



Justice Beyond the International Criminal Court: Towards a Regional Framework in Africa

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Declaration

I declare that this thesis is my own, unaided work. In 2018, I was privileged to have worked as a research scholar at the South African Institute of International Affairs (SAIIA). During my time at SAIIA, I published a peer-reviewed paper also titled “Justice Beyond the International Criminal Court: Towards a Regional Framework in Africa”. I have drawn on parts of this paper in my thesis. In the text, I indicate that I am drawing on the paper and will submit a hard copy of it as an annex to this thesis.

This thesis is submitted towards the award of Master of Arts in the Department of International Relations and the University of the Witwatersrand. It has not been submitted for any other degree or examination at this or any other institution.

Signature:

Date:

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Abstract

The last decade has seen a deterioration of the relationship between Africa and the International Criminal Court. Their interaction has been characterised by differences in the understanding of justice, allegations of bias and non-cooperation. Increased efforts by some African countries to create an alternative regional framework for justice can also be seen. This research report is interested in Africa's criticisms of the International Criminal Court and will demonstrate these through the case studies of the Democratic Republic of Congo, Kenya and Sudan. Lastly, it will consider the potential of Africa's regional mechanisms for justice, in responding to the criticisms raised against the International Criminal Court. As such, it will evaluate the experiences of the Extraordinary African Chambers and the Special Court for Sierra Leone, extracting possible lessons and concluding on the prospects for the delivery of criminal justice in Africa, in the context of the African Court for Human and People's Rights.

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Chapter 1

Problem Statement and Rationale

The International Criminal Court (ICC) came into operation in 2002, with the jurisdiction to try international crimes of genocide, war crimes and crimes against humanity. Its creation was based largely on the understanding that some crimes are so grave and the consequences so far reaching, that they become the concern of “humanity” as a whole and require international efforts for justice. These and other principles, contained in the Rome Statute, the Court’s founding document, guide the procedures and policies of the ICC.

Encouraged by the Nuremberg and Tokyo Tribunals and shaped by the work of the International Law Commission (ILC), the ICC is a product of over 60 years of deliberation and debate. It’s shape and form was altered through several draft statutes and the omission of a number of crimes, including economic ones, from the final text of the Rome Statute has had far reaching consequences, shaping who can be brought before the court and which crimes can be tried.

Still, in the wake of mass atrocities such as the Rwandan genocide, and aware of their lack of capacity to address them, African states welcomed the creation of the ICC. Having experienced a process of democratisation and an improvement in human rights that paralleled the Court’s establishment, many African states were supportive and actively engaged in the negotiation of the Rome Statute in the 1990s. It was a time of great optimism and the document had the backing of the majority of states on the continent. Indeed, Africa is still the largest bloc of members with 33 signatories¹.

This enthusiasm for the ICC continued throughout its formative years. It saw the Democratic Republic of Congo (DRC) carry out the arrest and surrender of wanted persons within its territory² and the self-referral of Uganda to the Court. However, towards the end of the 2000s, the increased issuance of warrants of arrest for African officials and the lack of such warrants for crimes committed outside of Africa changed this relationship for the worst. In addition to allegations of bias, the ICC’s reliance on criminal trials as a means to achieve justice appeared to clash with Africa’s preference for peace efforts to be included as part of the entire process. This disconnect generated much criticism of the Court, largely from African states but a fair amount from elsewhere too. It has seen some African states, at the encouragement of the African Union (AU), attempt to reform the ICC and where they have failed, engage in non-cooperation with the Court, at the expense of its credibility and effectiveness. The breakdown in relations has also seen increased efforts to establish an

¹ In order of their ascension: Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic, Benin, Mauritius, Democratic Republic of the Congo, Niger, Uganda, Namibia, Gambia, United Republic of Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Congo, Liberia, Kenya, Comoros, Chad, Madagascar, Seychelles, Tunisia, Cabo Verde, Côte d’Ivoire.

² The Kabila government surrendered four suspects to the ICC, including Thomas Lubanga, the Court’s first conviction.

African alternative to the ICC, which satisfies Africa's understanding of justice, namely the African Court for Human and People's Rights with an expanded mandate.

This research is interested in how and why Africa's relationship with international criminal justice, as understood and pursued by the ICC, deteriorated. As such, it seeks to explore some of the major criticisms raised by African states in relation to the ICC. Lastly, in the absence of membership to an international legal mechanism like the ICC, this research is interested in what alternative or complementary functions African human rights institutions offer to the ICC?

This research is important for four reasons:

- 1) Talks to repair the relationship between the ICC and Africa continue, arguably with more effort on the part of the ICC in recognising its responsibility, as a global institution, to account for its actions. In the pursuit of justice, an element of accountability is present and should be addressed by the ICC too.
- 2) Law is a process and should transcend time, space and context. It is not a definitive subject and thus, debates around international criminal law should be encouraged with the goal of improving the spirit and letter of the law.
- 3) The examination of international criminal law cannot take place outside of questions of power struggles, economic inequality, unilateralism, and great power politics amongst other things, that characterise the global governance debate. The ICC's operation in this environment has been fraught with contradictions and begs a closer assessment of how the legal, political and economic interact.
- 4) International criminal justice is a non-negotiable. Debates need to move beyond the typical for or against rhetoric to ask what standard of justice the present system can provide and how it may be improved upon. This assessment attempts to contribute to a body of research that will move the debate along. The longer it takes to shift the argument, the longer serious international crimes and human rights abuses will go unaddressed.

The main arguments this thesis seeks to make are as follows:

- 1) Africa's relationship with the ICC deteriorated as a result of concerns that the court is encroaching on sovereignty; complaints that the ICC is biased; and dissatisfaction with the ICC's preference for justice over peace
- 2) Some of these complaints are valid while others have been exaggerated.
- 3) At a regional level, Africa has taken important strides in establishing its own framework for international criminal justice. Political will and a recommitment to the values which inspired the framework is necessary to see the process through.

These arguments will be supported by a thorough analysis of Africa's relationship with the ICC to date, with a specific focus on the case studies of Sudan, Kenya and the DRC. Tracing the establishment and experience of Africa's own framework for international criminal justice will also support arguments that there are cogent alternatives for the ICC on the continent.

Through this research I expect to find that some African states and societies have different understandings and practises of justice in comparison to the ICC. Other areas of contention

have emerged since the Court's inception and include questions of bias, immunity, universal jurisdiction and the power of the UN Security Council. Thus, some African states have become disillusioned with the Court, calling for its reform and refusing to cooperate with its requests. They have also engaged in increased efforts to establish regional and continental alternatives to the ICC. To this end, the research will briefly frame the relationship between the ICC and Africa using the cases of the DRC, Kenya and Sudan to highlight some of the major criticisms raised by African states. Upon gaining further understanding on why their relationship deteriorated, the research will then consider African efforts for international criminal justice, and ask whether these efforts respond to the initial criticisms raised. As such, it will draw on the experiences of the Extraordinary African Chambers in Senegal and the Special Court for Sierra Leone, to conclude on what alternative or complementary functions African human rights institutions offer to the ICC. This research is not looking to solve the Africa ICC problem; it aims to show the complexity of the situation.

Literature Review

The relationship between Africa and the ICC is not a new area of research and has been well covered by existing literature. To date, these publications have focused on the ICC's functionality (Nissel 2004), its impact on peace processes (Grovogui 2015), retributive versus restorative justice, and questions of whether justice should be served and at what cost, or whether it should be sacrificed in the interests of peace (Clarke 2015).

According to Nissel (2004), one of the most controversial decisions was whether the ICC should have universal jurisdiction, which would enable the court to prosecute nationals of any state, regardless of whether that state had ratified the Rome Statute or not. In the end it was decided that the ICC would have a limited form of universal jurisdiction whereby a state must accept the jurisdiction of the court by becoming a state party (ratification) or by making a declaration if it is a non-state party.³ Accordingly, 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”.

Nissel views this article as a set of rules which attempt to clarify the ICC's jurisdiction and how it is triggered. Still, the continued debate around the jurisdiction of the court has meant that the Rome Statute is unsurprisingly “vague” in certain respects, with concepts such as “continuing crimes” being purposefully left out. This is one of several deficiencies identified in the way that the ICC was set up and will be discussed further in Chapter 2.

On the impact of the ICC's pursuit of justice in Libya, Guinea and Mali, Grovogui (2015) points out that Africa has been the most implicated in the actions prohibited by the ICC. His article is predicated on the nature of international crimes that are committed during civil war,

³ The Rome Statute of the International Criminal Court , Article 12(2)

conflict and political contestation by “parties neither indictable, nor innocent, yet have followers, associates and sympathisers”, as is the case with states I am observing, particularly Kenya. Grovogui’s call is for ICC proceedings, whatever the crime and its severity, to recognise the underlying claims of conflict and the larger social, moral and ethical implications of its work.

According to Grovogui, people’s sense of justice can be achieved through a range of means including economic redistribution, rebuilding the legal or political infrastructure, or ending sexual violence. However, as Clarke (2010) points out, the ICC does not focus on forgiveness or transition but on arresting and punishing. This method of assigning individualised responsibility draws on Western legal thought and its construction of concepts of justice and freedom. It does not take into consideration the root causes of violence. This emphasis on judicial process assumes that law is the sole way to achieve justice. In fact, it is only part of the story.

The ICC’s impact in Africa has also been examined by Branch (2017) who, through his analysis of the ICC trial of Dominic Ongwen,⁴ points out the difficulty of contributing to peace and justice in Africa. Branch puts forth that the “lack of fit” between the Court and Africa is not the result of cultural differences, as some have argued, but rather the result of the ICC’s counterproductive roll on the continent. Africa, and the high number of atrocities that take place there, fits squarely with what Branch calls the ICC’s “black and white” moral narratives. However, as the ICC has found out, international crimes committed in Africa are not so straightforward.

Part and parcel of recognising the implications of the ICC’s work in Africa is the broader acknowledgment that “justice” provided by international law is not absolute and should not always take precedence over local resolutions to long standing and complex political crises. Branch (2004) exemplifies the then ongoing international efforts to prosecute Hissène Habré, which was being initiated and driven forward by a broad coalition of Chadian human rights non-governmental organisations (NGOs) and victims groups. Branch rightly predicted that the continuation of domestic coalitions to build popular support may provide a good example of international legal solidarity with the local pursuit of justice. Indeed, that is what we saw happen and today the Habré case remains an illustration of how international law should be guided by those it is claiming to serve.

In her book, “Africa and the International Criminal Court”, Clarke acknowledges the two trajectories that debates around Africa and the ICC have typically followed. The first legalistic or pragmatic argument deals with amendments to the ICC, as suggested by the AU, and formulates recommendations for its reform. The second is a normative assessment, which evaluates the appropriateness of African states’ concerns and debates the selectivity of international criminal justice. This have given rise to two distinct categories of review: one which reflects on appropriate approaches to fixing the relationship between the ICC and Africa and another which generally assess the relationship itself. This research arguably

⁴ Of the Democratic Republic of Congo

belongs to the latter trajectory but looks beyond the relationship between Africa and the ICC to regional and continental mechanisms for justice.

Further to calls for alternative forms of justice, Clarke (2013) has also made the case for a broader understanding of justice that includes, for example, “greed”. In analysing the ICC’s indictments of the Ivory Coast’s first couple,⁵ Clarke points out that the Court’s action did not bring it any closer to confronting the root causes of the violence in the Ivory Coast in particular and on the continent more generally: greed - or the discovery and extraction of natural resources such as oil, diamonds and gas. Greed in Africa has been fed by the struggle for control of energy, minerals and food by political parties, rebels and international corporations. According to Clarke, the ICC also needs to punish those who profit from these struggles. She gives the example of the Chinese National Petroleum Corporation, which has been assailed for supplying Sudan’s military with resources and oil revenues used to support the mass displacement and murder of civilians, but which operates with impunity. International justice does not mean only investigating heads of state but also multinational corporations that form part of the ecosystem of Africa’s violence. The prosecution of such economic crimes was initially included in a draft code for an international criminal court but was omitted from the final text of the Rome Statute, facing resistance from several governments. This has had far reaching consequences for who can be tried at the Hague and for what crimes.

Conversely, the AU’s proposal to expand the criminal jurisdiction of the African Court for Human and People’s Rights to include corporate criminal liability for illicit exploitation of natural resources is key in this regard and will form part of my research. Clarke’s most recent work discusses these issues within the broader and more encompassing argument about the current global governance system and Africa’s position within it. I hope to add to this body of research by briefly exploring the relationship between Africa and the ICC and evaluating some of the criticisms raised by African states.

Existing literature has only just begun to move beyond the “bias” argument to consider prospects for criminal justice in Africa without the ICC. This is in part due to recent developments at the ICC which have further called into question the court’s capacity to deliver justice and prospects for its future. In March 2016, Jean-Pierre Bemba, former vice president of the DRC, was found guilty by the ICC on the basis that he failed to prevent and stop crimes committed by soldiers in the CAR from 2002 to 2003. He was convicted on two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging). It was the court’s first conviction for the crime of sexual violence and a triumph for women’s rights (Brunger 2016). However, in June 2018, the ICC’s Appeals Chamber acquitted Bemba on procedural grounds, with wide implications for international criminal jurisprudence.⁶ Following shortly after was the acquittal of former president of Côte d’Ivoire Laurent Gbagbo and former leader of the Jeunes Patriotes Charles Blé Goudé due

⁵ Warrants of arrest were issued for Laurent and Simone Gbagbo for crimes against humanity in 2011 and 2012 respectively.

⁶ Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled “Decision on Sentence pursuant to Article 76 of the Statute”

to a lack of evidence.⁷ Gibert (2019) has called their acquittals the “latest of several failures by the ICC’s prosecution team to secure the condemnation of indictees”.

Willingness to look beyond the ICC for mechanisms of redress may also be a result of the success of several hybrid courts in bringing justice closer to victims on the ground. The experiences of the Special Court for Sierra Leone and the Extraordinary African Chambers have been well documented in existing literature. A hybrid court in the Central African Republic is building on those experiences, struggling over the meaning and feasibility of justice and potentially responding to calls for prosecuting authorities to extend across domestic and international judicial regimes (Niang 2019).

The concepts identified in the works of these authors will be detailed further in Chapter 2, in relation to the case studies of Sudan, Kenya and the DRC.

Theory and Methodology

This research began by explaining the outcome: the non-cooperation of African states with the ICC, and their pursuit of regional mechanisms for justice, and searched for causes through process tracing. A background discussion briefly traced the experiences of Sudan, Kenya and the DRC with the ICC, to highlight the major criticisms raised. The research then traced efforts to establish a continental court, drawing on lessons from the Extraordinary African Chambers and the Special Court for Sierra Leone, and concluding on what alternative or complementary functions African human rights institutions offer to the ICC.

This research is thus case orientated and qualitative by design, looking at the experiences of select countries with the ICC. According to Van Evera (1997, 89-117), with qualitative designs, the insights of actors central to the events one is attempting to explain are central and may be examined for causes.

“Non-cooperation of African states with the ICC” is understood in this research to mean the negative reactions of the DRC, Kenya and Sudan to the indictments of wanted persons in their countries. This was assessed through dissent at the AU (official requests made by the union and individual member states to reform the ICC, and official resolutions denouncing the Court and its jurisdiction), attempts to withdraw from the Court and official statements of African states, and the failure of African states to carry out the arrest and surrender of wanted persons within their territories. The bulk of this assessment was drawn from existing literature and formed the basis of the background discussion and literature review.

“The pursuit of regional mechanisms for justice” is understood to mean the efforts of the AU and some African states to create regional and continental courts. It was assessed through official statements, resolutions and legislation calling for such. As assessment of the efforts was conducted using the aforementioned primary data and allowed me to build findings.

⁷ The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé ICC-02/11-01/15

The main research question is then: what is the potential of regional criminal justice mechanisms to provide a viable alternative to the ICC and respond to criticisms raised against the court? Questions to consider under this broad theme include:

- What are some of the major criticisms raised against the ICC?
- In the absence of membership to an international legal mechanism like the ICC, what are Africa's prospects for the delivery of international criminal justice?

To answer these questions, the process tracing method was applied. Process tracing is the study of how decision making links the initial condition to the observed outcome. This involves identifying intervening steps and mechanisms which make up a causal chain linking a cause and its effect (Waldner 2012).

Process tracing has traditionally been viewed as inferior to experimental or statistical approaches but it is well suited in a world marked by several interaction effects, where it is challenging to explain outcomes in terms of two or three causes. In such an environment, process tracing helps to narrow the list of potential causes. Moreover, pairing process tracing with theoretically oriented narratives has resulted in the identification of important regularities through the juxtaposition of historical cases (George and Bennet 2005).

There are numerous types of process tracing (Ibid) and this research has employed the analytical variety, in which a brief narrative of the selected countries respective experiences with the ICC were presented in the form of a chronicle that aims to highlight the major concerns and criticisms levelled against the ICC. Parts of the narrative were accompanied by information which is highly specific to the case but which relates to the broader disagreement between Africa and the ICC. These empirical findings then allowed for consideration of regional mechanisms for international criminal justice.

According to George and Bennet (2005), process tracing should be adapted to the nature of the causal processes thought to characterize the phenomenon being investigated. This research is characterized by complex causality, where the outcome flows from a convergence of several conditions and causal chains. However, even with close observation, it is difficult to eliminate all potential rival explanations, especially when human agents are involved. Process tracing evidence is thus non-standardized because it is sensitive to the precise nature of the process being traced. Some evidence may take the form of an event, while some may be presented as a decision making process or a collective action (Waldner 2012). This makes process tracing studies inherently falsifiable. Conversely, process tracing forces the researcher to consider equifinality and to consider alternative paths through which the outcome may have occurred.

Therefore, in as much as process tracing is the most suitable method of analysis for this research, it does have its limits. While process tracing does provide a strong basis for causal inferences, this can only happen if it can establish an uninterrupted causal path linking the causes to the observed effects. Moreover, if data is unavailable, process tracing can only reach provisional conclusions. This is especially true for case study research in which different interpretations may arise from different reasons. This will be addressed by identifying all the potentially relevant causes and by comparing various case studies of the

same events. While the DRC, Kenya and Sudan had vastly different experiences with the ICC, all cases were investigated for international crimes committed during civil war and political unrest. By emphasizing the causal paths within each case, as opposed to the variables across them, arguments of causality are strengthened.

In summary, this research is an empirical enquiry that investigates contemporary phenomena within its real-life context where the boundaries between phenomena and context are not clearly defined. Process tracing was employed for its interest in historical events and its sensitivity to their complexities. The research wishes to theorize the group of cases but also explain their individual dynamics. Process tracing provides a common ground for this.

This research will make use of case studies, which provide the intensive empirical analysis that may uncover previously unnoticed causal factors and historical patterns. As an alternative to controlled comparisons, process tracing is valuable in situations where it is not possible to find similar cases in every respect but one (Ibid) and will allow for the identification of different causal paths that lead to a similar outcome in different cases. The DRC, Kenya and Sudan have had different experiences with the ICC but all three have a similar outcome – resistance and non-cooperation with the Court.

The case studies are thus relevant to the research aim and have allowed for empirical inferences. Their selection was not arbitrary, but was guided by the following criteria:

- African countries that have been investigated by the ICC.
- African cases which came before the court through all three of the possible means: through self-referral (DRC), through the referral of the United Nations Security Council (Sudan), and through the decision to investigate by the Office of the Prosecutor (Kenya).

Although perhaps a large case selection, with a vast amount of data, with process tracing, the more cases observed, the more causal paths I was able to consider that lead to the outcome and clarity around the conditions under which it occurs. Furthermore, the experiences of these countries with the ICC were drawn from existing literature and formed the basis of a background discussion and literature review, which in turn allowed me to briefly frame Africa's relationship with the ICC in relation to the major areas of misunderstanding namely, the ICC's encroachment on sovereignty, questions of bias and the clash between efforts for peace and justice.

The bulk of the remaining research, which considers African efforts for the delivery of international criminal justice, allowed me to move beyond critique, to ask which African frameworks for criminal justice are possible and whether they respond to the criticisms raised.

