinquième session du Conseil des droits de l'homme, Genève, le 14 juin 2017 http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21760&LangID=F#sthash.JS79mgfx.dpuf consulté le 15 août 2018.

Plauchut A, 'Burundi: quel avenir pour les acquis d'Arusha?' https://www.grip.org/sites/grip.org/files/NOTES_ANALYSE/2015/NA_2015-07-24_FR_A-PLAUCHUT.pdf consulté le 15 août 2018.

'Rivkin D and Casey L: The International Criminal Court vs. the American People' *The Heritage Foundation,* February 1999 https://www.heritage.org/report/the-international-criminal-court-vs-the-american-people on 5 July 2018.

'Russia, China block Security Council referral of Syria to International Criminal Court' *UN News*, 22 May 2014 https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court on 5 July 2018.

'Saizonuou S: Sanctions contre le Burundi: Museveni critique l'UE' *La Nouvelle Tribune*, 21 mai 2017 https://lanouvelletribune.info/2017/05/sanctions-contre-burundi-museveni-critique-ue/ consulté le 15 août 2018.

Secretariat of the Assembly of the States Parties, 'Informal Compilation of Proposals to Amend the Rome Statute', 23 January 2015, http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-InfComp-RS-amendments-ENG.pdf on 29 September 2015.

'Smith D: Kenya MPs vote to quit International Criminal Court' *The Guardian,*

5 September 2013 https://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court on 5 July 2018.

'Status of US bilateral immunity agreements' *Coalition for the International Criminal Court* http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf on 5 July 2018.

'Tracy Wilkinson: Spain indicts 40 Rwandan officers' *Los Angeles Times*, 7 February 2008 http://articles.latimes.com/2008/feb/07/world/fg-rwanda7 on 6 July 2018.

'Why Kenyan cases at the ICC collapsed' www.jfjustice.net on 13 November 2017.

https://www.assemblee.bi/spip.php?page=imprimer&id_article=1297 consulté le 6 avril 2017.

http://www.bbc.com/news/world-africa-33590991 on 21 June 2015.

http://www.chambresafricaines.org/ on 23 November 2016.

https://www.icc-cpi.int/Pages/Home.aspx# on 23 February 2018.

http://www.icglr.org/index.php/en/background on 24 October 2016.

https://www.icjafrica.com/ on 23 February 2018.

http://www.memoireonline.com/04/15/9005/m_Les-operations-de-maintien-de-la-paix-de-lONU-etles-droits-de-lhomme11.html consulté le 21 août 2017.

http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21757&LangID=F on 15 August 2018.

https://papersmart.unmeetings.org/ga/72nd-session/plenary-meetings/statements/ on 5 July 2018.

http://www.president.go.ke/2016/12/12/kenya-giving-serious-thought-to-icc-withdrawal-president-kenyatta-says/ on 15 August 2018.

https://www.ppbdi.com/index.php/extras/politique-cooperatio-actualiteinternationales/7006-burundi-chine-bons-amis-bons-partenaires-et-bons-freres-la-chine-et-le-burundi-avancent-ensemble consulté le 30 mai 2017.

https://redress.org/wp-content/uploads/2017/08/French_PSEA_Remedies_covers.pdf consulté le 15 août 2018.

https://www.state.gov/j/gcj/icc/ on 12 April 2017.

Institutional authors

Conference papers

Ahmed DM, 'Why African states should leave the ICC' paper presented at The Crisis of International Criminal Law in Africa Conference, University of Leicester, November 2017.

Sandholtz W, 'Backlash and international human rights courts', Paper prepared for the Contracting Human Rights Workshop at the University of California, Santa Barbara, 26-28 January 2017.

Reports

Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes,* August 2002,

Charting a wiser course: Human rights & world drug problem - A Report of the Special Committee on Drugs and the Law of the New York City Bar Association, 19 April 2016.

Gowan R and Gordon N, 'Pathways to Security Council Reform' A Report by the New York University Center on International Cooperation commissioned by the Permanent Mission of Japan to the United Nations, 2014.

United Nations, 'A More Secure World: Our Shared Responsibility - Report of the Secretary General's High-Level Panel on Threats, Challenges and Changes', 2004.

United Nations, Report of the preparatory committee on the establishment of an International Criminal Court, United Nations diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, Rome, Italy 5 June – 17 July 1998.

Working papers

Carbone G and Meloni C, 'Africa vs ICC: Searching for an exit strategy' Italian Institute for International Political Studies, 28 March 2017.

Du Plessis M, Louw A and Maunganidze O, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions', Institute for Security Studies Paper No.241, November 2012.

Edward RM, 'The African Charter on Democracy, Elections and Governance: Positive step on a long path', Open Society Institute, Africa Governance Monitoring and Advocacy Project, May 2007.

Institute for Security Studies, 'Peace and Security Council Report' Issue 77, February 2016.

Jennett JH, Karmel R, Zerk J and Powles S, 'Corporate responsibility for international crimes' Royal Institute of International Affairs' International Law Programme Meeting Summary, 19 May 2015.

Kahombo B, 'Africa within the justice system of the International Criminal Court: The need for a reform' KFG Working Paper Series No.2, Berlin, May 2016.

Krieger H, 'A turn to non-state actors: Inducing compliance with international humanitarian law in war-torn areas of limited statehood', SFB-Governance Working Paper Series, June 2013.

Kyriakakis J, 'Corporate criminal liability at the African Criminal Court' Briefing Paper – ACRI Meeting, Arusha, 2016.

Muzila L, Morales M, Mathias M and Berger T, *On the take: Criminalizing illicit enrichment to fight corruption*, The World Bank and UNODC, 2012.

Vandeginste S et Niyonkuru C, 'Le peuple constituant et les Ingingo Ngenderwako de l'Accord d'Arusha: les limites légales et légitimes d'une révision de la Constitution du Burundi', Working paper, Institute of Development Policy and Management, 2017.

Vandeginste S, 'Exit Arusha? Pathways from power-sharing in Burundi. A manuscript outline', Working Paper, Institute of Development Policy and Management, 2017.

Vandeginste S, 'The ICC Bruexit: Free at last? Burundi on its way out of the Rome Statute', IOB Analysis and Policy Brief 20, Institute of Development and Policy Management, 2016.

Von Feigenblatt O, 'ASEAN and human security: Challenges and opportunities', Working Paper No. 09, Ritsumeikan Center for Asia Pacific Studies (RCAPS), 2009.

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