Data sources were drawn from a variety of primary and secondary sources. Primary sources included official statements and press releases of African governments, the AU and the ICC, given in relation to the "Africa-ICC" debate. It also included legislation and resolutions that seek the reform of the ICC or the creation of an African alternative and the case information

of each country as provided by the ICC. The primary data was readily available and easily accessible. Secondary sources included books, articles, academic journals and online resources that address the “Africa-ICC debate”, in relation to the case studies selected.

Chapter 2

Background Discussion: The Cases of Sudan, Kenya and the Democratic Republic of Congo.

African states' criticism of the ICC can be broadly summarised in three points (Nel 2015):

- Concerns that the ICC is encroaching on sovereignty
- Complaints that the ICC is biased against Africa and ignores crimes against humanity in other parts of the world
- Dissatisfaction with the ICC's preference for justice over peace.

Within these broad themes, further points of dissatisfaction with the ICC can be identified, such as the ICC's inability to secure state cooperation, the tendency of cases before the ICC to become politicised and the failure of the prosecution to secure convictions against those that have been indicted.

The case studies of Sudan, Kenya and the DRC respectively are explored in this chapter to demonstrate how the above three specific criticisms have manifested themselves in practise. A brief background discussion on the history of the ICC and its relationship with Africa serves to contextualise the situation.

The Establishment of International Criminal Court

The devastation of the Second World War shocked the world. In the aftermath, the allies had to decide what to do with the worst of the Nazi war criminals. While the US pushed for the war criminals to be put on trial, Britain and the Soviet Union advocated for summary executions.

The US' preference for a criminal trial prevailed and manifested itself in the creation of the Nuremberg Tribunal, where the defendants were accused and convicted of murdering over a million people. Opening the proceedings on the tribunal's first day, first prosecutor Ben Ferencz said: "We ask this court to affirm by international penal action man's right to live in peace and dignity, regardless of his race or creed... the case we present is a plea of humanity to law... the charges we present accuse the defendants of having committed genocide" (Linder 2019). It was hoped that the Nuremberg trials would lay the foundation for genocide as a crime and send the message that crimes against humanity are punishable and that nobody is immune (Ferencz 2015).

Motions to establish a more permanent international criminal court were also being put forward by jurists who envisaged a tribunal that could try individuals accused of international crimes (UN 1998). It was an effort to address past conflicts and ensure that they never happened again. To this end, an International Law Commission (ILC) was established in 1949, with a mandate to develop international law in general.⁸ One of the 14 topics included

⁸ Article 1, Statute of the International Law Commission

in its work plan was the concept of international responsibility, which, at the time, was largely thought of as the individual responsibility of states, since states were the major actors and causes of the issues arising in the international system.

Although the ILC began working on state responsibility at a very early stage, the subject was conceived in a narrow way (Crawford 2008). The Commission was largely concerned with what state responsibility would mean for diplomatic protection of persons and property, in the context of foreign direct investment. This was an issue mainly for capitalist exporting states (overwhelmingly located in North America and Western Europe) and capital importing states around the world. During the height of the period of decolonisation, this was a particularly difficult subject. As a result, proposals made in the late 1950s received little debate in the Commission, and were seen as giving rise to impossible ideological conflict (Ibid).

This was remedied in part when the ILC made a basic distinction between the substantive obligations of states, (arising from treaties, general rules of international law or bilateral agreements) and the basic requirements that had to be met before a state could be said to have been in breach of an international obligation. In other words, a distinction between primary and secondary rules. The distinction made the task more manageable and helped to form the framework within which international law operated. However, in the 1960s, most of the work of the ILC was spent completing what became the Vienna Convention on the Law of Treaties in 1969. It was one of the most important contributions of the ILC to the development of international law but it also meant that work on international responsibility had to take a back seat (Ibid).

Despite the lessons of Nuremberg and the progress at the ILC, horrors continued in Guatemala, Cambodia, and Kurdistan to name a few. By the early 1990s, Yugoslavia had also broken into civil war. The UN intervened with peacekeepers and proposed an innovative tribunal to prosecute individuals for the worst of these crimes. After agreeing to ensure these types of atrocities never occurred again, the pressure to “get it right this time” was immense (Goldstone 2007).

As in Nuremberg nearly 50 years earlier, the US took the lead in supporting this new tribunal. But while the Yugoslav trials got under way, genocide broke out in Rwanda in 1994. Eight hundred thousand people were murdered in 100 days and the world had once again failed to intervene and prevent the mass crimes that took place. After the fact, the international community, under the guidance of the UN, set out to bring justice to those responsible, also through a criminal tribunal. While both ad hoc courts were proving successful, they were also recognised as expensive and time consuming processes.

At the same time, the ILC was debating the adoption of a statute for a permanent international criminal court. Since 1983, the Commission had been reviewing a draft “Code of Offences against the Peace and Security of Mankind” which then became a draft “Code of Crimes against the Peace and Security of Mankind”. The ILC had asked the UN General Assembly to decide whether its mandate in relation to the draft code also included the preparation of a statute for international criminal jurisdiction, since some members viewed the code without such a mechanism as redundant (UN 2017).

In the years that followed, several reports were presented at the ILC and member states of the UN were asked to give their views on the conclusions regarding the implementation of the draft code. The thirteenth report differed from the previous reports in one important way.⁹ Six of the 12 crimes included in the first reading of the draft code had been removed: the threat of aggression, intervention, colonial domination and other forms of alien domination, apartheid, the recruitment, use, financing and training of mercenaries, and wilful and severe damage to the environment. This was a direct consequence of opposition from governments in respect of those crimes. Instead, the report focused on the remaining crimes, namely: genocide, systematic or mass violations of human rights, exceptionally serious war crimes, international terrorism and illicit traffic in narcotic drugs.

The ILC continued its work with a view to establishing a draft statute, taking into account the views expressed during the debate as well as the written submissions received from states (Ibid). The draft statute contained 60 articles dealing with the establishment of the court, its composition and administration, jurisdiction, investigation and prosecution, trials, appeals and review, and international cooperation. Rather than rely on any one specific criminal legal system, the draft was a combination of the most “appropriate elements” and consulted existing treaties and earlier proposals for international tribunals.

The Commission adopted the draft statute for an international criminal court, and in line with Article 23 of its Statute, recommended to the UN General Assembly that it convene an international conference to study the draft statute - what later became known as the Rome Conference (Ibid).

In June 1998, the Rome Conference was convened for states to discuss a treaty that would establish a permanent international criminal court. The omission of the six additional crimes from the final draft statute shaped negotiations around which crimes could be prosecuted. After six weeks of deliberation, on 17 July 1998, the Rome Statute of the International Criminal Court (Rome Statute) was adopted by a majority of 120 states. Seven countries voted against the treaty: the US, China, Iraq, Israel, Libya, Qatar and Yemen. A further 21 states abstained from voting (Scharf 1998).

By the 31 December 2000 deadline, 139 states had signed the Rome Statute. It would come into effect with 60 ratifications, a requirement that was met by April 2002 (ICC 2005). At the time of writing, the ICC had 123 state parties (ICC 2019).

The ICC began operating on 1 July 2002 with the jurisdiction to prosecute international crimes of genocide, crimes against humanity and war crimes. Its creation was based in part on the notion that some crimes are so grave and the consequences so far reaching that they become the concern of humanity as a whole, and require international efforts for justice. The ICC aims to “put an end to impunity for the perpetrators” of international crimes and notes that it is the ‘responsibility of every state’ to further this goal.¹⁰ These and other principles, contained in the Rome Statute, guide the ICC’s procedures and policies (Clifford 2019).

⁹ International Law Commission, Forty-seventh session 1995.

¹⁰ Rome Statute, 1998, Preamble.

Jurisdiction:

The jurisdiction of the court was widely debated at the Rome Conference (Scharf 1998). One of the most controversial decisions was whether the ICC should have universal jurisdiction, which would enable the court to prosecute nationals of any state, regardless of whether that state had ratified the Rome Statute or not. The controversy around the jurisdiction of the ICC arose again later, most notably when the UN Security Council referred the situation in Darfur, Sudan to the ICC for investigation. This will be discussed in further detail below, suffice to say that in the end it was decided that the ICC would have a limited form of universal jurisdiction whereby a state must accept the jurisdiction of the court by becoming a state party (ratification) or by making a declaration if it is a non-state party.¹¹ Accordingly, 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”.

The ICC is thus not a universal court. Jurisdiction can however be extended to a situation on the territory of a non-state party by the UN Security Council. This Article 13(b) power has been the source of much controversy and will be discussed in detail later on in this chapter under the Sudan case study.

Definitions for the crimes over which the ICC has jurisdiction are described in articles 5 through 8 of the Rome Statute. Genocide is defined as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The various acts include killing and causing serious bodily harm to members of a group, imposing measures that prevent birth and forcibly transferring children from one group to another.¹² Article 7 of the Rome Statute prohibits crimes against humanity “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” War crimes are defined in Article 8, which sets out an extensive list of rules and acts that are prohibited during armed conflict.

While the ICC has jurisdiction over these crimes, the court is “complementary to national jurisdictions”,¹³ meaning that prosecution should only occur in cases where domestic courts are unwilling or unable to do so. Member states have the primary responsibility to try their own offenders, failing which the ICC is a potential recourse. The rationale is that the ICC should not undermine sovereignty but reinforce domestic tools of justice (Clifford 2019). This principle of complementarity, described in Article 17 of the Rome Statute, creates a presumption in favour of national action. It should also allow for the proper distribution of ICC resources.

¹¹ Ibid, Article 12(2)

¹² Ibid, Article

¹³ Ibid, Article 1

To apply the principle of complementarity and to restrict the possibility of the ICC undermining a state's sovereignty, Article 18 of the Rome Statute requires the Prosecutor to "notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned" before starting an investigation. The Prosecutor is also prevented from starting an investigation of his own initiative without first receiving approval from the court's Pre-Trial Chamber (PTC).¹⁴

Structure, operation and access to the court:

The ICC has three chambers: a Pre-Trial Chamber, a Trial Chamber and an Appeals Chamber.¹⁵ It also has an Office of the Prosecutor (OTP) which is responsible for receiving and investigating cases.¹⁶ The ICC's work is overseen by the Assembly of State Parties (ASP) - a forum of state parties which meets once a year to discuss any issues, set the court's budget and conduct elections, amongst other things.¹⁷

The ICC relies on state cooperation to function.¹⁸ By ratifying the Rome Statute, state parties commit themselves to cooperating with the court in relation to investigations and prosecution. Article 87 of the Rome Statute empowers the ICC to request a state's cooperation. A failure to cooperate can result in a referral of that state to the UN Security Council.¹⁹

A case may come before the ICC via two mechanisms provided for by the Rome Statute:

- A case may be referred by a state party or the UN Security Council ²⁰
- A case may be initiated by the Prosecutor ²¹

According to Article 14 of the Rome Statute, any state party may "refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed", provided that the pre-conditions in Article 12 have been met, that is: the alleged crime took place in the territory of a state party or the crime was committed by a national of a state party.

The ICC Prosecutor is also empowered by Article 15 of the Rome Statute to "initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court".

¹⁴ Ibid, Article 15(3)

¹⁵ Ibid, Article 34 and 39

¹⁶ Ibid, Article 42(4)

¹⁷ Ibid, Article 112.

¹⁸ Ibid, Article 86

¹⁹ Ibid, Article 87(7).

²⁰ Ibid, Article 13 and 14

²¹ Ibid, Article 15

The ICC in practise:

By November 2003, almost a year and six months after the ICC had begun its operations, the OTP had received over 650 complaints. Fifty of those complained about crimes which allegedly occurred before 1 July 2002, suggesting a lack of understanding about the court and its jurisdiction. Several complaints referenced alleged crimes which fell outside of the court's subject matter jurisdiction. For example, 38 complaints put forth that war crimes had taken place during the US' 2003 invasion of Iraq. The validity of those claims aside, the US is not party to the Rome Statute and thus, remains outside of the ICC's reach. By 2006, the number of complaints had risen to 1700, 80% of which were outside the jurisdiction of the ICC (ICC 2006).

Nevertheless, there are successful examples of the ICC's vision for international criminal justice. In 2012, the DRC's Thomas Lubanga Dyilo was convicted by the court for enlisting children into the Lord's Resistance Army.²² This is one of only three convictions to date. In 2014, Germain Katanga, a Congolese national, was convicted for attacks carried out on the civilian population of Ituri, DRC²³ and in 2015 Ahmad Al Faqi Al Mahdi was sentenced to nine years in prison for intentionally directing attacks against religious buildings in Mali ²⁴ (Clifford 2019).

The low arrest and investigation rate relates to the ICC's dependence on the cooperation of its member states to function. The court has no police force of its own and lacks the institutional features to address criminal cases, rendering it almost completely reliant on the political will of its signatories. While the ICC can request cooperation legally, through obligations in the Rome Statute, on its own it has no power to make arrests and conduct investigations, limiting the number of cases it hears without state participation. Moreover, while Article 87 of the Rome Statute lists repercussions for non-compliance, in reality no state has suffered serious consequences for failing to cooperate with the ICC (Ibid).

When in 2015, South Africa failed to arrest Sudanese President Omar al-Bashir, wanted by the ICC for war crimes and crimes against humanity, the PTC issued a statement acknowledging that South Africa had failed to comply with obligations as a signatory to the Rome Statute but it choose not to refer South Africa to the UN Security Council, as it is empowered to do (ICC 2017).

In 2018, the Rome Statute celebrated its 20th anniversary, an appropriate time at which to pause and reflect on the ICC's efforts to deliver international criminal justice to victims of mass human rights violations. Twenty years ago, the hope was that the Rome Statute would have a transformational effect, conferring upon the ICC the power to prosecute and enforce freely. However, according to Chappell (2017), the court that emerged is far from that dream. While the ICC still enjoys the support of many in the international community, it is facing increasing criticism. The latest in the court's stream of challenges is its embattled relationship with Africa. The remainder of this chapter is aimed at describing and

²² The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06, 2012.

²³ The Prosecutor v. Germain Katanga ICC-01/04-01/07.

²⁴ The Prosecutor v. Ahmad Al Faqi Al Mahdi ICC-01/12-01/15, 2015.

understanding this relationship, with a concentration on the criticism being raised by African leaders and states.

Africa and the ICC

According to Nel (2015), Africa's relationship with the ICC has coincided with the state of governance in each country. States with poor governance and rule of law seemed to be most opposed to the jurisdiction of the court for fear that their leaders may be prosecuted. Conversely, countries with a history of good governance and rule of law appeared more supportive. Africa's central role in the establishment of the ICC challenges her argument.

In the wake of mass atrocities, such as the Rwandan genocide, and aware of their lack of capacity to adequately respond to them, African states welcomed the creation of the ICC. Having experienced a process of democratisation and an improvement in human rights standards that paralleled the Court's establishment, many African states were supportive and actively engaged in the negotiation of the Rome Statute in the 1990s (Du Plessis, Maluwa & O'Reilly 2013). It was a time of great optimism as the document had the backing of the majority of states on the continent. Today, Africa is still the largest regional bloc of the Court, with 33 signatories (ICC 2019).²⁵

African states contributed significantly to the arrangements leading up to, during and after the Rome Conference. Prior to the conference, approximately 90 African organisations from South Africa, Uganda, Ethiopia, Kenya, Nigeria and Rwanda joined a coalition for an international criminal court, lobbying in their respective countries for its establishment (Mochochoko 2005).

Following the presentation of a draft statute for an international criminal court by the ILC in 1993, the group met in Pretoria in 1997 to decide on negotiation processes for the upcoming Rome Conference. Participants also agreed on a common position, so as to ensure a meaningful outcome from the conference. This set of principles provided the basis for negotiations in Rome (Maqunga 2009).

During the Rome Conference, Africa presented two guiding documents. Both expressed a commitment to a court that would be independent from the UN Security Council, staffed by an independent prosecutor and with jurisdiction over core crimes (Mochochoko 2005, 250). The role of the UN Security Council was thus a concern for representatives from Africa from the start and continued to be controversial when the Court was officially established and investigations began. It was an issue that was never satisfactorily addressed, to the detriment of perceptions around the ICC's independence. In addition, African states also chaired and coordinated various sessions during the conference. The resultant Rome Statute was established with great involvement from African states.

On 2 February 1999, Senegal became the first state party to ratify the Rome Statute (ICC 2003). Thirty two African states have since followed suit. In addition to an obligation to

²⁵ Before the withdrawal of Burundi in October 2017, Africa boasted 34 signatories.

cooperate with the court, state parties may also take measures to prohibit crimes defined in the Rome Statute in domestic law, which would allow them to try such crimes at national level. South Africa, Kenya, Uganda, Côte d'Ivoire and Senegal have included the international crimes described in the Rome Statute into their domestic criminal law. The argument, therefore, that some African states resisted the establishment of the ICC is condescending and underestimates the value of rule of law on the continent. That 33 African states signed and ratified the Rome Statute demonstrates a commitment to fighting impunity for international crimes.

Africa's enthusiasm for the ICC continued throughout its formative years. It saw self-referrals from Uganda, the DRC and the Central African Republic (CAR). Other African states actively cooperated with the court, carrying out arrests and surrendering suspects to the ICC (Clifford 2019).

It is difficult to detect the exact moment when the relationship between Africa and the ICC shifted, but this thesis puts forth as its starting point 2008/2009 when warrants of arrest for African officials were being increasingly issued, with an absence of investigation outside of Africa. In addition to allegations of bias, some African leaders expressed concern over the ICC's use of universal jurisdiction. This followed the arrest of former Rwandan Chief of Protocol to the President, Rose Kabuye, in Germany, in connection with the 1994 genocide. President Paul Kagame opposed the arrest, calling it a violation of Rwanda's sovereignty (Kimball 2008).

Universal jurisdiction is still debated both in theory and practice under international law, for its perceived disregard for sovereignty. Sovereignty is an important cornerstone of the international order, and for good reason. In the absence of a higher central authority to control the interaction of states, respect for sovereignty creates stability (Doyle 2016). It stems from the respect for the rights of other states to establish their own way of life, free from international interference. However, this argument weakens in the face of obvious abuses of human rights, where intervention is considered justifiable through, for example, the Responsibility to Protect. Moreover, crimes such as genocide, which produce flows of refugees and can constitute a risk to national security, cannot be viewed strictly as domestic issues. Thus, some states have incorporated the concept of universal jurisdiction into domestic law, on the understanding that some crimes are so grave, they affect humanity as a whole and require international efforts for justice (Clifford 2019).

In 2008, the AU Commission issued a report on the abuse of the application of universal jurisdiction by non-African states. The report noted that indictments against African leaders have a destabilising effect and may negatively impact their ability to conduct international relations, especially where peace processes are ongoing. The report requested that any summonses issued to heads of state to appear before a court in another country be subject to the approval or consent of that head of state, with respect for diplomatic immunity (AU 2008).

A further technical objection to universal jurisdiction relates to the challenge in applying the principle universally. Different states have varying domestic legislation dealing with universal

jurisdiction and in the absence of standard rules, its application becomes problematic (Apiko and Aggad 2016). In South Africa, for example, the Implementation of the Rome Statute Act removes immunity from prosecution and directly contradicts amnesty laws as dictated in the Diplomatic Privileges and Immunities Act.²⁶ Similar Acts are common in most states, allowing for the immunity of diplomatic leaders so that the practise of international relations goes unhindered (Clifford 2019).

In its criticism of the ICC, Africa has not come off unscathed. Many have described the continent's attitude as hypocritical and see its objections as a convenient front to shield leaders from prosecution. While it is entirely possible that some African opposition to the ICC is a defense mechanism for dictators, to dismiss Africa's criticism as self interest is to ignore the context.

Africa's "double-faced" position is reported frequently in the media. However, other states have expressed similar reservations about the functions and independence of the court from its establishment. The US, for example, opposed the ICC from the beginning, voting with Israel and five others against the Rome Statute (Scharf 2001). Although the Rome Statute was signed under President Bill Clinton, it faced strong resistance from Congress, and was never ratified. Members of Congress were wary of the lack of checks and balances on the authority of the Court, given that it is not answerable to any organisation and does not employ the jury system (Hoile 2012). Under President George W. Bush the Court received even less support. In 2002 the American Service Members Protection Act was passed, effectively allowing US troops to come to the aid of any American citizen on trial in the Court. Bush's administration also saw the signing of several Bilateral Immunity Agreements (BIAs) with ICC member states. The agreements provided that neither state would surrender citizens of the other party to the ICC, unless the parties had agreed to do so in advance (Clifford 2019). ICC member states that did not sign BIAs with the US were threatened with foreign aid cuts, a decision that cost South Africa approximately \$ 8,1 million over the 2004/5 fiscal year (Boehme 2016). The BIA's essentially created a band of states that could safely operate with impunity.

India, while enthusiastic about the idea of an international court, also found the structure of the ICC wanting. Explaining its decision not to join, leader of the Indian Delegation to the Rome Conference Dilip Lahiri (1998) remarked:

We have always had in mind a court that would deal with exceptional situations where state machinery had collapsed, or where the judicial system was either so flawed, inadequate or non-existent that justice had to be meted out through an international court because redress was not available within the country. That however, has not happened.

The Indian government was unsatisfied with the power of the UNSC to bind non-state parties to the Rome Statute; a clause it said violated a fundamental principle of international law and rendered the Rome Statute subordinate to the UNSC, increasing the likelihood of politicised prosecutions (Ibid).

²⁶ Article 4, Act 37 of 2001.

Russia signed the Rome Statute but never formally supported or cooperated with the court. In 2016, President Vladimir Putin announced that Russia would withdraw its signature from the Rome Statute. According to its foreign ministry, the ICC “failed to meet expectations to become a truly independent, authoritative international tribunal” (Walker 2016). In March 2018, the Philippines also notified the UN Secretary General of its intention to withdraw. This may be more of a testament to the shift in global politics than the weaknesses of the ICC, as suggested by Chadwick (2016):

Just as Britain has voted to leave the EU and the US has chosen the exuberantly anti-internationalist Donald Trump to be president, countries the world over are rushing to reclaim sovereignty and reject supranational scrutiny. The ICC, a vital institution tasked with ensuring that governments prosecute perpetrators of atrocity, is caught in the headlights.

These criticisms have not convinced states such as Botswana, Nigeria and Senegal who remain committed to the ICC and insist that the solution does not lie in withdrawal but in continued cooperation and possible reform. Côte d’Ivoire, the DRC, Mali, Rwanda and Uganda, have surrendered wanted persons in their territories.²⁷ Other states have expressed their support of the ICC vocally, most sharply at the 2014 Assembly of State Parties, where representatives from Burkina Faso, CAR, Ghana, Malawi, Sierra Leone and Zambia affirmed the importance of the Court in fighting impunity. Also during this session, the Assembly elected its first African president, Justice Minister Sidiki Kaba of Senegal (Human Rights Watch 2014). Amidst AU talks of an Africa-wide withdrawal strategy from the ICC, Côte d’Ivoire, Nigeria and Senegal reaffirmed their commitment to the Court. Moreover, four African states have referred themselves to the ICC, a point some believe refutes the claim that the ICC is biased against Africa²⁸ (Clifford 2019).

The ICC question has divided members of the AU, some of whom believe the court to be a cornerstone of justice and others who refute its neo-colonial jurisdiction. Preoccupied with efforts for greater economic integration, there has been little clarity on the way forward at the AU (Ibid).

The following case studies encompass some of the most significant events since the ICC’s establishment and are therefore an appropriate choice for further analysis. In doing so, I aim to test the validity of African criticism against the ICC and identify the faults emerging from the ICC in its intervention in Sudan, Kenya and the DRC. Beyond the legalities, I aim to highlight the political and ethical questions that have plagued these cases, creating a foundation for the consideration of a broader conception of justice in Chapter 3.

²⁷ The Prosecutor v Laurent Gbagbo and Charles Blé Goudé ICC-02/11-01/15; The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06; The Prosecutor v. Germain Katanga ICC-01/04-01/07; The Prosecutor v. Dominic Ongwen ICC-02/04-01/15; The Prosecutor v. Bosco Ntaganda ICC-01/04-02/06; The Prosecutor v. Ahmad Al Faqi Al Mahdi ICC-01/12-01/15, 2015.

²⁸ Central African Republic, Mali, Uganda, DRC.

The ICC in Sudan: An encroachment on sovereignty?

The Prosecutor v Omar al-Bashir

Sudan was the first time a case has come before the ICC via referral by the UN Security Council. As a leading precedent, it is worth contextualising the referral and reflecting on the facts.

The relationship between the ICC and the UN Security Council has always been a concern for Africa. A particular point of contention has been the Council's power, through Article 13(b) of the Rome Statute, to refer any case to the Prosecutor of the ICC, by acting under Chapter VII of the Charter of the United Nations (UN Charter), regardless of whether the state involved has ratified the Rome Statute or not. This is possible because UN Security Council resolutions are binding on all member states of the UN. This is also how the ICC has been afforded jurisdiction in respect of Sudan, a state that has not ratified the Rome Statute. There are issues with the referral in relation to both law and politics and these will be explored below.

History of the conflict:

Since independence in 1956, Sudan has been ruled as a military state with occasional attempts at democracy. Change of government has, on a number of occasions, occurred as the result of a coup (United Nations 2005, 18). President al-Bashir himself came to power in 1989 after a coup which forced many into exile. Bursts of violence between Arab and African ethnic groups were reported throughout the 80s and 90s. The clashes took place in Darfur, western Sudan, over oil reserves, arable land and the "political polarization" of the region (Ibid, 22).

The underlying racial tension reached its height in April 2003 when civil war erupted in Darfur. The instigating rebel groups were the Sudan Liberation Army and the Justice and Equality Movement. In response to the uprising, the government of Sudan allegedly initiated a genocidal campaign against civilians who belonged to the same ethnic groups as the two rebel movements. Relying on the existing racial tension, the government was said to have called on local groups to assist in holding off the rebels. The majority of the attacks were allegedly perpetrated by the "Janjaweed", an Arab militia supported by the government (Rondreux 2017).

According to the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (UN 2005, 32), the government of Sudan armed and provided military support to the Janjaweed, who have been responsible for the murder and rape of black Africans in the region. It is estimated that 400 000 people died in the first two years of the war, as a result of violence, malnutrition and disease. The government of Sudan insists that it is not involved in the crimes committed by the Janjaweed while victims, human rights organisations and the UN Commission for Human Rights confirm that it is (Rondreux 2017).

In March 2004, UN Secretary General Kofi Annan spoke out against the war in Darfur (UN News 2004). Before the case was referred to the ICC, the UN Security Council requested that Annan establish a commission of inquiry to “investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify perpetrators of such violations with a view to ensuring that those responsible are held accountable.”²⁹

The Darfur Commission presented its report to the UN Security Council in February 2005. It had visited Sudan twice and found evidence of violations of international human rights law and humanitarian law, and clear links between the militia and the government of Sudan (United Nations, 2005). The Commission noted that the situation in Darfur met the requirements of Chapter VII of the UN Charter as it constituted a threat to peace and security. It recommended therefore, that the UN Security Council refer the situation to the ICC “to protect the civilians of Darfur and end the rampant impunity currently prevailing”. The ICC was described as the “only credible way of bringing alleged perpetrators to justice” (Ibid, 146).

The ICC and the UN Security Council:

The Rome Statute allows the UN Security Council to influence the work of the ICC in two important matters: it can refer cases to the ICC for investigation through Article 13(b) and it can defer investigation of cases through Article 16.

Article 13 of the Rome Statute states that:

“the Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”.

This means that with nine or more affirmative votes in the UN Security Council, even a non-state party may be referred to the ICC.

The UN Security Council may only refer a situation by acting under Chapter VII of the UN Charter, that is, the council must regard the situation in the state as a “threat to the peace, breach of the peace, or act of aggression.”³⁰ The council must be sure that the “character, gravity and scale [of the crime], constitutes a manifest violation of the Charter of the United Nations.”³¹

Chapter VII also states that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or

²⁹ UNSC Resolution 1564.

³⁰ Charter of the United Nations, Chapter VII, Article 39.

³¹ Rome Statute, Article 8.

decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

Given the controversy around this power and the strict rules for its use, the referral mechanism seemed an unlikely option until Sudan.

Much like the UN Security Council’s ability to refer cases to the ICC for investigation, Article 16 of the Rome Statute empowers the council with a mechanism of negative intervention. It states that:

“no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.

With Article 16, the UN Security Council can prevent ICC investigation in a state by requesting that no action be commenced for a renewable period of one year. Such a request requires the approval of nine members of the council. However, the five permanent (P5) members of the Council (the US, Russia, China, the UK and France) can, with a single vote, veto decisions to refer or defer ICC investigations.

The power of the UN Security Council was one of the most widely debated issues at the Rome Conference. While some states argued for the protection of national sovereignty, other states believed the rule of law needed to be implemented without favour (Cassese 1999, 161). States were particularly concerned about the Article 16 deferral power and only accepted its inclusion on the condition that it would be used sparingly and only if a specific threat to international peace and security could be identified. Like Article 13(b), it was not envisaged that the deferral mechanism would often be used (Ncube 2017).

Further to the controversial referral and deferral power of the UN Security Council, African states have questioned the refusal of the US, China and Russia (three of the P5 members of the UNSC) to join the ICC. These states, and any others who occupy a non-permanent seat at the council and are not state parties to the Rome Statute, have not subjected themselves to the jurisdiction of the Court, yet may refer other states for investigation and have used their power freely to direct the ICC’s operations, especially where its involvement threatened to impact negatively on their interests (Clifford 2019). In 2014, Russia, a state widely implicated in the ongoing Syrian civil war, vetoed the adoption of a draft resolution that would have referred the conflict to the Court.³² ICC intervention in Syria is warranted. Concerns over war crimes and crimes against humanity at the hands of the government have been well publicised. The accusation is that by referring the situation in Darfur to the ICC but blocking action in Syria, the UN Security Council, and by extension, the ICC, is guilty of double standards (Jalloh and Bantekas 2017).

Resolution 1593:

³² United Nations. 2014. “*Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*”, Security Council 7180th Meeting.

In line with Article 13(b), the UN Security Council adopted Resolution 1593 on 31 March 2005, referring the atrocities committed in Darfur to the ICC, as recommended by the Darfur Commission. But the referral was not approved unanimously. The US openly objected to the referral, referencing its well known concerns about jurisdiction over nationals of states not party to the Rome Statute. It suggested, in place of a referral, a Sudan tribunal (Human Rights Watch 2005). To appease the US, a special provision was included in the resolution to ensure that, in the ICC's investigation into Sudan, jurisdiction would not be awarded over states that had not ratified the Rome Statute. Paragraph 6 of the resolution reads:

"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 authorized by the council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State".

This provision ensured that the US did not veto the referral. Instead, it abstained from voting and the hypocrisy of an immunity clause for a UN Security Council referral of a situation on the territory of a non-state party to the ICC was overlooked.

It has been suggested however that Paragraph 6 is legally invalid. It contradicts Chapter VII treaty provisions in the Rome Statute which are binding upon all member states of the UN, including the US (Cryer 2006). That was certainly the case when Uganda attempted to refer violations by the Lord's Resistance Army, (a rebel group that has been wreaking havoc in East Africa) to the ICC, while shielding crimes committed by its own state soldiers. Luis Moreno Ocampo, the ICC's Chief Prosecutor at the time, went as far as to declare that no such exception could be possible (Akhavan 2005).

Issues of jurisdiction:

Much of the controversy surrounding the Sudan referral has to do with the fact that Sudan has not ratified the Rome Statute and rejects the jurisdiction of the ICC. Khartoum called the resolution a violation of its sovereignty (Sudan Tribune 2005) and insisted that it would not allow any Sudanese national to be tried before a foreign court (Appiah 2005). This potential issue was raised by the drafters of the Rome Statute but was never fully addressed (Bassiouni 1999).

However, the Rome Statute does include provisions to apply the principle of complementarity and to restrict the possibility of the ICC undermining a state's sovereignty. Article 18 of the Rome Statute requires the Prosecutor to "notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned" before starting an investigation. After notifying the relevant parties (state or non-state), those concerned may submit that they will investigate the situation against their own nationals themselves. At this stage, it is open to both state

parties and non-state parties to insist they they will investigate allegations against their own citizens themselves. The ICC must then suspend its investigation.³³

The Darfur Commission found however that “the Sudanese justice system is unable and unwilling to address the situation in Darfur” given that it has “significantly weakened during the last decade” (United Nations 2005, 5).

Despite these various jurisdictional arguments, Ocampo decided that there was a sufficient basis on which to begin an investigation, which he initiated in June 2005. He relied on exceptions to the principle of complementarity included in Article 17 of the Rome Statute to show that the Sudanese government was unwilling or unable to prosecute (ICC 2005). In several reports to the UN Security Council thereafter, Ocampo referred to evidence that demonstrated an extensive pattern of atrocity crimes, including murder, rape, displacement of civilians and looting and burning of civilian property.³⁴

The Prosecutor v. Omar Hassan Ahmad Al Bashir:

In 2008, Ocampo applied to the PTC to approve a warrant of arrest against President al-Bashir for genocide, crimes against humanity and war crimes in Darfur.³⁵ The AU objected to the warrant on the grounds that Sudan is not a signatory to the Rome Statute. International treaties are predicated on their voluntary nature, accounting for state sovereignty. If a state can still be subjected to the conditions of a treaty it did not sign, its sovereignty is disregarded. The controversy was escalated by the fact that although Sudan is not a state party, non-state parties voted for or refrained from vetoing the referral, and have the power to defer investigations.

With South Africa’s Mbeki government taking the lead, the AU sought to have the investigation deferred for 12 months, under Article 16 of the Rome Statute (Sudan Tribune 2008). The reason for the inclusion of Article 16 is to allow the UN Security Council to temporarily set aside the pursuit of justice during times when demands for peace are being made. For example, if temporarily suspending legal investigation of a suspect will lead to a peace treaty, precedence should be given to peace (Werle and Vorbaum, 2017).

This is the argument the AU Peace and Security Council (PSC) made in July 2008 when it filled an urgent application to the UN Security Council, requesting that it use its Article 16 power to defer the ICC process for the moment.³⁶ It regretted the pursuit of the warrant amidst ongoing efforts for conflict resolution in Sudan, in which al-Bashir is a key figure. The application requested that the international community hold back and allow Sudan and counterparts the opportunity to address the situation through their own mechanisms (Clifford 2019). For example, the AU had been engaged in peace talks with government forces and

³³ Rome Statute, Article 18(2).

³⁴ Twenty-first Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593, 2005, 7.

³⁵ Decision Requesting Additional Supporting Materials in relation to the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Al Bashir, 2008.

³⁶ African Union Peace and Security Council. 2007. “*Communique*”. Presented at the PSC 87th Meeting, Addis Ababa, Ethiopia.

armed opposition groups in Darfur since 2005. The result of these negotiations was the signing of the Darfur Peace Agreement in 2006 between the Sudanese government and the Sudanese Liberation Army, one of the largest armed movements fighting for the right to self determination in Southern Sudan. One of the AU's greater complaints is that instead of assisting, the ICC often undermines efforts for peace in Africa (Du Plessis 2008).

However, Du Plessis (2008) suggests that Article 16 is limited to deferrals of particular situations and is invoked on a case by case basis. It cannot be used to provide immunity for a class of individuals or nationals and was not intended as a means by which the UN Security Council could undermine or interfere in the work of the ICC. Du Plessis argues therefore, that the Prosecutor's investigation in relation to Sudan stands independently from the UN Security Council referral that triggered the ICC's jurisdiction.

When no response to the first PSC application was received, a second application to the UN Security Council in September 2008 referenced steps taken thus far in Sudan's peace process, including the establishment of a panel to investigate allegations and the appointment of a special prosecutor.³⁷ Although these efforts were ineffective, they suggest a commitment and attempt by Sudan and the AU to address the situation on their own (Clifford 2019). The ICC also has a responsibility, in respect of the complementarity principle, to defer situations to national courts where efforts to prosecute exist. However, Ocampo stated that based on their "current assessment, it does not appear that the national authorities have investigated or prosecuted or are investigating or prosecuting cases that are or will be the focus of our attention such as to render those cases inadmissible before the ICC."³⁸

And so, much to the irritation of the AU PSC, the ICC's PTC confirmed the warrant of arrest on 4 March 2009, but only in respect of war crimes and crimes against humanity.³⁹ That the UN Security Council did not meaningfully engage the AU's request, only "noting"⁴⁰ its applications and postponing a final decision to another time, (Akande, du Plessis & Jalloh 2010) was a further source of tension, leading in turn to widespread support of what was already a growing anti-ICC sentiment by several African governments (Clifford 2019).

Having had no luck with the UN Security Council, African state parties recommended, at a 2009 AU Ministerial Meeting, that Article 16 of the Rome Statute be amended to allow the UN General Assembly to exercise the deferral power if the UN Security Council had failed to make a decision within a certain time period.⁴¹ Leaders correctly reasoned that the UN General Assembly was more representative of the global community, yet the proposal was rejected by most states.

³⁷ African Union Peace and Security Council. 2008. "*Communique*". Presented at the PSC 151st Meeting, New York, USA.

³⁸ Statement of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo to the UN Security Council pursuant to Un Security Council Resolution 1593. 2006. Sudan.

³⁹ Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 2009.

⁴⁰ UN Security Council Resolution 1828.

⁴¹ African Union. Thirteenth Ordinary Session 1 – 3 July 2009 Sirte, Great Socialist People's Libyan Arab Jamahiriya.

A 2009 Report of the AU High Level Panel on Darfur also put forth solid suggestions for achieving both justice and peace in the region. The report did not dismiss legal proceedings; in fact it emphasised the need for the prosecution of those responsible, perhaps through a hybrid court.⁴² Efforts to establish this court have since stalled following interest in pursuing a truth and reconciliation process, modelled after South Africa's, instead (Sirleaf 2017). This tribal reconciliation and conflict resolution process was said to have brought together tribes from both sides of the conflict and resulted in the cessation of inter-tribal clashes in western Darfur.

It may have been beneficial for the UN Security Council to defer ICC involvement as it posed a threat to peace and stability in Sudan (Clifford 2019). The warrant of arrest instead increased uncertainty in the midst of delicate discussions and negotiations between rebel movements and the National Congress Party, led by al-Bashir (Adar 2010). Human Rights Watch reported in 2008 however, that the peace process had stalled for reasons unrelated to the arrest warrant and that al-Bashir had yet to participate in peace talks in any event.

According to Clarke (2010), the ICC has often paid inadequate attention to the consequences of its legal intervention and its "less than ideal timing" with the potential of disrupting peace talks. Her argument relates to calls for ICC proceedings to be sequenced to allow peace processes to run their course. Whether efforts for both peace and justice cannot be pursued at the same time will be discussed further in relation to the DRC.

The political reality is that in some situations, it might be judicious to temporarily suspend the prosecution of a suspect. In fact, Article 53(2)(c) of the Rome Statute provides the Prosecutor with the discretion to halt prosecution where, after investigation, he finds that "a prosecution is not in the interests of justice".

Rondreux (2017) suggests that the AU's political and diplomatic approach to the Sudanese conflict highlights central features and characteristics of Africa's international relations. Its long and violent process of decolonisation has entrenched core principles of sovereignty and territorial integrity in inner state affairs.

The AU, having given up on its requests for referral, continued to argue instead that al-Bashir had immunity from prosecution as a sitting president. The Rome Statute does not address immunity and commentators argue that this is because drafters of the Rome Statute never intended for immunity to trump the ICC's jurisdiction (Dugard 2002). Theoretically, states can grant immunity for international crimes but international criminal lawyers are in agreement that states cannot grant immunity for war crimes under the 1949 Geneva Conventions (Ibid, 699).

Still, the ICC prosecution pushed on and on 3 February 2010, the Appeals Chamber ruled that al-Bashir may also be liable for genocide in addition to crimes against humanity and war crimes (Dov 2010).

⁴² Page 21

Issues of Cooperation:

One major challenge with Sudan was enforcing Resolution 1593, paragraph 2 of which states that “the government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide necessary assistance to the court...”

The Rome Statute also deals extensively with the issue of cooperation in articles 86 to 102. Included is a general provision obliging all state parties to cooperate with the court, and guidelines for requests for surrender, competing requests, provisional arrests and postponements. These provisions are not restricted to state parties. The ICC is also empowered to request cooperation from non-state parties. Although these obligations exist, the court has struggled to ensure compliance.

The Sudanese government did cooperate with the ICC on certain issues but its actions have been limited to supplying information in support of its argument that national efforts for peace and justice should trump ICC intervention on the basis of complementarity (Du Plessis 2008). This argument was made on the basis that the crimes concerned were going to be investigated by the Special Criminal Court on the Events in Darfur (Darfur Special Court), established on 7 June 2005. In addition to the Darfur Special Court, a Special Prosecutions Committee and a National Committee of Inquiry were also established. Ocampo did not agree that the Darfur Special Court was having any effect on efforts for justice, revealing that while his office had identified over 160 suspects for investigation and possible prosecution, the Darfur Special Court had only conducted six trials involving 30 suspects.⁴³

Nevertheless, the Sudanese government insisted that the ICC did not have jurisdiction. In 2006, the then Sudanese justice minister Mohamed al-Mardi said “if they are here to discuss the progress of trials or the role of national justice then we are ready to give them whatever information they are looking for. But if the matter is about investigations then they...don't have jurisdiction” (El-Kaissouni 2007).

Leaders of the rebel movements on the other hand, welcomed the ICC and presented themselves as partners in the fight against the government. Emboldened by the ICC, military activity against the government increased (Nouwen and Wouter 2010).

The ICC also faced difficulty getting member states to comply with their obligation to arrest and surrender al-Bashir. His warrant of arrest meant that African states' obligation to cooperate with the ICC changed from a possibility with no real consequences to a material and serious conflict of interests (Du Plessis, Maluwa and O'Reilly 2013). Countries visited by al-Bashir found themselves caught between their Rome Statute obligations on one hand and respecting the immunity of heads of state under customary international law on the other. Most chose the latter. For example, Malawi has had to appear before the Assembly of State Parties to the ICC to explain its non-cooperation following its failure to carry out al-Bashir's

⁴³ Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Resolution 1593. 2005, 5.

arrest.⁴⁴ Similarly, the DRC was summoned to the Court's Pre-Trial Chamber ⁴⁵ (Clifford 2019).

The ICC has been trying, unsuccessfully for eight years to have al-Bashir arrested. Despite a warrant for his arrest, al-Bashir has safely travelled through Africa and the Middle East. In December 2014, the current Chief Prosecutor of the ICC, Fatou Bensouda, announced that the court was no longer pursuing investigations in Darfur because states were not carrying out arrest warrants (AFP 2014).

When South Africa too failed to comply with its obligation to arrest and surrender al-Bashir during his visit to the country in 2015, the ICC's PTC noted in its ruling that:

"the Chamber observes that States Parties have been referred to both the Assembly of States Parties and the United Nations Security Council in six instances in relation to failures to arrest and surrender Omar Al-Bashir... However ... meetings of the Security Council of the United Nations ...have not resulted in measures against States Parties that have failed to comply with their obligations to cooperate with the Court".

According to Killingsworth (2017), this statement provides further evidence of the ICC's inability to function in the manner envisaged by the architects of the Rome Statute.

A majority of the issues with the ICC's intervention in Sudan are a result of the skewed politics of the UN Security Council. Many states within and outside of Africa view the power of the UN Security Council as a shameful exercise of authority by the world's greatest states. The UN's poor engagement on the issue of its deferral power has fueled this perception.

Notifying the UN Secretary General of its intention to withdraw from the ICC in October 2016, the South African government expressed concern over the membership of the P5, questioning whether the ICC is still reflective of the principles that guided its creation.⁴⁶ As long as the aforementioned three states are not party to the Rome Statute, the credibility of the ICC will continue to be questioned, and hopes of universal membership will not be realised. Moreover, the power conferred to the UNSC makes difficult any attempt to equate the ICC with *international* justice, given that it is not respected by the world's most powerful countries or applied consistently (Clifford 2019).

Other difficulties in the Sudan case relate to the ICC's reliance on state cooperation to investigate cases and arrest suspects. Since his warrant of arrest in 2009, al-Bashir has travelled to several countries without incident. According to Cassese (1999), this is a common problem with trying to enforce international law through the prosecution of individuals. So much hinges on the goodwill of states. The court's inability to apprehend

⁴⁴ "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".

⁴⁵ "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court".

⁴⁶ "Tabling of the Instrument of Withdrawal from the Rome Statute of the International Criminal Court".

al-Bashir highlights one of its greatest limitations: it's reliance on state cooperation to get anything done (Killingsworth 2017).

As a result, the chance of the case going to trial looks as unlikely as ever. It was referred for investigation by the UN Security over 13 years ago.

The ICC in Kenya: an African bias?

The Prosecutor v Uhuru Kenyatta

Since al-Bashir's arrest warrant in 2009, and the AU's inability to convince the ICC of its arguments, calls for a mass continent-wide withdrawal from the court are increasing. These calls have gained traction at the AU, among repeated claims that the ICC is biased against Africa. Ten of 11 cases currently being investigated by the court are in Africa.⁴⁷ In addition, the Court is conducting preliminary investigations in Afghanistan, Columbia, Gabon, Guinea, Iraq, Nigeria, Palestine, the Philippines, Ukraine and Venezuela. The progress of these cases has been extremely slow. Colombia has been in the preliminary stage since 2004, while investigations in Iraq were closed in 2006 and reopened in 2014, upon receipt of new evidence (Clifford 2019).

The argument that the ICC's focus in Africa is because of the high number of atrocity crimes committed there may have been true in the beginning. To be clear, the investigation of African countries is not a problem in an of itself (Killingsworth 2017). A greater problem for the ICC is the situations not under investigation, for example Syria, and the nature of the crimes that are prosecuted.

The bias argument did not surface with Kenya but a unique set of circumstances did allow the Kenyan case to lend itself more towards the bias argument than Sudan or the DRC, for example. With the al-Bashir controversy still fresh, the ICC's decision to open an investigation in Kenya came during complex domestic political relations between opposing parties as well as regional and global dynamics which both supported the possibility of prosecution and undermined its desirability. With elections also taking place in 2013, while the investigation was still ongoing, the bias argument was taken to new heights.

The ICC's intervention in Kenya is important not only to address the question of bias, but because it was the first investigation brought before the ICC through initiation by the Prosecutor. Before Kenya, all other cases were investigated through self-referrals or UN Security Council referrals. The decision to intervene in Kenya "proprio motu" proved controversial and raised more doubt about the ICC's promise to deliver substantive justice for international crimes.

History of the conflict:

⁴⁷ Two in the Central African Republic and one each in Burundi, Cote d'Ivoire, DRC, Georgia, Kenya, Libya, Mali, Sudan and Uganda.

The decision to prosecute international crimes committed in Kenya arose as a result of the violence that followed Kenya's flawed 2007/8 general election, which left over 1200 people dead and displaced a further 400 000 (Lynch 2018). The violence formed part of a campaign by leaders to exploit existing ethnic tensions for political gain and brought Kenya to the brink of civil war.

Uhuru Kenyatta, son of Kenya's first president Jomo Kenyatta, was believed to be one of the masterminds behind the violence. The Kenyattas belong to the Kikuyu ethnic group, the largest in Kenya, and have benefited handsomely as the country's first family since 1964. Kenyatta, following in the footsteps of his father, first ran for president in 2002 but was unsuccessful. In 2007, rather than running himself, Kenyatta backed fellow Kikuyu, Mwai Kibaki's bid for the election. Kibaki was running against Raila Odinga from the Luo ethnic group.

For some time it appeared as if Odinga was in the lead and would win the election, however on the last day of vote counting, Odinga fell behind leaving many Kenyans and international observers to believe that the election was rigged. Violence broke out immediately after the election, starting first as a protest but quickly escalating into attacks targeting members of specific ethnic groups. The violence only subsided when Kibaki and Odinga agreed to form a coalition government. Under this "grand coalition government", Kenyatta was appointed minister of finance and deputy prime minister.

In 2008, Kibaki and Odinga established the Commission of Inquiry on Post Election Violence, also known as the Waki Commission, to investigate the election violence. In addition to the Waki Commission, an independent review committee was set up to consider the faults in the election and a Truth, Justice and Reconciliation Commission was established to address historical grievances which predated the election.

The resultant Waki Report found evidence of "massive failures by the state security agencies, especially the police, to anticipate and contain the violence" and named "land grievances and the centralization of power in the presidency" as the root causes of the violence (2008, 1). The report recommended reform of the police system and the creation of a special tribunal for Kenya, "with the mandate to prosecute crimes committed as a result of post-election violence". The tribunal was to have an "international component in the form of the presence of non-Kenyans on the senior investigations and prosecution staff" (Ibid, 9).

If no tribunal was created, the Waki Report recommended that the then UN Secretary General, Kofi Annan, send a sealed envelope containing the names of the suspects to the ICC (Ibid, 19). Despite assurances that a special tribunal would be created to prosecute those responsible, the Kenyan government made little effort to put the process in motion. Thus, in 2009, Annan sent the envelope of names to the ICC (Human Rights Watch 2010). One of the names was Uhuru Kenyatta.

Upon receiving the envelope, then Chief Prosecutor Ocampo decided to open a “*proprio motu* investigation.”⁴⁸ It was the first time he had done so and his decision soon attracted controversy.

There were questions as to whether the Kenyan situation was within the ICC’s jurisdiction. Typically, a domestic court would deal with such a case. As a court of last resort, prosecution by the ICC should only proceed if the OTP is certain that the state does not have the ability or willingness to prosecute themselves. The Kenyan justice system is described by Killingsworth (2017) as lacking transparency and fairness. A further controversy was Kenyatta’s status as a state official and whether that should excuse him from prosecution. However, Kenyatta was charged as an individual and not as a government official (Ibid).

The ICC Prosecutor is empowered by Article 15 of the Rome Statute to initiate independent (*proprio motu*) investigations “on the basis of information on crimes within the jurisdiction of the Court.” This power was met with opposition during the negotiations of the Rome Statute and so drafters determined that in order for the Prosecutor to exercise this power, pre-conditions in Article 12 had to be met (Du Plessis 2008), namely:

- a) the alleged crimes must have been committed by nationals of a state party or;
- b) the alleged crimes must have taken place in a state party.

Kenya has been a state party to the ICC since 15 March 2005 and therefore fell under the jurisdiction of the ICC.

If the Prosecutor wishes to initiate an investigation “*proprio motu*”, he must also obtain permission from the court’s PTC.⁴⁹ On 29 November 2009, Ocampo applied for approval to prosecute six senior Kenyan officials (ICC 2009). These were the individuals that the court regarded as most responsible for the violence. The PTC approved the request on 31 March 2010 on the basis that the information demonstrated crimes against humanity were being committed in Kenya.⁵⁰ The violence was said to be planned and organised by various groups including local leaders and politicians.⁵¹ The PTC also found that the requirements for gravity were met on account of the large number of crimes committed, their brutality, and the trauma they caused.⁵²

The Prosecutor v. Uhuru Muigai Kenyatta

The OTP charged Kenyatta with five counts of crimes against humanity as a “co-perpetrator” in cases of murder, deportation or forcible transfer, rape, and persecution. Kenyatta announced that he would respect international law and cooperate with the ICC (Makinda

⁴⁸ Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II

⁴⁹ Rome Statute, Article 15(3)

⁵⁰ Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya.

⁵¹ Ibid.

⁵² Ibid, 24.

2013). As a signatory to the Rome Statute, the government of Kenya is also obliged to assist the court in relation to both investigations and prosecutions.

However, the prosecution consistently accused the Kenyan government of refusing to cooperate with its requests for information. It argued that the government purposely withheld financial and phone records, which proved the link between Kenyatta and the Mungiki sect, which was involved in the 2007 violence. Fergal Gaynor, who represented the victims in the case, suggested that Kenyatta was directly involved in the destruction of evidence. The defence and Kenya's Attorney General refuted her claims and insisted that they cooperated with all prosecutions (BBC 2014).

Claims that witnesses were being bribed and intimidated also arose. Several witnesses died, went missing, were too scared to testify or significantly changed their stories. The challenge for the ICC was immense. It was relying on cooperation from a splintered Kenyan government while having to ensure that witnesses were protected, all in the midst of the 2013 election. When in March 2013 Kenyatta was elected as President, the case became more complicated. The charges against him were still pending and the date for a trial had not been set. That a now sitting head of state was being investigated by the ICC created significant political restlessness and the court was forced to respond (Clarke Kottnerus and de Volder 2016). A UN Security Council deferral was also narrowly avoided with seven votes in favour and eight abstentions (United Nations 2013).

In October 2014, Kenyatta was asked to attend a status conference at The Hague. The session was held for the judges to decide whether Kenyatta had a case to answer and whether to set a date for trial (ICC 2014). Some found his decision to appear before the court odd, given the AU's position that no sitting head of state or government should be subject to the ICC's jurisdiction. But Kenyatta appeared in his individual or personal capacity, taking advantage of a provision in the Kenyan constitution, which allowed him to resign as president for the duration of his time at the ICC (Killingsworth 2014). Kenyatta thus temporarily handed over power to deputy president William Ruto, who was also facing charges at the ICC as an indirect co-perpetrator involved with crimes of murder, deportation or forcible transfer of population, and persecution.⁵³ Perhaps Kenyatta also felt that his presence at the court would show that he had nothing to hide. On the day of the session, he was received by a crowd of supporters outside the ICC. Kenyatta's lawyer did most of the talking, denying all the charges and arguing that the lack of evidence against Kenyatta was more a reflection on the weakness of the prosecution's case rather than proof that information had been withheld (Ibid).

On 5 December 2014, Chief Prosecutor Bensouda decided to withdraw the charges against Kenyatta, due to a lack of evidence.⁵⁴ The ICC complained that the Kenyan government failed to provide the OTP with important records and the hurdles caused by this lack of cooperation had a "severe" impact on the case. The AU welcomed the decision but regretted that it had taken this long for the OTP to come to that conclusion (Clarke, Kottnerus, and de Volder 2016). The collapse of the trial strengthened the organisation's campaign against

⁵³ The Prosecutor v. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11

⁵⁴ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta

the ICC (Ibid). Kenyatta has been the ringleader amongst those calling for African states to withdraw enmasse from the court.

The Africa bias:

The OTP and ICC supporters justify the court's focus in Africa on the basis of legal arguments - the court is simply pursuing referrals, tracking the most serious atrocities and intervening where national judicial systems are weakest (Kemp 2016).

The ICC itself has been slow to defend its case selection, apart from quoting its legal mandate and referencing preliminary investigations outside of Africa. In a 2015 statement, Chief Prosecutor Fatou Bensouda said:

Words such as 'biased', 'targeted' and 'politicised' dominate the public and media narrative. But dramatic headlines obscure the truth and distort the public understanding of what we do... contrary to the fallacy that the ICC is focused on Africa, our workload is far from exclusive to the Continent. In my Office, we are busy conducting preliminary examinations in Afghanistan, Iraq, Colombia, Palestine and Ukraine, among others. As with everything we do, we are carefully assessing these situations independently and impartially. Let me be clear: I will not hesitate to open investigations in any of these situations to bring perpetrators to justice if our legal criteria allow us to do so.

It is true that Bensouda is working hard to extend the court's work beyond Africa. Most recently, the ICC requested investigation into war crimes and detainee abuse by American soldiers in Afghanistan in 2017. However, the ICC's ability to proceed with a formal case is already in question and faces strong opposition from the US (Clifford 2019). In September 2018, US National Security Advisor John Bolton called the ICC 'unaccountable' and 'dangerous', saying that probes into US service members are 'unfounded', 'unjustifiable' and would result in financial sanctions against the Court and any state that tries to assist it (Handley 2018).

The ICC's almost exclusive focus on Africa has made it a "de facto" regional transitional body and according to Branch (2017), this did not happen by mistake. Almost immediately after its establishment, the court was already facing threats from the US, who refused to relinquish jurisdiction to the ICC during its war on terror. Thus, the OTP's survival strategy was to target seemingly meaningless African violence. Its first investigations were not those of Iraq or Afghanistan, which were experiencing raging wars at the time, but the DRC, followed soon by Darfur. Branch argues that only in Africa could the ICC pretend that violence had no politics and self-evident victims. This was made easier by the traditional representation of Africa as a land of corrupt leaders who consistently committed atrocities against their own populations. Thus, Branch concludes, the historical image of Africa "fits perfectly with the prosecution's black and white unquestionable moral narratives" of clear criminal atrocity against innocent victims. The ICC needed "pure" victims and perpetrators, without any ambiguities or grey areas. This is perhaps what it thought it had found again in Kenya.

Branch's argument is supported by Schwöbel-Patel (2017) who insists that a brief glance at the ICC's own promotional standards indicates a preference for a certain ideal image of

victimhood - victims who show no power or means. The problem with this is that it reinforces stereotypes which classify some victims as more important than others.

Similarly, Clarke (2015) explores the notion of the “African perpetrator” and culpability, suggesting that both are mediated through a distinct postcolonial continuum. The ICC’s different assessments for assigning guilt result in what she calls the “impunity gap”. Applying the concept to the cases of Kenyatta and Ruto, Clarke demonstrates how their images matched the international perception of the African perpetrator whose actions were in need of international judicial management. She does this by considering the historical and judicial frames through which Kenyatta and Ruto have been viewed and analysing the circumstances surrounding the 2007/8 election violence. These are then compared to the legal arguments made by the ICC about how it determined culpability. Several flaws are highlighted. Relying on the principle of legal time (which although not new to legal jurisprudence, has rarely been considered in Western systems), Clarke argues that there is a gap between legal presumptions of temporary responsibility and the grass roots conception of who is actually criminally responsible for acts of violence, including historically relevant institutions such as colonial agents and discriminatory segregation politics. In Kenya the gap has manifested itself between the failure of post-colonial Kenya to balance power historically and the ICC’s use of law to attempt to rectify that history.

It is therefore important, in our analysis of the ICC, to consider how far the court reinforces neo-colonial stereotypes about victims and perpetrators, a habit which surely restricts its ability to investigate beyond Africa.

As Branch (2017) has argued, Africa is both “politically marginal and weak enough” for the ICC. This does not necessarily mean that the ICC is biased or that it is purposely targeting Africa. Rather, the ICC has been unable to prosecute and investigate in states that are shielded by the diplomatic might of the UN Security Council (specifically the P5) and are thus limited to Africa, where objections to its involvement are less consequential (Clifford 2019). In a brazen characterisation of the situation, Former British Foreign Secretary Robin Cook remarked, ‘If I may say so, this is not a court set up to bring to book Prime Ministers of the UK or Presidents of the US’ (New African 2012).

In protest of the ICC’s perceived bias, in 2017 the AU decided on a strategy for mass withdrawal of member states from the Court.⁵⁵ This followed notifications of withdrawal from the ICC by Burundi, The Gambia and South Africa.⁵⁶ Explaining its decision to withdraw, at the time, the Gambian government noted that ‘there are many Western countries, at least 30, that have committed heinous crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war crime or criminal has been indicted’ (Reuters 2016). Aside from the question of a bias, the Kenya case highlighted other weaknesses of the ICC.

⁵⁵ “Withdrawal Strategy Document’, 2017.

⁵⁶ Burundi has successfully withdrawn and South Africa has rescinded its instrument of withdrawal, following a domestic legal challenge of the decision to leave the ICC.

Grovogui(2015) reflects on what it means to try and enforce the general principles of law and international jurisprudence in situations arising from civil war. His argument is grounded on the nature of international crimes that are committed in times of conflict and political contestation by parties that are neither indictable nor innocent, yet have followers, associates and sympathisers, such as Kenyatta.

For example, after the serious charges that were laid against Kenyatta, it was expected that his political support would decline. Instead, Kenyatta was elected as president in 2013 and many interpreted his win as a sign that the ICC's intervention may have helped him consolidate his position. Kenyatta's parade at the Hague, a trip which commentators suspect was not even necessary, won him unprecedented sympathies with the Kenyan public (Cacciatori 2014).

It is true that Kenyatta used the existing bias rhetoric to discredit the ICC and persuade the electorate. One of the methods employed by Kenyatta was to highlight that the ICC's investigation overlooked former president Kibaki and 2007 opposition leader Odinga. Speaking outside of the ICC following his appearance, Kenyatta said:

"the most important thing for us now is to stand together as Kenyans. We know where we are coming from, we know where we are, we know where we are going, and no one will dictate to us where we are going... you have heard it for yourself, they have nothing against me".

The two main claims used were that the ICC is racist and over-politicised. Setting aside the issue of whether these claims are legitimate, Kenyatta was able to exploit the fact that all the court's cases so far had been in Africa. The Kenyan government complained that Western powers had ruled the country during colonialism and were now using the ICC to establish another form of imperialism. Cacciatori opines that if Kenyatta's claims were isolated, they may easily have been dismissed as a front to protect himself from prosecution. However, other African leaders had long been expressing their concern about the ICC's operation. That Kenyatta was able to exploit the bias argument highlights another of the ICC's problems - an ineffective communication strategy. The longer it takes for the ICC to address the bias perception, the greater the danger that its work beyond Africa also becomes jeopardised.

When the cases closed, the ICC also fuelled (most likely-unintentionally), among supporters and opponents alike, the idea that injustice had occurred either as a result of neo-colonialism, as suggested by Kenyatta, or impunity, as suggested by the ICC (Lynch 2018).

To be clear, the ICC's efforts to pursue worthy cases in Africa should be congratulated. However, for its almost exclusive attention in Africa, the court is facing increasing criticism which continues to threaten its legitimacy and future. If it is to survive, the ICC must extend its focus to war crimes beyond Africa.

All cases in Kenya have now been closed. This is devastating for victims of the 2007/8 violence and calls into question again the ICC's promise to deliver international criminal

justice for international crimes. David Hoile, Director of the Africa Research Centre has called the Kenya case another in a series of “botched” attempts at justice.

The ICC in the Democratic Republic of Congo: Are Peace and Justice mutually exclusive pursuits?

The Prosecutor v Mathieu Ngudjolo, Thomas Lubanga and Jean-Pierre Bemba

The DRC has endured two civil wars: one along the DRC-Uganda border which was settled with a peace agreement in 2003⁵⁷ and another, which continues unabated in the eastern region of the country.

Both wars have been characterised by particularly brutal forms of violence, including rape, slavery and forced participation in hostilities. The violence has ensued at the hands of government forces, criminal gangs, terrorist groups and militias, and has thrived in an environment of unstable government, vulnerable borders and interference from external stakeholders (Killingsworth 2013).

For these crimes, and in respect of the DRC case as a whole, the ICC has made the most progress, successfully convicting two individuals and creating powerful precedents for the prosecution of sexual crimes as a weapon of war.

History of the conflict:

The ethnic violence in the eastern region of the DRC started with atrocities committed by Ugandan forces during the first civil war. The International Court of Justice found that Ugandan troops were responsible for killing and torturing civilians, destroying and looting property and training child soldiers. In 2005, the government of Uganda was ordered to pay billions of dollars in reparations to the DRC. Rwanda has also been heavily involved in the conflict since the end of its genocide in 1994. Pro-Tutsi groups, who were backed by Rwanda, have fought against Hutu groups in the neighbouring province of Kivu (Moffet 2015).

Attempts for the cessation of hostilities have been obstructed by the complicated nature of the war, which at present is being fought largely between troops loyal to the government in Kinshasa and rebel groups with continually changing names and affiliations. The main groups involved are (France24):

- The M23 rebel group, who seeks integration into the DRC’s army. The group reportedly receives military support from Rwanda and Uganda although both governments deny the accusations.
- The Democratic Forces for the Liberation of Rwanda, who claims to protect Hutus that fled to the DRC after the Rwandan genocide in 1994. Mass rape and massacre by the group are regularly reported in the Kivu province.

⁵⁷ Agreement Between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Cooperation and Normalisation of Relations Between the Two Countries, 2003.

- The Mai Mai militias, a group of smaller armed groups formed by local warlords, tribal leaders and village heads. The groups have organised for their self-protection against increasing violence in the North and South Kivu provinces
- The Lord's Resistance Army, founded by the notorious Joseph Kony in Uganda. The group has weakened considerably after Ugandan counter-insurgency and ICC investigation into its activities.
- The Patriotic Forces for the Liberation of Congo, the armed branch of the Union of Congolese Patriots political party. It has been involved in ethnic warfare in the Ituri province since the early 2000s.

The fluidity of these groups and their cross-border activities saw the situation referred to the ICC by the DRC government. After receiving the request for investigation, the Court noted:

“The Prosecutor of the International Criminal Court, Luis Moreno Ocampo, has received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. By means of this letter, the DRC asked the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the International Criminal Court.” (ICC 2004).

Some have questioned the true intention behind the government's referral of the situation and suspect that it was an attempt by the DRC to use the ICC for political ends. It is no secret that the DRC government invited the ICC into its country to assist with prosecuting the rebel groups (Du Plessis 2008). But by becoming a state party to ICC, the DRC has also demonstrated acceptance, legally and morally, of Rome Statute ideals.

In June 2004, Ocampo initiated investigations in the DRC.⁵⁸

The Prosecutor v Thomas Lubanga:

The court's first case in relation to the DRC was that of Thomas Lubanga. In March 2012, the rebel leader became the first person to be tried and convicted by the ICC.⁵⁹ His trial was not without incident. All but one of the witness testimonies were later found to be tainted and had to be thrown out. Although Lubanga was still convicted, he was given a relatively light sentence of 14 years imprisonment (Carlson 2018).

The Lubanga case was also the ICC's first experiment with awarding reparations. On 21 October 2016, the court's Trial Chamber confirmed a trust fund plan for collective reparations.⁶⁰ The aim of the fund is to encourage reconciliation for former child soldiers by, for example, establishing commemoration centres. In December 2017, the ICC also

⁵⁸ Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber 1

⁵⁹ The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06

⁶⁰ Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations

delivered a decision on Lubanga's personal liability for the crimes committed.⁶¹ He was ordered to pay US\$10 million towards the trust fund. Lubanga claims however, that he has no means to pay the costs. As a result, the Trial Chamber has had to ask the board of the trust fund for the victims to find the money. Although the ICC's attempt to provide reparation for the victims is to be commended, Chappel (2017), suggests that the Trial Chamber "overreached" in claiming that it could provide transformational justice to Lubanga's victims. The court seemed to be suggesting that it could address the conditions that caused the violence in the first place, which was difficult given the resources available.

The Prosecutor v Mathieu Ngudjolo⁶²:

One of the main crimes that the ICC was looking into was the February 2004 attack on the Hema village of Bogoro, in which 200 civilians were killed, most of them children. The attack was perpetrated by an armed rebel group, allegedly led by Congolese nationals Germain Katanga and Mathieu Ngudjolo.

Ngudjolo was arrested by Congolese authorities and surrendered to the ICC in February 2008 where he faced charges for three crimes against humanity and seven war crimes. Ngudjolo pled not guilty to all the charges, insisting that he had been in another town delivering a baby at the time of the Bogoro attack (ICC 2012).

After a four year investigation, the ICC's Trial Chamber acquitted Ngudjolo, finding that the prosecution had not proven beyond reasonable doubt that he had led the attack on Bogoro (Ibid). The decision was appealed by the prosecution who argued that the Trial Chamber had misapplied the standard of proof, failed to consider all the evidence and did not provide a fair trial.⁶³ In response to the appeal, Ngudjolo's defence team argued that the continued trial was harassing their client.⁶⁴ In any event, the appeal decision in 2013 upheld the trial decision and confirmed Ngudjolo's acquittal.⁶⁵ Although Ngudjolo had confessed to a UN investigator that he had organised the Bogoro attack, the Appeals Chamber found the confession too general. According to Moffet (2015), Ngudjolo's acquittal was the result of "disturbing weaknesses" in the prosecution's original investigation.

The prosecution did have more luck with Katanga who, in October 2017, was arrested and surrendered to the ICC by Congolese authorities. Katanga was convicted as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging).⁶⁶

⁶¹ Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"

⁶² ICC-01/04-02/12

⁶³ Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect

⁶⁴ Response of the Defence for Mathieu Ngudjolo to the "Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect"

⁶⁵ Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the decision of Trial Chamber II entitled "Jugement rendu en application de l'article 74 du Statut"

⁶⁶ ICC-01/04-01/07

The Prosecution v Jean-Pierre Bemba⁶⁷

Bemba was the commander in chief and president of the Liberation Movement of the Congo (MLC), who in 2002 entered the CAR, at the request of former president Ange-Félix Patassé to help the government defend itself against a coup.

In March 2016, Bemba was found guilty by the ICC on the basis that he failed to prevent and stop crimes committed by MLC soldiers in the CAR from 2002 to 2003. He was convicted on two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging). It was the court's first conviction for the crime of sexual violence. It was also the first time that the concept of "command responsibility" was used by the ICC (Brunger 2016).

The charges against Bemba concentrated on the use of sexual violence as a weapon of war. As the military commander of the MLC, Bemba was held personally criminally liable for crimes committed by his soldiers against civilians in the CAR. Although Bemba was not physically present, evidence revealed that he knew the crimes were being committed (Ibid). The judges reasoned that as Bemba was the commander of the army, with authority and control over its actions, he had "failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."⁶⁸ During his trial, approximately 5000 victims were able to share their experiences through legal representation (Ibid). The case was hailed a triumph for women's rights and victims of the MLC.

However, in June 2018, the ICC's Appeals Chamber acquitted Bemba by majority, with wide implications for international criminal jurisprudence.⁶⁹

The Appeals Chamber ruled that the Prosecution had not sufficiently specified the charges against Bemba. Although the prosecution notified Bemba of the charges he was facing, namely rape, murder and pillage, it was not enough to then later reference specific instances or crimes that were not declared before the trial. The Appeals Chamber also found that the Trial Chamber had incorrectly determined that Bemba "did not take all necessary and reasonable" steps when handing down its conviction. The Trial Chamber also paid "insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr. Bemba's ability, as a remote commander, to take measures". It therefore did not agree with the standard used to determine what Bemba should have done and found it problematic that Bemba was never informed of the standard by which he was being judged.

According to Carlson (2018), the Appeal Chamber's decision could have "substantial implications for the possibility of winning convictions under command responsibility" in the

⁶⁷ ICC-01/05-01/13

⁶⁸ Judgment pursuant to Article 74 of the Statute, 39(59)

⁶⁹ Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled "Decision on Sentence pursuant to Article 76 of the Statute"

future. A worrying precedent has been created whereby if an accused is brought before the court on charges of indirect responsibility, he may escape conviction if it can be proved that he was far enough away from the conflict.

Moreover, that Bemba was acquitted on procedural grounds is a blow to the ICC's promise to deliver substantive justice. The judges agreed calling acquittals such as this "regrettable". However, they are "the price that must be paid in order to uphold fundamental principles of fairness and the integrity of the judicial process" (Ibid).

With al-Bashir at large, a withdrawal of the cases against Kenyatta and the recent acquittals of Bemba and Gbagbo, the fragility of the ICC in terms of procedural deficiencies is highlighted. This is not to say that the ICC's cases against these individuals had no standing. Rather, the court has shown how procedural rules have come to undermine the substance of its work. This is an issue inherent in pursuing justice only via the courts of a legal system and lends credence to the argument for peace efforts to come before or in conjunction with the prosecutorial process.

Peace v Justice:

Despite some success in prosecuting those responsible for international crimes in the DRC, the question that has come up frequently since then, is what impact has this had on the ground? And are peace and justice in the DRC mutually exclusive pursuits?

The full debate around peace versus justice is beyond the scope of this thesis however certain points may be worth highlighting, particularly in relation to the DRC.

International criminal justice includes both retributive justice and restorative justice. The former focuses on guilt-based outcomes while the latter focuses on establishing truth and reconciliation (Ncube 2017). The correct sequencing of the two has occupied debates in international criminal law for some time. The ICC and the theory of international law which guides it, advocates for justice before peace (Kersten 2013). It does not believe in immunity for perpetrators and equates justice with the use of legal tools such as court trials. The Court does not deny the importance of peace efforts but sees justice as a prerequisite for true and lasting peaceful cohabitation. Bensouda (2013) writes: "History has taught us that peace achieved by ignoring justice is short-lived." The histories of many African states that fall into conflict again, even after extensive peace processes, support her claims (Clifford 2019).

Judicial processes, including those at the ICC, are based on the idea that justice is best achieved by convicting the guilty. Although the ICC follows an international criminal justice model that aims first to achieve justice for victims of international crimes, this does not mean that judicial processes should be pursued at all costs. According to Article 53 (2)(c) of the Rome Statute, the Prosecutor can decide, upon investigation, not to proceed with a prosecution if it is not "in the interests of justice".

Indeed, commentators are starting to doubt whether international prosecution of high level perpetrators is the most suitable way to address mass atrocity crimes (Clarke Knottnerus

and de Volder 2016). Does ending impunity have to be achieved by avenging victims or can it not, where possible, be achieved through types of individualised justice such as reparations, reconciliation, or apology? According to Grovogui (2015) a people's sense of justice can be achieved through a range of means including economic redistribution, rebuilding the legal or political infrastructure, or ending sexual violence. But the ICC does not focus on forgiveness or transition but on arresting and punishing (Clarke 2010). This method of assigning individualised responsibility draws on Western legal thought and its construction of concepts of justice and freedom. It does not take into consideration the root causes of violence. This emphasis on judicial process assumes that law is the sole way to achieve justice. In fact, it is only part of the story (Ibid). The ICC's intervention in the DRC has proved that. In the Lubanga case, the court demonstrated its inability to include reconstruction as part of the broader pursuit of justice. Despite its best efforts to award reparations and promote reconciliation for former child soldiers, the Trial Chamber was unable to deliver and was thought by Chappel (2017) to have "overreached" in claiming that it could provide transformational justice to Lubanga's victims.

Proponents of the peace argument have questioned whether the ICC's work has resulted in justice for victims of mass crimes.⁷⁰ They argue that reconciliatory processes conducted within countries are more efficient in bringing justice closer to the people. If there is no political resolve to bring about sincere change, the prosecutorial process begins to mean something materially less effective (Clifford 2019). For example, the 2012 conviction of Lubanga has meant little to the armed rebel groups whose criminal actions continue unabated (Human Rights Watch 2017). As peace, security and reconciliation expert Tim Murithi (2013) points out, "the argument that ICC prosecutions will bring about change on the ground and "put an end to impunity", as boldly stated by the Preamble of the Rome Statute, will begin to ring hollow to the victims on the ground, unless a credible political process accompanies the prosecutorial strategy' (*Institute for Justice and Reconciliation*).

Although Africa has traditionally advocated for peace processes to be explored before legal processes are instituted, it has rejected impunity. This is evident in the constitutions of countries such as Kenya, in which no immunity for crimes committed against humanity exists (Clifford 2019). At the same time, assigning criminal responsibility for crimes that have taken place during civil war, conflict and political contestation is not straightforward (McNamee 2014). Africa's history, which admittedly includes a high number of atrocity crimes, has demonstrated how, through the passage of time and peace efforts, enemies have turned into allies and that indictable parties can have followers. It may be helpful for the ICC, whatever the crime and its severity, to recognise the principal claims of conflict and the larger social and moral implications of its work (Grovogui 2015).

⁷⁰ See Branch, Adam. 2004. "International Justice, Local Injustice". *Dissent Magazine* 51: 22-26; Clarke, Kamari.M. 2015. "Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap". *The International Journal of Human Rights* 19: 592-614; Grovogui, Siba. N. 2015. "Intricate Entanglement: The International Criminal Court and the Pursuit of Peace, Reconciliation and Justice in Libya, Guinea, and Mali". *Africa Development* 2:99-122.

The result of this history is the prioritisation of peace over immediate justice by African leaders (Rondreux 2017). While not dismissing the need for justice, some believe temporal immunity should be granted to state officials or rebel leaders to ensure their participation in peace negotiations (Clifford 2019). But academics have also questioned whether immunity can heal wounds. When atrocities are buried and when people are asked to “forget” or “move on”, resentments tend to fester. If granting immunity is to work, it needs to create a forum for dialogue and truth.

The ICC’s cases in the DRC demonstrate one of the biggest drawbacks of international prosecutions - the reality on the ground for many victims is often left unaddressed. This is especially true in relation to crimes of sexual violence which cause irreversible individual and societal harm (Carlson 2015). To fully address these crimes, it should be acknowledged that redress sometimes extends beyond criminal trials at the ICC.

It is for this reason that increasing attention is being paid to the efforts of hybrid courts in delivering international criminal justice. They have shown that the pursuit of both peace and justice can (and should) occur side by side. These concepts will be explored further in Chapter 3.

Conclusion

Lessons from the three cases

Through the ICC’s intervention in Sudan, we have seen that the role of the UN Security Council has been controversial from the start. It is worth emphasising that three of the P5 are not state parties to the ICC but nevertheless exert significant influence over its work. Africa’s sharpest critique of the ICC is therefore that international criminal law does not apply to the world’s major powers, who act as both ‘players and referees’, setting the rules of the game but refusing to play by them (McNamee 2014).

The UN Security Council and its mandate in relation to the ICC requires reform. How that reform would take place is beyond the scope of this thesis but it likely entails a range of proposals. Those suggested by scholars include removing the veto power of the P5 or expanding the council to include member states which more accurately represent the globe. The AU’s recommendation to extend deferral power to the UN General Assembly, even if it was inspired by the al-Bashir saga, has merit and should not be dismissed. Unfortunately, both the UN Security Council and the ICC have responded largely with rhetoric to the criticisms raised by Africa and this has only fuelled the fire.

Ocampo continuously denied the criticism of African states and repeated his duty to ‘apply the law without bowing to political considerations’ (Kersten 2016, 34). Under Bensouda, the ICC has made an effort to address questions raised by Africa’s position. In November 2013, the ASP’s annual meetings included an interstate debate on the ICC’s relationship with Africa and on the ‘indictment of sitting heads of state and government, and its consequences on peace, stability and reconciliation’ (Ruhindi 2013, 5). During the debate, state parties

approved an amendment to the ICC's rules on presence at trial for those accused who fulfill extraordinary public duties at the highest national level. According to Clarke, Knottnerus and de Volder (2016), the amendment was intended to reduce the amount of time that Kenyatta would have to spend in the Hague.

Despite these various deliberations, the relationship between the court and Africa has not improved. While the AU welcomed the amendment, it regretted that the UN Security Council had still not responded to its requests for deferral and emphasised that the council should do more to avoid the current state of apathy.

The Sudan case also revealed the ICC's lack of adaptability in Africa. One way in which the court may be regarded as successful is if it can inspire member states to comply with their obligations as stated in the Rome Statute. Instead, states have remained uncooperative in the investigation of cases and several suspects are still at large, with authorities choosing not to arrest and surrender them to The Hague, despite the potential consequences.

The perception that the ICC is purposely targeting Africa is widespread. This chapter argues that the ICC is not inherently biased, it suggests instead that the work of the ICC is so restricted by the political, military and economic power imbalance that Africa remains the only continent in which it may carry out its objectives. To conclude with Branch's (2017) position, the ICC is only able to conduct prosecutions in the name of global justice by "taking advantage of existing lines of racial division, global inequality and violence that has defined Africa for centuries". The court has not shown that it can pursue cases outside of Africa and yet there are other victims of massive atrocities that deserve the court's assistance.

For its tendency to entrench problematic stereotypes, and for causing, intentionally or otherwise, the complete politicisation of the Kenya case, it is necessary for the ICC to consider investigations and prosecutions in the wider context of conflict in Africa (Moffet 2015).

Africa and the ICC have also clashed over issues of peace versus justice. Often, leaders indicted by the ICC are intricately involved in the conflict and attempts for its resolution (Murithi 2013). In its instrument of withdrawal, the South African government said that it found its obligations with regard to the peaceful resolution of conflicts were inconsistent with the interpretation of justice given by the ICC in the Rome Statute. It also reiterated that international law could not be exercised in an unrealistic way that strives exclusively for justice at the expense of peace, security and stability. Peace efforts may be hampered by Rome Statute obligations, which clash directly with the principle of immunity, a long-standing tradition in international relations without which the global order could not function (Clifford 2019).

AU calls for immunity have been interpreted as the protection of criminal African leaders. However, the context in which this call has emerged is significant and reveals the root causes of violence and accountability on the continent, which are not remedied by prosecution but through efforts for peace and reconciliation (Ibid). The Assembly of the AU, as a political body, will naturally opt for a political solution, stressing peace-making and

compromise. The mandate of the ICC, as a legal body, does not fit into this and perhaps rightfully so. The ICC and other courts aim to protect the world's citizens from the most serious crimes; they do not exist to appease governments (McNamee 2014). At the same time, the ICC should recognise that it is operating in a political arena, in which non-judicial demands question its status and purpose (Niang 2017). Discussions around the improvement of international criminal law cannot take place outside questions of economic inequality, unilateralism and great power politics, all of which characterise the global governance debate.

The ICC continues to ignore African criticism in a way that would not be possible with other regions. It is in this environment that calls are increasingly being made for alternative forms of justice that may be delivered by local and regional mechanisms rather than an international court (Clarke Knottnerus and de Volder 2016).

Chapter 3

Lessons from the Special Court for Sierra Leone and the Extraordinary African Chambers

Prosecuting international crimes is not the sole responsibility of the ICC. Other institutions have a role to play. The pursuit of justice and responsibility in Africa has included both judicial and non-judicial processes such as truth commissions, reparations and community-based mechanisms and hybrid courts.

This chapter moves the discussion away from the question of compatibility between the ICC and Africa to consider local and regional alternatives. The experience of two hybrid courts are highlighted: the Special Court for Sierra Leone and the Extraordinary African Chambers. Their successes and failures provide valuable lessons for the ongoing experiments, on the African continent, with criminal justice in the prosecution of international crimes.

Hybrid Courts

The idea behind hybrid courts is that they have increased legitimacy to adjudicate over local issues, help to build capacity at a domestic level and are in a better position to promote norms (Rondreux 2017). As a fairly recent legal development, the use of hybrid courts has been limited so far. This is perhaps because hybrid courts only operate in specific locations over specific periods of time and in relation to special situations.

As opposed to international courts, which are staffed solely by international judges, hybrid courts encompass local expertise and judges and consult both international jurisprudence and domestic legislation where possible. The extra human and material resources assists in bolstering the legal process.

By combining various legal systems into one, hybrid courts are able to address the gap between the constraints of a national court (which may not be equipped to deal with such cases) and the overreach of an international court (which may be preoccupied by “larger” cases). Their mixed constitution means hybrid courts work to strengthen the system of complementarity which should characterise international efforts for criminal justice. In consideration of these courts, it should be acknowledged that the ever-changing system of international criminal justice entails more than just the ICC (Clifford 2019). Over time, developments in this school of thought have demonstrated that while the ICC is one of the most prominent symbols of international criminal justice, it should be seen as part of a collective effort (Kemp 2016).

The ICC, as a court of last resort, has little objection to the operation of hybrid and regional courts. It should seek to complement domestic and regional efforts for both peace and justice, as the rightful drivers in prosecuting crimes within Africa (Clifford 2019). In a 2016 interview, Bensouda addressed this saying that proposals for an African court were not a ‘slap in the face’ as had been suggested: ‘In fact, [the] ICC is a court of last resort. We will

be encouraged by national jurisdictions taking up their responsibility to investigate and prosecute these crimes' (Schmitt 2016).

Below, I revisit the Special Court for Sierra Leone and the Extraordinary African Chambers as two experiments of hybrid courts.

Special Court for Sierra Leone

The Special Court for Sierra Leone was the world's first hybrid court. It was established on the request of its government to the UN for a court that could address the serious crimes committed against civilians and UN peacekeepers by rebel groups during the country's decade long civil war (1991-2002) (Siwingwa 2016). Its operation saw ten persons brought before the court, including the former Liberian President Charles Ghankay Taylor, for the violation of international and domestic humanitarian law.⁷¹

Establishment:

The Statute of the Special Court for Sierra Leone did not place restrictions on who could be brought before the court. Article 1 states:

"The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".

It was therefore possible to indict government officials and sitting heads of state, including Charles Taylor who allegedly headed the armed forces involved in the civil war.

The court's jurisdiction was still restricted however, in that it could only prosecute persons who bore the "greatest responsibility". The criticism here is that middle to lower level officials who also directly perpetrated abuses were not tried (Sirleaf 2017). However, this is the nature of hybrid courts, which operate in relation to specific circumstances. While the court was also empowered to bring charges under Sierra Leonean law, it failed to do so, a missed opportunity to build national jurisprudence (Ibid).

The Statute of the Special Court for Sierra Leone is also notable for its broad definition of crimes against humanity,⁷² including murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence, persecution on political, racial, ethnic or religious grounds and other inhumane acts.

Article 15 of the statute empowers the prosecutor to investigate and prosecute persons. It states that "the Prosecutor shall act independently as a separate organ of the Special Court.

⁷¹ The Prosecutor v Charles Ghankay Taylor, SCSL-03-01-A, 2013.

⁷² Article 2

He or she shall not seek or receive instructions from any Government or from any other source.” Exercising its mandate, the prosecution produced a list of names of the persons it believed bore the greatest responsibility for the crimes referenced above. The prosecution also asked the people of Sierra Leone who they thought should be brought before the court. Charles Taylor’s name came up several times (Human Rights Watch 2012). This innovative method of investigation is a reflection of the prosecution’s approach, which was essentially, a trial by error. The way that the indictments were prepared, for example, was unique. Each was only 20 pages or less and the charges were quite brief. The prosecution was unsure of how this would be perceived when it sent the indictments, with supporting packages, to a duty judge for a probable cause review (Ibid). The judge found that there was evidence to support and all the indictments were approved on 7 March 2003, including the 17 count indictment of Charles Taylor who was the sitting president of Liberia at the time.⁷³ Taylor’s indictment was ordered kept under seal and the arrest warrants for the remaining suspects were executed by the duty judge.

All the individuals indicted were already being followed and on 10 March 2003, most of them were apprehended. Each was given his indictment, arrest warrant and was advised of his rights. They were then taken to an incarceration centre 150 miles south of Freetown, Sierra Leone’s capital city. At that stage, Taylor did not yet know that he had been indicted. This information was purposely withheld until the last possible moment, out of fear that if he found out, he would destroy evidence or interfere with potential witnesses. That not one word of Taylor’s indictment was leaked before the right moment was a major feat in his prosecution (Ibid).

The Prosecutor vs. Charles Ghankay Taylor:

When the Prosecutor thought the time was right, the indictment against Taylor was unsealed and on 4 June 2003, Taylor’s arrest warrant was served on the Ghanaian High Commissioner, where Taylor was attending a peace conference.⁷⁴ Copies of the warrant were also faxed to the Foreign Ministry of Ghana. Upon the news, Taylor fled back to Liberia. Under increasing international and domestic pressure, Taylor stepped down as president on 11 August 2003 and was exiled or put under house arrest in Nigeria, where he remained until 2006.

During that time, the international community continued to mobilise and push for Taylor’s arrest. When Taylor tried to escape Nigeria, President Obasanjo had authorities apprehend him near the Cameroonian border on the basis that he had broken his promise to stay where he was (BBC 2009). It is also true that the moral impact of the indictment eventually forced Obasanjo’s hand. Taylor was arrested and put onto a plane to Liberia, where he was formally arrested and flown to the Special Court in Sierra Leone.

Although the court sat in Freetown, then president Ellen Johnson Sirleaf did not think it was a good idea for Taylor’s trial to take place there, fearing that his supporters would overshadow the proceedings and that his presence would be a threat to peace and security

⁷³ Indictment SCSL-03-I

⁷⁴ Warrant of Arrest and Order for Transfer and Detention SCSL-03-I

(Residual Special Court for Sierra Leone 2006). The prosecution agreed that Taylor had to be tried somewhere else. The UN passed resolution 1688 to have him tried in The Hague but the Netherlands would not accept the resolution unless another state agreed to host Taylor once he had been convicted. The UK took on this responsibility and Taylor was flown to The Hague on 20 June 2006 (Ibid). The facilities of the ICC and later the Special Tribunal for Lebanon were used.

Taylor's trial opened on 4 June 2007. He refused to attend, complaining about the capability of his lawyer, who in turn announced that he could no longer represent Taylor and left the courtroom.⁷⁵ The challenge of making sure Taylor had representation caused further delay in his trial. Not wanting to derail the trial altogether, the Special Court instead opted to adjourn for seven months, a decision which meant the court would have to double the funding for Taylor's defense budget. At that stage, the court had been running for three years already and was largely dependent on voluntary contributions. Additional funds were raised and in the end, the total cost of prosecuting Taylor came to US\$50 million (Ibid).

Taylor was charged on eleven counts of war crimes, crimes against humanity and other violations of international humanitarian law committed during the civil war in Sierra Leone from 1996-2002. The crimes of commission involved thousands of murders, incidents of mutilation, rape, sexual slavery, pillage, the use of children under the age of 15 in hostilities and collective punishment, all part of a campaign of terror against the civilian population of Sierra Leone that was, in itself, a crime of terror during civil war. He pleaded not guilty to all charges, saying "I did not and could not have committed these acts against the sister Republic of Sierra Leone. I think that this is an attempt to continue to divide and rule the people of Liberia and Sierra Leone".⁷⁶

The prosecution began presenting their evidence in January 2008.⁷⁷ Aside from some news clippings, there were not many written submissions. The prosecution's case against Taylor was built on the testimonies of 31 insiders who confirmed links between Taylor and the crimes committed in Sierra Leone. There were also 52 crime based witnesses who themselves had seen or suffered atrocities, including amputees, rape victims, former child soldiers and persons enslaved, robbed and terrorised. These witnesses, some of whom had never travelled more than 10 kilometres in their lives and who were taking great risk in testifying, safely had their say. Only four witnesses testified in closed sessions. The remainder testified in open court with some security measures such as voice and facial distortion. All open court testimonies were streamed on the internet and received daily media coverage in Sierra Leone and Liberia.

Taylor was indicted on both direct and indirect forms of criminal responsibility, the former involving planning, ordering, instigating or aiding and abetting crimes and the latter involving contributing to another's crimes.

⁷⁵ Prosecution Opening Statement SCSL-2003-01-T

⁷⁶ Initial Appearance SCSL-2003-01-PT

⁷⁷ Trial SCSL-2003-01-T

The prosecution also claimed that Taylor had participated in a criminal enterprise but the claim was rejected by the judges. According to Lee (2012), this is reflective of the broader conceptual problems with the way the prosecution framed liability during the trial. Lee does note however, that Taylor's trial alerted the international community to the use of gender-based violence as a weapon of war and the need to develop appropriate methods to prosecute those responsible.

In February 2009, the prosecution concluded with its evidence and the defence's case began in July.⁷⁸ On 13 July, Taylor took the stand and was described as eloquent, charismatic and intelligent. During his cross examination in November however, Taylor did confuse some of his evidence (Residual Special Court for Sierra Leone 2006).

The verdict was handed down in March 2011.⁷⁹ The court found Taylor guilty of aiding and abetting the Revolutionary United Front and the Armed Forces Revolutionary Council during crimes committed in the Sierra Leone war between 1996 and 2002.⁸⁰ Although Taylor had not committed many of the crimes himself, he did provide the rebel groups with financial, military and technical support. The judges ruled that Taylor had knowledge of the crimes that were being committed, courtesy of daily security reports, briefings and media coverage. It was ruled beyond reasonable doubt that not only did Taylor know about the crimes, but that he possessed a "clear intent" to act in support of them.⁸¹

The court also weighed rape as a stand alone crime and as a tool of terrorism, determining that girls and women in the Kono, Kailahun, and Freetown districts had been raped or used as sex slaves (sometimes in public) by rebel groups as part of a wider campaign of terror.⁸² The judgments included three of the court's firsts: for the crime of recruiting and using child soldiers in hostilities, for forced marriage as a crime against humanity and for attacking peacekeepers as a war crime.

In September 2013, Taylor's conviction and 50 year sentence were upheld on appeal.⁸³ With the close of Taylor's trial, the Special Court for Sierra Leone became the first in the world to complete its mandate and transition into a residual mechanism that still exists today (Clifford 2019). It is mandated to supervise the enforcement of sentences and guarantee the rights of those who have been convicted (Residual Special Court for Sierra Leone 2019).

Legacy of the court:

Acknowledging different forms of criminal responsibility, particularly indirect forms, has wide jurisprudential implications. It makes it possible to prosecute military leaders and officials, who can escape responsibility on the basis that they did not physically commit crimes.

⁷⁸ Ibid.

⁷⁹ Judgment SCSL-03-01-T

⁸⁰ Ibid, p 2446

⁸¹ Ibid, p 202

⁸² Ibid, p 346 - 453

⁸³ Judgement SCSL-03-01-A

Of the 23 individuals that have been indicted, proceedings against all but one have been completed. Johnny Paul Koroma remains at large, although he is believed to be deceased (ibid). Seven are currently serving their sentences ranging from 15-50 years.⁸⁴ One died while serving his sentence,⁸⁵ eight have finished their sentences,⁸⁶ three have been acquitted,⁸⁷ and three died prior to the conclusion of the proceedings against them.⁸⁸

That most of these proceedings took place in Freetown, where many of the war crimes took place, meant that the proceedings were more impactful and accessible to the victims (Sirleaf 2017). But for the people of Sierra Leone, the court's legacy goes beyond criminal trials. The message heard by all was that no man is above the law. Taylor's indictment took him out of the equation and surely contributed to a situation where it became possible for power to change hands in both countries without violence.

The Special Court for Sierra Leone is a valuable example of what happens when all actors come together (both international and local) in the pursuit of justice that is in line with the highest standards but which also takes in account the particularities of the situation. As David Crane, chief prosecutor of the special court between 2002 and 2005 said in an interview: "We have to ask as the international community, is the justice we seek the justice they want? We have to be humble enough and not arrogant enough to go in and say this is the way" (Robert H Jackson Centre 2012).

Extraordinary African Chambers

The Extraordinary African Chambers (EAC) were also a unique experiment. It was the first time that a hybrid court was backed by a regional organisation as opposed to the UN, as we saw with Sierra Leone. It was also the first time that a former head of state from one country was tried in the court of another country.

The EAC had the jurisdiction to investigate and prosecute crimes of genocide, war crimes, crimes against humanity and crimes of torture committed in Chad during 1982 to 1990,⁸⁹ during the rule of President Hissène Habré, whose tenure was marked by severe political oppression, torture and the death of approximately 40,000 people (Taffo 2013).

History of the conflict:

⁸⁴ The Prosecutor v Morris Kallon, 2004; The Prosecutor v Issa Sesay, 2009; The Prosecutor v Charles Taylor 2013; The Prosecutor v Augustine Gbao 2009; The Prosecutor v Brima Kamara 2007; The Prosecutor v Allieu Kondewa 2007; The Prosecutor v Santigie Kanu 2007

⁸⁵ The Prosecutor v Alex Brima, 2007

⁸⁶ The Prosecutor v Moinina Fofana 2007; Independent Counsel v. Margaret Fomba Brima 2005; Independent Counsel v. Neneh Binta Bah Jalloh 2005; Independent Counsel v. Ester Kamara 2005; Independent Counsel v. Anifa Kamara 2005, Independent Counsel v Hassan Bangura 2012; Independent Prosecutor v Samuel Kargbo 2012; Independent Prosecutor v Eric Senessie 2011

⁸⁷ Independent Counsel v. Brima Samura 2005; Courtenay Griffiths 2012; Independent Prosecutor v Prince Taylor 2013

⁸⁸ The Prosecutor v Sam Bockarie, 2003; The Prosecutor v Samuel Norman, 2004; The Prosecutor v Foday Sankoh, 2003

⁸⁹ Statute of the Extraordinary African Chambers, Article 3.

Habré was the president of Chad from 1982 to 1990. Obsessed with threats to his power from within, the result of a long history of staving off territorial invasion by Libya and rebel groups in Chad, Habré turned the country into a police state. The Documentation and Security Directorate (DDS) was a private police unit established by Habré to carry out abuses against opponents of his regime, both real and imaginary. The unit had thousands of officers who all reported directly to Habré, but who essentially had free reign to carry out their mandate. The DDS is accused of thousands of political killings, systematic torture and forced detention.

When president Idriss Déby, Habré's former chief of staff, came to power, he appointed a truth commission to investigate the crimes committed during Habré's regime. The commission found in 1992 that Habré was responsible for the deaths of over 40 000 people and the imprisonment and torture of approximately 4445 victims over 15 years.⁹⁰ In its report, the commission recommended putting Habré on trial, but Déby failed to take action thereafter, likely torn between the fact that he was once one of Habré's men and that Habré's regime had been responsible for the death of many of his family and friends.

The situation was complicated further given that Habré had fled the country. Before leaving, Habré emptied Chad's treasury of approximately US\$ 11 million, money which allowed him to build a network of support in Senegal and block the case against him for more than 12 years (Human Rights Watch 2016). Following the findings of the commission, a court in Chad did however, issue a "death sentence in absentia", convicting Habré even though he was not physically present (Ngarmbassa 2008).

Believing the trial to be a farce, several attempts were made to try Habré while he was living in exile. A civil society group filed a suit against Habré in Senegal while others advocated for justice at the UN and the AU. Belgium, relying on its domestic adoption of the principle of universal jurisdiction, made four attempts to extradite Habré and have him tried there. However, Habré continuously sought the dismissal of these actions, largely on the basis that he had immunity as a former head of state (Human Rights watch 2016).

The precursory question of who could exercise jurisdiction over Habré was heard by courts in Senegal, Chad, Belgium and by transnational courts such as the Economic Community of West African States (ECOWAS) Court of Justice, the African Court for Human and People's Rights and the International Court of Justice (Ibid).

Finally, in July 2012, the International Court of Justice ordered Senegal to prosecute Habré there or extradite him.⁹¹ This order prompted Senegal to collaborate with the AU and together they established the EAC.

Establishment:

⁹⁰ Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories

⁹¹ Belgium v. Senegal, Judgment.

The EAC was thus a collaborative effort, the result of cooperation between Senegal, Chad and the AU. It was the first time the AU had established a tribunal and its extensive involvement is noteworthy - proof that the organisation can direct issues of international criminal justice in Africa (Kemp 2016).

Much like the Special Court for Sierra Leone, the establishment of the EAC was a trial by error and several provisions had to be made to accommodate its existence. First, Senegal had to amend its constitution to be able to try Habré before the EAC. This is a good example of how domestic legal systems are often reinforced by housing hybrid courts.

Four chambers were temporarily created within the existing Senegalese court framework:⁹²

- An Extraordinary Investigative Chamber (within the Dakar Special Regional Court) with four Senegalese investigative judges
- An Extraordinary Indicting Chamber (at the Dakar Court of Appeals) with three Senegalese judges
- An Extraordinary Trial Chamber (at the Dakar Court of Appeals) with two Senegalese judges and one president from the AU
- An Extraordinary Appeals Chamber (at the Dakar Court of Appeals) with two Senegalese judges and one president from the AU

Although provision was made to house the court within the existing Senegalese legal system, international law was also considered where appropriate.⁹³ The EAC was also supported financially by the US and the EU, although some authors have written that most of the funds came from the African continent (Human Rights Watch 2016).

The role of civil society:

The continued international and domestic effort to bring Habré to trial was driven by a very effective lobbying campaign and was run by a broad network of Chadian human rights NGOs and victims groups (Gibert 2015). It was an unprecedented civilian movement, which, with the assistance of Human Rights Watch, publicised victims' ordeal and collected evidence to exert pressure on the various international actors that have been involved with the case. It is not an exaggeration to say that without the perseverance of the victims and civil society organisations, Habré would not have been brought before the EAC.

The two main organisations lobbying for justice were the Association des Victimes des Crimes du Régime de Hissein Habré and the Association Tchadienne Pour la Protection des Droits de l'Homme headed respectively by Clement Abalfouta, a victim of the Habré regime and Jacqueline Moudeina, a human rights lawyer. Their network was strengthened by Senegalese organisations such as Rencontre africaine pour la défense des droits de l'homme. Together, the groups considered several potential judicial options to bring Habré to trial and visited Senegal regularly to check on the progress of the case.

⁹² Statute of the Extraordinary African Chambers, Article 2

⁹³ Ibid, Article 25

Souleyman Guengueng, a former prisoner of the Habré regime was an instrumental figure. He spent almost three years in various detention centres. “I saw my friends, my fellow inmates, die from hunger, die from despair, die from torture and die from diseases. From the depths of my cell, I swore to God to fight for justice if I got out alive”, Guengueng said in a 2015 interview.⁹⁴ When he was released from prison, Guengueng established an organisation through which victims could share their experiences and mobilise for justice. Guengueng interviewed over 800 survivors and produced files of their evidence (Human Rights Watch 2016). Once the evidence had been collected, it remained to find a state that would direct the trial.

Human Rights Watch also played a key role. While investigating, the organisation discovered thousands of files strewn across the floor of an abandoned DDS building in N'djamena. Included were lists of political prisoners, interrogation reports and death certificates of the prisoners that had died while in detention. The documents were a roadmap detailing how Habré carried out repression and corroborated the testimonies collected by Guengueng.

Based on both the interviews and the files found in the DDS building, Human Rights Watch produced a 738 page dossier, documenting the regime's responsibility for the death of over 40 000 people and other atrocities. It became the basis for the first indictment of Habré in Senegal in 2000 (Brody 2017).

The extensive involvement of civil society helped to legitimise the case against Habré, and made up for the loss of evidence when, over the years, many witnesses died. There is also evidence to show that civil society had an impact on the way the trial was prepared. For example, it was at the insistence of the victims that the dossier against Habré included crimes committed against each of Chad's victimised ethnic groups (Gibert 2015).

When the police captured Habré in his villa in Dakar, many of the victims did not believe he had been arrested. Despite an international warrant for his arrest, he had been living safely in Senegal since 1990. It took 24 years of relentless campaigning to bring him before a court.

The Prosecutor v Hissene Habré

As this type of trial is usually conducted by international courts and Senegal had no prior experience with criminal trials of this nature, president Abdoulaye Wade requested international assistance to prepare for the trial. A group of experts from the EU assessed the EAC's needs and recommended technical and financial assistance. To this end, a delegation was sent to Senegal, led by Bruno Cathala, a former registrar of the ICC (Brody 2017). The AU sent as its representative Robert Dossou, former foreign and justice minister of Benin. Du Plessis (2008) has interpreted the envoy as a sign that the AU was increasing its support for the pursuit of international criminal justice on the continent.

⁹⁴ Facing Justice - Victims Bring Dictator Hissène Habré to Trial

Habré's trial began on 20 July 2015, when he was brought before three judges at the EAC for charges that placed him at the forefront of incidents of torture and international crimes in Chad. The day got off to a dramatic start when Habré was brought kicking and screaming into the courtroom. Gberdao Gustave Kam, president of the EAC told Habré: "whether you agree or not, the court has ordered you to be brought here by force... and no matter what, the rule of law will prevail" (Human Rights Watch 2016). Still, Habré continued to protest the EAC's jurisdiction, shouting "down with imperialists!" and calling the trial a "farce by rotten Senegalese politicians and African traitors". After being thrown out, Habré refused to return to the courtroom and the trial had to be adjourned for the day (Ibid).

Habré was brought to the courtroom the next day but appeared without his lawyers. The EAC immediately appointed new lawyers to represent Habré but the trial had to be adjourned again to allow them to prepare, this time until September 7. According to Anders (2015), Habré and his lawyers coordinated their actions and succeeded in delaying the proceedings. The adjournment cost the EAC a 50% increase in its operating budget. Anders suggests that this may have been part of the defence's strategy to derail the trial by increasing the costs. It is true that an indefinite postponement may have undermined the EAC's credibility and raised questions about its commitment to ensuring a fair trial for the accused.

This was not the only threat to the success of the trial. Initially, Chad promised to cooperate with the EAC but later openly resisted (Jackson 2016). Nevertheless, the prosecution pushed ahead and after the second adjournment, the trial ran without incident. There were no further delays and the safety of the witnesses was ensured throughout the trial. This is a notable feat given that the bulk of the trial relied on the testimonies of approximately 90 victims. Although Habré did not commit crimes in relation to each of the witnesses himself, the judges limited the scope of the investigation to him by applying indirect forms of criminal responsibility, a principle that assigns guilt where the accused can foresee criminal acts arising from his actions. The principle has been criticised for its lax standard and has been formally disregarded by the ICC (Ambos 2008).

In addition to indirect forms of criminal responsibility, the EAC also employed other more accepted criminal standards. For example, Habré was also found to have personally committed crimes in each legal category of direct responsibility, including rape. This finding was based on the testimony of a witness who revealed that Habré had raped her four times (Carlson 2017).

A total of 93 witnesses testified, most of them direct victims of the Habré regime. The witnesses that were not victims included a data analyst, who testified about the mortality rate in the detention centres, a forensic team, which had dug up mass graves across the country, a doctor who had treated over 600 torture victims, and a handwriting expert who identified Habré's writing on police documents (Brody 2017). Bandoum Bandjim was one of the key witnesses. He was a former member of the DDS and confirmed during his testimony that the director of the unit visited Habré every day with files which were annotated and sent back with directions to either set prisoners free, execute them, or torture them (Ibid, 19).

Throughout all of this, Habré insisted that he did not recognise the EAC's jurisdiction and refused to speak during the eight month trial.

On 30 May 2016, Habré was found guilty of crimes against humanity, summary execution, rape and torture and was sentenced to life in prison. In addition, he was ordered to pay a sum of US\$90 million in compensation to the victims (Ibid 17). The decision was also confirmed on appeal on 27 April 2017. According to Carlson (2017) however, certain parts of the judgment revealed discrepancies in the procedural process which may be attributed to the court's hybrid legal construction.

Although the two and a half month adjournment increased the court's expenditure, the total operating budget for the trial came to US\$8.6 million (Brody 2017, 29). This amount covered the entire trial from investigation through to appeals. By comparison, the ICC's budget in the same year was US\$139.59 million.⁹⁵ Habré's prosecution is evidence that where there is political will and adequate resources, the cause of justice in Africa can be advanced (Clifford 2019).

The EAC also successfully averted having the trial hijacked by politicians pushing their own agenda to the disadvantage of the process, as was seen with the ICC's intervention in Kenya. For example, when Habré's lawyers did not pitch for the trial, the Trial Chamber simply appointed new lawyers to represent him. Similarly, when, on the first day, Habré had to be physically carried into the courtroom, the Trial Chamber had the courtroom emptied every morning thereafter so that, should there be a scene, there would be no spectators. This ensured that Habré's resistance did not become a focal point in the media (Carlson 2017).

Legacy of the court:

There are several lessons to be taken from the experience of the EAC. The first is that the involvement of civil society is key. The resilience of Habré's victims, who fought for 24 years to bring Habré to trial, must be commended. Their work had "enormous implications for human rights advocacy," particularly in relation to the role victims can play in holding their abusers accountable (Jackson 2016). The hope is that other survivors will be inspired to take charge of their own process.

Having worked so closely with civil society, the EAC is also a good example of how internationally supported framework can work with local demands. Although the entire process took 15 years, it met the victim's expectations. As Guengueng has said: "to be there in front of the judges, I already felt fulfilled" (Human Rights Watch 2016).

As the first African initiative, fighting against the impunity of serious crimes committed in an African country, by an African president against African civilians, the EAC also demonstrates that the AU does take seriously its commitment to justice. That the trial took place in Africa led to significantly more acceptance than there is for cases coming from The Hague (Brody

⁹⁵ Report on Budget Performance of the International Criminal Court as at 30 June 2016

2017, 5). It also opened up a space for Africa in international criminal law and global jurisprudence.

But the EAC was not without its faults. Several procedural deficiencies of the court were overlooked in favour of securing a conviction. Moreover, the success of the EAC was the result of collaboration between many actors. Only through cooperation between, Senegal, Chad, Belgium, Human Rights Watch, CSOs, the AU and even the ICC, did the chambers successfully hold a trial which met international standards of justice. The EAC provides a possible template for future trials of this kind.

Conclusion

With both the Taylor and Habrè cases, the courts were conscious of local demands, resulting in trials that brought justice closer to the victims. The hope is that both cases send a strong signal to perpetrators of mass atrocities, particularly African heads of state, that impunity will not be met with passivity.

Both the EAC and the Special Court for Sierra Leone represented an acceptable compromise to the worsening relationship between the AU and the ICC (Carlson 2017). More importantly, the hybrid model of criminal justice applied in both courts highlights valuable lessons for Africa's regional experiment with international criminal justice at the African Court. Encouragingly, at the 29th AU Summit in January 2017, the AU Commission held a seminar on "Carrying Forward the Legacy of the Extraordinary African Chambers" (African Union 2017).

Chapter 4

The African Union and International Criminal Justice

According to Mabunda (2013), the enforcement of a Western liberal framework of human rights has always been problematic in Africa, and while states have often spoken of human rights, this rhetoric has not translated into a rights reality. Mabunda's view is shared by Bösl and Diescho (2009) who argue that human rights as a legal concept arrived relatively late in Africa, its evolution taking place against the backdrop of the UN system.

However, international law has its own tradition and history in Africa (Branch 2017). And a lack of a Western rights framework does not mean an absence of a human rights tradition. Africa's pluralistic approach has attempted, in part, to resuscitate traditional forms of justice that have been dismantled or undermined by Western inspired, modern legal systems. A look at this history, and the existing structure and framework of the African legal system, serves to highlight the features which have worked best and the features that should be avoided in Africa's ongoing experiment with international criminal justice. Moreover, despite varying regional perceptions of human rights, the concept and its universality is generally accepted in Africa (Bösl and Diescho 2009, v). The human rights framework, as deployed by the ICC, has gained traction in Africa and includes institutions and structures at both national and regional levels.

Further, since the OAU's establishment in 1963, several mechanisms that aim to promote and protect human rights in Africa have come to the fore. At present, the African system is comprised of three framework instruments: the African Charter on Human and People's Rights, the African Commission on Human and Peoples Rights and the AU Constitutive Act. These instruments have played a key role in creating a regional human rights system.

The Organisation of African Unity

The OAU was established in May 1963 by Heads of African States and Governments. In line with the anti-colonial perspective that inspired the creation of the OAU, the organisation's Charter (the founding document) placed an emphasis on sovereignty. The preamble of the Charter refers to the need to "safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neocolonialism in all its forms." The concept of defending the continent's independence entailed non-intervention in the internal affairs of member states, a principle enshrined in Article III(2) of the Charter. This norm was strictly adhered to and manifested itself in a reluctance of member states to get involved in what they considered to be the private affairs of other states.

The emphasis on sovereignty contributed to the reluctance of member states to condemn one another for human rights abuses. The OAU turned a blind eye to several repressive regimes in Africa and showed an unwillingness to sincerely pursue the promotion or enforcement of human rights (Udombana 2002).

The African Charter on Human and People's Rights

Soon after the establishment of the OAU, member states began considering the idea of an enforcement mechanism for the protection of regional human rights. It was not until June 1981, in response to growing international and domestic pressure that Heads of State and Government unanimously adopted the African Charter on Human and People's Rights, at the OAU's 18th Assembly. The African Charter has been hailed as a milestone in the evolution of human rights protection at the regional level. It was also the first major African contribution to the global human rights discourse. In recognising economic crimes and crimes of plunder as violations of human rights, the charter has gone a step further than the global discourse of rights.

The African Charter enshrines the human right to life, integrity, human dignity, liberty, security, non-discrimination and more.⁹⁶ To guarantee these rights, the African Charter provides for the establishment of an African Commission on Human and People's Rights (ACHPR) to:⁹⁷

- "promote Human and People's Rights"
- "Ensure the protection of human and peoples' rights under conditions laid down by the present Charter"
- "Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU" and
- "Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government" .

The African Charter recognises both individual and peoples' rights, "taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples rights."⁹⁸ The inclusion of this statement reflects the drafters intention that the African Charter be inclusive of the role and influence of African culture (Ibid).

All 53 member states of the OAU ratified the African Charter (African Union 2017). All member states thus have the obligation to recognise the rights and freedoms in the Charter and have undertaken to adopt legislative or other measures to give effect to them.⁹⁹ In addition, states have an obligation to "guarantee the independence of the Courts" and "allow the establishment and improvement of appropriate national institutions entrusted with the

⁹⁶ Article 4, Article 5, Article 6, Article 28

⁹⁷ Article 45

⁹⁸ Preamble

⁹⁹ Article 1

promotion and protection of the rights and freedoms guaranteed by the present Charter.”¹⁰⁰ States such as Nigeria and Benin have gone further to incorporate the Charter’s provisions into their domestic law. Strengthening domestic legislation in this way is an essential step in ensuring justice for victims of human rights abuse. Human rights are now guaranteed in the constitutions of almost all independent African states. Institutional infrastructures, such as independent judiciaries, have also been constitutionally guaranteed.

The African Charter was a meaningful step forward but it has not escaped criticism. Several provisions were included to protect states from taking full responsibility for human rights violations. Moreover, while the Charter provides for an African Commission on Human and People’s Rights to promote, protect and interpret its provisions, it makes no mention of a court to enforce the rights guaranteed.

According to Nsongurua (2014), the absence of a judicial mechanism in the Charter was deliberate. The drafters subscribed to negotiation and the diplomatic settlement of disputes, arguing that African culture did not approve of legal processes common to the Western system. It is true that traditional African conflict resolution aims to improve relations between the warring parties on the basis of principles such as equity, good conscience and fair play. It has also been argued that African states would have been reluctant to ratify the African Charter had provision for legal processes been made compulsory.

Moreover, human rights organisations and NGOs were unsure about the sequencing of the Court under the African Charter. While some organisations pushed for first improving the ACHPR so that a distinct African human rights jurisprudence could develop, others emphasised the urgency for a regional court (Ibid). Either way, the failure of the African Charter to provide a safeguard for the rights it is promising has been described as its greatest weakness.

The African Commission for Human and Peoples Rights

The African Commission for Human and Peoples Rights (ACHPR) opened in 1987 as the main instrument for ensuring the observance of rights guaranteed in the African Charter. It has 11 members who are elected for six year renewable terms (ACHPR 2019). The commission sits twice a year and members serve in their personal capacity. To ensure geographical representation, not more than one national from the same African country may serve at the same time (Ibid).

Chapter II of the African Charter states that the ACHPR is mandated to “promote human and peoples rights and ensure their protection in Africa” in three primary ways:

1. “To promote Human and People’s Rights and in particular:
 - a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences,

¹⁰⁰ Article 26

- disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
 - b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
 - c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter
 3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU".

State parties and private individuals, including NGOs, may submit communications to the ACHPR regarding human rights violations on the continent.¹⁰¹ The commission will, after considering the complaint, produce a report of the facts of the situation and its own findings, to be forwarded to the states concerned and to the Assembly of Heads of State and Government.¹⁰² What happens next is left up to the competence and conscience of the Assembly, a process that has often been criticised for its lack of answerability (Ibid).

Pursuant to the powers listed in Chapter II (1), the ACHPR has carried out missions to several African countries, including Senegal, the DRC and Sudan, to monitor and assess the situation of refugees and displaced persons (Mujuzi 2009). It has also co-sponsored a number of seminars and international conferences with other international organisations. In terms of protection of human rights, the ACHPR has rendered several decisions on violations of human rights. Most notable was a case regarding the violation by Nigeria of development related rights in the Niger Delta.¹⁰³ However, the list of ACHPR accomplishments is short, in part because of its own failure to interpret its mandate to the maximum benefit, and in part because it was never intended to be more than a body that would promote human rights (Udombana 2002).

For example, the ACHPR is empowered to interpret the provisions of the African Charter when requested.¹⁰⁴ When doing so, the commission must consider international human rights law.¹⁰⁵ This power is valuable, yet it has rarely been employed, a pity given the ambiguity of some of the African Charter's provisions (Ibid). The commission has shown a clear preference for mediation and amicable settlements even though a liberal interpretation of its mandate could empower it to play a more active role in adjudicating disputes and protecting human rights.

It has been suggested by Udombana (2002) that Heads of State and Government of the OAU were wary of granting the ACHPR significant power to ensure adherence of human rights. Thus, the commission cannot award damages, restitution, or reparations. It does not

¹⁰¹ Article Article 46, 55.

¹⁰² Article 52

¹⁰³ SERAC and Another v Nigeria

¹⁰⁴ Article 45 (3)

¹⁰⁵ Articles 60 and 61

have express power to reprimand offending states, but may make recommendations to parties, many of which have simply been disregarded by member states.¹⁰⁶

According to Article 62 of the African Charter, “each party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.” The reporting system could serve as an important forum for dialogue and has the potential to detect and respond directly to causes of conflict before they manifest further. Unfortunately, member states have also shown disregard for this provision. Out of 55 member states, only 12 have submitted all of their reports. Twenty states are late by one or two reports and a further 16 states are late by three or more reports. Six states have not submitted any reports since ratifying the African Charter in 1986 (ACHPR 2019). Lacking a mechanism to enforce its provisions, the commission, and by extension the OAU, has often been described as a “toothless bulldog”.

This is made worse by the gross underfunding of the commission. For the amount of work that it must undertake, its current level of resources is insufficient. The ACHPR has had to discontinue various programs due to financial constraints. In 2006, it reported that it was not able to conduct most of the missions scheduled for that year, “due to lack of funds”.¹⁰⁷ In the Commission’s 2017 report, not much appears to have changed. The report notes that continued reliance on partners to fund its activities “is not desirable for an AU Organ dealing with such important and sensitive matters.” It further laments “insufficient funding” from the member state budget which “impedes the Commission’s capacity to follow-up on implementation as it prevents the Commission from developing effective follow up of its findings during country visits, and recommendations arising from its findings, resulting in the overall weakening of the effectiveness of the Commission.”¹⁰⁸

Several other provisions have restricted the commission's ability to function independently. Confidentiality clauses, for example, limit public awareness of the commission's work and ensure that even its successes go unnoticed. Article 59 of the African Charter states that “all measures taken within the provisions of the Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.” In other words, the decision on whether to publicise a human rights violation on the part of a member state falls to the member states themselves.

Special conditions also make it difficult for individuals to seek recourse from the ACHPR. In order to consider private communications, as opposed to those submitted by member states, the commission must agree by majority to examine it.¹⁰⁹ This essentially gives the commissioners discretion to pick and choose among the complaints. As a result, public confidence in the ACHPR and its work has waned. It has been accused of not being able to take a position on human rights issues, the very reason for its creation (Murray 2004).

¹⁰⁶ Article 45 (1) a

¹⁰⁷ 20th Report of the African Commission on Human and People’s Rights, p5.

¹⁰⁸ 42nd Activity Report of the African Commission on Human and People’s Rights, p19.

¹⁰⁹ Article 55 (1); (2).

On its own, the ACHPR has shown that it is not able to hold onto the legitimacy and relevance necessary to effect the protection of human rights in Africa (Nsongurua 2014). Although there was popular demand for a quasi-judicial body that could enforce the provisions of the Charter, it was clearly not being met by the commission. It was suggested that the ACHPR may be bolstered by a court but the creation of that court was still a long way off. The OAU was only just beginning the transition that would usher in a new continental legal order.

The Constitutive Act of the African Union

Greater integration efforts saw the OAU transition into the AU in 2002 and the beginnings of a continental legal order in Africa. Unlike the OAU, the AU was founded by a Constitutive Act, a codified legal framework that underpins how the organisation should conduct itself (Amao 2018).

Although many of the founding principles of the OAU were included in this new legal framework, the Constitutive Act departed from the OAU Charter in one important way - it discarded the non-intervention approach, adopting in its place the principle of non-indifference under Article 4 (h). The AU has the right to “intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”. The inclusion of this right is unique to the AU and is a marked shift from the OAU whose key principle was non-interference in the private affairs of member states (Rondreux 2017).

The principle of non-indifference stemmed from the inability of the OAU to intervene in gross human rights violations in the past (Mabunda 2013). No longer could leaders use the notion of sovereignty to cover up human rights abuse on the basis that how a state treats its peoples is its own exclusive business.

Apart from the principle of non-indifference, the Constitutive Act has a progressive, centralised framework for promoting and protecting human rights in Africa and because this framework has constitutional status, it is binding on all member states of the AU. Articles 3(h), 4(m) and 4(o) emphasise the the AU is committed to promoting and protecting human rights, respecting democratic principles, the rule of law and good governance, and condemning and rejecting impunity. The language of the text throughout suggests that human rights are central to the work of the AU (Murray 2004) and the unanimous adoption and ratification of the act is further acknowledgement of states’ responsibility for the wellbeing of its peoples.

In pursuit of the principles and objectives of the Constitutive Act, African states have been making a concerted effort to establish institutional architecture that may deliver justice to victims of human rights abuse (Mabunda 2013). These efforts have included the establishment of a judicial body or court. Prior to this, the only potential recourse was the ACHPR, whose effectiveness (or lack thereof) has been discussed above. Although a continental legal framework was developing, many African states lacked independent judiciaries, which meant citizens could not access effective recourse at a national or regional

level and human rights abuses continued pervasively. The existing architecture was not enough to guarantee the rights that has been so boldly enshrined in the Constitutive Act (Nsongurua 2014) and an additional mechanism was clearly needed.

The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (African Court) was established in June 1998 by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. However, the seeds for the establishment of the African Court were planted long before that.

In November 1993, a meeting of African and international NGOs discussed a possible draft protocol to establish an African Court. Those present made significant contributions to the draft texts (Nsongurua 2000, 34). A working group was also established to further refine some of the concepts and to include suggestions from the meeting. The working group's report was submitted to the OAU in 1994 and was added to the agenda of the annual OAU Assembly meeting that year. It was at this meeting that the OAU adopted the first resolution confirming the need to establish a court that would compliment and reinforce the ACHPR. The resolution requested that the secretary general of the OAU organise a meeting of governmental legal experts who, together with the ACHPR, would start thinking about the process to establish the court. This group met three times over the next two years. Civil society was also key in the drafting process (Ibid).

A first official draft of the protocol was presented and approved in 1995 (Naldi and Magliveras 1996). The draft was circulated to member states for their suggestions and comments, with a view to hold a deliberation session soon after. Five key changes were made to the first draft (Ibid):

- An amicable settlement" clause was added
- The required number of ratifications for the protocol was increased from 11 to 15
- The court was requested to sit in one chamber instead of the two initially suggested
- The Assembly of Heads of State and Government was authorised to intervene in the process of removing judges
- Access to the court was restricted the ACHPR and state parties

The second draft was also distributed amongst member states and a third meeting took place in December 1997, in Addis Ababa, where a final draft text was presented and approved without any further amendments. The (the Protocol) was adopted in June 1998. Nsongurua (2014) has called the text a compromise between the different trends throughout the history of its drafting.

The establishment of the African Court is a historic development in the field of human rights law. With its adoption, Africa joined European and Inter-American regional human rights systems in providing judicial guarantees at a regional level (Udombana 2000). Before this, Africa had the only human rights system without a court and this became a problem which

the OAU could no longer ignore, especially since grave human rights abuses on the continent were receiving increasing international and domestic attention.

The Protocol establishing the African Court only came to force on 25 January 2004, once it had received 15 ratifications (ACJHR 2019). The preamble of the Protocol locates the document within the broader goal of meeting the OAU's foundational objectives and emphasises principles such as freedom, equality and justice. The Protocol also determines the jurisdiction of the court, explains who may submit cases to it and under what conditions, and establishes the type of violations that may be addressed.

According to Article 2 of the Protocol, the court should “complement the protective mandate of the African Commission on Human and Peoples’ Rights.” The court has a broad mandate and upon ratification, is immediately granted jurisdiction “to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.”¹¹⁰ The African Court has both contentious and advisory jurisdiction, meaning that it can adjudicate disputes between individuals and state parties and it may

“at the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.”¹¹¹

The African Court thus boasts the widest jurisdiction of any regional human rights system in terms of who is entitled to submit requests for advisory opinion on legal matters. A function that was underused with the ACHPR, the African Charter and the Protocol may now benefit from a more thorough analysis of their meanings. The court's advisory jurisdiction is also the broadest in terms of subject matter. It may provide legal opinion any legal matter in the African Charter, the Protocol and any other human rights instruments that have been ratified by member states.¹¹² There are few guidelines for determining when the court should exercise its advisory jurisdiction suggesting that it occurs at the court's discretion. However, the court must give reasons for giving or withholding its advisory opinion.¹¹³

Should the court give an advisory opinion, that opinion is not formally binding on any member state or party. Rather, it derives its value as a legal authority from a judicial institution (Ibid). It can therefore have a significant impact on the development of regional human rights jurisprudence and may also influence the domestic application of the African Charter, the Protocol and any other human rights instruments that have been ratified by member states of the AU.

Article 5 of the Protocol defines who is entitled to submit cases to the court. Five categories of claimants can access the court directly:

¹¹⁰ Article 3

¹¹¹ Article 4

¹¹² Article 4(1)

¹¹³ Article 4(2)

- The ACHPR
- A state party that has lodged a complaint to the ACHPR
- A state party against which a complaint has been lodged at the ACHPR
- A state party whose citizen is a victim of a human rights violation
- African Intergovernmental Organisations

In terms of how communications or complaints are heard, the African Court may establish its own Rules of Procedure. However, a number of compulsory provisions have already been laid down. For example, the court can only consider communications if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

This is in line with Article 56 of the African Charter and general international law. For example, the exhaustion of local remedies including judicial and administrative procedures before granting recourse to international remedies is a common requirement (International Justice Resource Center 2017). However, the African Charter makes an exception where procedures are being “unduly prolonged”.¹¹⁴ This exception is welcome given the traditional issues of slow and ineffective domestic legal processes in Africa (Udombana 2000).

For the five aforementioned categories, access to the court is automatic upon a state’s ratification of the protocol. Claims are thus either filed directly with the court by the complaining party or indirectly by the ACHPR.¹¹⁵

A sixth category exists for relevant NGOs and individuals who may submit cases to the court however, special conditions apply.¹¹⁶ The court has the discretion to allow or deny access to NGOs and individuals and even if it allows access, the state involved in the claim must have made an express declaration accepting the court’s jurisdiction in that regard. This is according to Article 34(6) which states that:

“at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol.

¹¹⁴ Article 50

¹¹⁵ Rule 34, Rules of Procedure

¹¹⁶ Article 5(3)

The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration”.

It has been suggested that Article 34(6) was deliberately included as a compromise to facilitate the adoption of the protocol, as the question of whether non-state bodies and individuals would be afforded access to the court was controversial throughout the entire drafting process (De Vos 2004). If this is the case, Article 34(6) represents a serious restriction on the court’s jurisdiction. NGOs and individuals are often those with the greatest need for recourse and few state parties have been willing to support direct access. At the time of writing, only eight African states had made the declaration recognising the competence of the Court to receive cases from non-governmental organisations and individuals.¹¹⁷

Still, the jurisdiction of the African court extends much further than that of the ACHPR. The court has express jurisdiction over all human rights instruments ratified by the states concerned, including all regional, bilateral, multilateral and international treaties. This broad mandate has important implications. Even the most limited interpretation of the court’s mandate covers the gaps identified in the African Charter, because rather than relying exclusively on the rights guaranteed in the Charter, a group may bring a case before the court under another international treaty that may better protects its rights (Udombana 2000).

In contrast to the commission, the African court has also been empowered to offer remedies to victims of human rights violations. Article 27 of the Protocol states that:

1. “If the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.

By providing reparation to victims, the African Court facilitates reconciliation by acknowledging the suffering that took place and offering some measures of redress or compensation . This is an important step forward not only in protecting human rights but in deterring their violation in the first instance. Moreover, while the Protocol does not grant express powers to order structural remedies or the revoking of certain practices or laws that may have led to the human rights abuse in the first place, Nsongurua (2014) suggests that a progressive interpretation of Article 27 permits such a result.

Provisions have also been included which enable the African court to enforce its judgments. By ratifying the Protocol, state parties have undertaken to “comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.”¹¹⁸ Should a state fail to do so, the court is empowered to note this in its annual report to the Assembly of Heads of State and Government.¹¹⁹ The Protocol also requires that the OAU Council of Ministers be notified of the court’s judgments and be charged with

¹¹⁷ Benin, Burkina Faso, Côte d’Ivoire, Ghana, Mali, Malawi , Tanzania and Tunisia

¹¹⁸ Article 30.

¹¹⁹ Article 31

monitoring their execution on behalf of the Assembly.¹²⁰ This does not mean that the Council or the Assembly can take action against non-complying states but political pressure could be employed to force compliance, by, for example, passing a resolution at the AU. These provisions strengthen the authority of the court, making it difficult for states to disregard its judgments as has been seen with the ACHPR.

Also in contrast to the ACHPR, the African court is not subject to confidentiality clauses. It may freely publicise its proceedings and judgments, as provided for by Article 10 of the Protocol. This provision is also an important tool in ensuring that the general public is made aware of the court's activities and may share its opinion in relation to its work freely - an essential step in promoting and protecting human rights.

The African Court has 11 judges. All judges must be nationals from member states of the AU and must be "elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights."¹²¹ The Protocol also states that "no two judges shall be nationals of the same state."¹²² They may be elected by secret ballot for a 6 year term that is renewable only once.¹²³ This ensures even representation across Africa's major geographical regions.¹²⁴ The Protocol has also considered balanced gender representation, which was a fairly new concept in Africa at that stage.¹²⁵

With 30 state parties,¹²⁶ the African Court is the AU's only functioning court. Although its first two years of operation were marred with administrative and operational issues, it has since experienced some successes (Clifford 2019). Since the adoption of its final rules in 2010, the Court has received 190 applications (African Court 2019). 98% of those have come from individuals and NGOs. The remainder came from the ACHPR, most notably the binding ruling against Libya in 2011 for human rights violations.¹²⁷ Disappointingly, not one case has been referred by a member state since the court's establishment. Moreover, of the 190 applications, only 48 have been finalised.

One of the more celebrated cases has been the court's ruling against the Kenyan government for violating the rights of the Mau Ogiek people by evicting them from their ancestral land in the Mau Forest Complex.¹²⁸ The Mau Ogiek had unsuccessfully fought against regular evictions at national level before bringing the case before the African Court.

¹²⁰ Article 29

¹²¹ Article 11(1)

¹²² Article 11(2)

¹²³ Article 14(1)

¹²⁴ Article 14(2)

¹²⁵ Article 14(3)

¹²⁶ Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

¹²⁷ African Commission on Human and People's Rights v Great Socialist People's Libyan Arab Jamahiriya, 004/2011.

¹²⁸ African Commission on Human and People's Rights v Republic of Kenya, 006/2012.

¹²⁹ The Kenyan government justified their actions on the basis of concerns for the environment.¹³⁰ The court however, dismissed these claims, ruling that the eviction from ancestral forrest territories violated the African Charter (Wily 2017). The Ogiek case was the first time that the court ruled on rights involving indigenous peoples. It therefore carries wide jurisprudential implications for indigenous and rural dwellers who own land based on customary law. In a number of similar cases, where judicial infrastructure or independence at national level has been lacking, the court has provided autonomous recourse (Ibid).

However, the court, like all AU institutions, faces issues with funding. This is problematic for perceptions of efficiency and the credibility of trials that do not enjoy sufficient investigation. Cases brought before the court either take too long due to financial constraints or are dismissed because the court does not have jurisdiction over them. The unacceptable consequence is that serious human rights abuses on the continent continue to go unaddressed. It is partly because of these constraints (and the proliferation of AU institutions) that the AU tabled a protocol in 2008 to merge the African Court with the African Court of Justice as a single court that would save costs and address issues of international law, human rights law and later (through the Malabo Protocol of 2014) international criminal law (Clifford 2019).

The African Court of Justice and Human Rights

The African Court of Justice was intended to be the main judicial organ of the AU, however its establishment was put on hold when Heads of State and Government adopted a protocol merging the African Court with the African Court of Justice, to create the African Court of Justice and Human Rights (ACJHR).

The 2008 merger protocol proposed the creation of two chambers: one dealing with interstate disputes and general affairs, and the other with human rights. In 2009, recognising the need for an international crimes division, Heads of State began assessing the plausibility of extending the jurisdiction of the ACJHR to try international crimes under a third chamber. The result was the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), officially adopted at the May 2014 AU Summit in Malabo, Equatorial Guinea (Clifford 2019). The Malabo Protocol extends the jurisdiction of the ACJHR to allow it to adjudicate international criminal law violations in addition to interstate disputes and human rights violations.¹³¹ This new court will come into force upon ratification by 15 member states of the AU.¹³²

There is a widespread belief that African states expedited this process in response to al-Bashir's arrest warrant however, the idea to prosecute international crimes in Africa is not new and the impetus for the court must be seen in terms of the basic principles of the AU Constitutive Act, Article 4(h) of which states that it is

¹²⁹ Ibid, p3

¹³⁰ Ibid, p37

¹³¹ Article 3

¹³² Article 11

“the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the member state of the Union”.

An African court with international criminal jurisdiction is therefore an obligation that the AU must meet because its legal framework now demands it. Not doing so would result in an odd situation whereby the AU Constitutive Act criminalises international crimes but its courts cannot prosecute them. Surely that was not the intention of the drafters. In fact, it is an assumption of interpretative law that legislators would not include provisions which are inconsistent (Botha 2012). Legal obligations aside, there is also a historical need for a court to prosecute crimes committed in Africa which may be of no prosecutorial interest to the rest of the world, or which international courts have no jurisdiction over (Du Plessis 2014).

The ACJHR will have a Pre Trial Chamber, a Trial Chamber and an Appellate Chamber.¹³³ It may receive submissions from the Assembly of Heads of State and Government, the AU Peace and Security Council, state prosecutors and the independent prosecutor.¹³⁴

Like the African Court, the ACJHR will have the jurisdiction to “hear matters or appeals as may be referred to in any other agreements that the Member States or Regional Economic Communities or other international organisations recognised by the African Union”.¹³⁵

The Malabo Protocol also gives the court jurisdiction over the four core international crimes of genocide, war crimes, crimes against humanity and crimes of aggression.¹³⁶ A regional court with the jurisdiction to try international crimes is unprecedented in the history of international courts and tribunals. Literature that assesses the Malabo Protocol is emerging, however much of the focus is on how it will relate to the ICC’s Rome Statute (Sirleaf 2017). This chapter explores instead the provisions which set the Malabo Protocol and the ACJHR apart from the ICC and identifies ways in which those provisions respond to African criticism of the ICC.

The jurisdiction afforded over the core international crimes is not all that different from that which has been included in the Rome Statute. Article 28B however, is notable for its wide interpretation of genocide. For the purposes of the Malabo Protocol

“genocide means any of the following acts committed with intent to destroy , in whole or in part, a national, ethnical, racial or religious group such as:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to member of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group”

¹³³ Article 16(2)

¹³⁴ Article 15

¹³⁵ Article 3(2)

¹³⁶ Article 28(A)

These acts are also included in the Rome Statute definition of genocide,¹³⁷ however the ACJHR differs in one major aspect: Article 28B adds subsection f) “Acts of rape or any other form of sexual violence.” This is a welcome inclusion especially given the prevalence of sexual violence as a weapon in African conflict.

In addition to the core international crimes, Article 28A of the Malabo Protocol lists ten crimes thought to be prevalent in Africa. These are unconstitutional change of government, piracy, terrorism, mercenary activity, corruption, money laundering, trafficking in persons, drugs and hazardous waste, and the illicit exploitation of natural resources.

By including these crimes, the ACJHR considers both the background and root causes of international crimes. It recognises that massive atrocities do not occur in isolation but are rather rooted in systems of crime (Ibid). Thus, most of the crimes over which the court is afforded jurisdiction concern threats to peace and security.

The crimes respond directly to African realities. In affording the ACJHR jurisdiction over them, the Malabo Protocol is not questioning the relevance of existing core international crimes, but adds to the list crimes that are prevalent within the African context. For example, the unconstitutional change of government is uncommon outside of Africa. Within the continent however, power regularly changes hands through violent coups, or conversely, leaders refuse to leave office even once their constitutional term limits have been reached (Werle and Vorbaum 2017). The most recent examples of this phenomenon come from Zimbabwe and Burundi. Both situations threatened to disrupt peace and security in their respective states and regions and yet there was no possibility of the offenders being brought before national or international courts.

Similarly, African borders are known to be porous, leaving states exposed to transnational crimes, militias and terrorist groups. This has been the first hand experience of the Great Lakes region where the proliferation of light weapons crossing seamlessly over borders has fuelled conflicts. Given the tendency of conflicts to spread, and the proximity of the ACJHR to the situation, the regional approach considers the interconnectedness of African states.

Article 46(C) of the Malabo Protocol is also a notable inclusion. It deals with corporate criminal liability, giving the ACJHR jurisdiction over legal persons. According to the article, “corporate intention to commit an offense may be established by proof that it was the policy of the corporation to do the act which constituted the offence” or corporate knowledge of the commission of an offense may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.”

No other international criminal court has jurisdiction over corporate bodies. During ICC negotiations at the Rome Conference, the idea was also controversial. And yet, the expansion of criminal jurisdiction to include corporate criminal liability, particularly with

¹³⁷ Article 6

regards to the illicit exploitation of natural resources is a crucial step for Africa where competition for control over the government is to compete for control over natural resources (Clarke 2013). The effects of this have been seen in the DRC, Uganda, Sierra Leone, Somalia and Liberia where political parties, multinational corporations and rebel groups clash over access to the extractive industries.

This contextualisation is important because while hybrid courts for special situations have been established successfully in different countries, what has not happened is the regionalisation of international criminal law that is particularly suitable to a specific region. The ACJHR may be the most appropriate judicial body to address these phenomena and respond more effectively to their challenges. By criminalising these acts, the ACJHR could assist in averting core international crimes by addressing their root causes. Jurisdiction is drawn along the reality of conflict lines and investigations and prosecutions will recognise all angles of criminality (Sirleaf 2017). Practically, because of its proximity to the crimes, the ACJHR may also experience enhanced effectiveness in terms of accessing the scene, collecting evidence and finding witnesses. This is crucial where information is compromised because the process takes too long. It could also be more cost effective where local resources already exist (Mabunda 2013).

By comparison, the Rome Statute is restricted to the four most serious international crimes of genocide, war crimes and crimes against humanity and crimes of aggression. These are admittedly important and are common to all of humanity across the globe. However, these crimes often occur once law and order has already broken down. Moreover, the ICC is restricted by its distance in terms of accessing information, which in turns increases its operation costs.

The ACHJR may also be in a better position to establish systems of redress which resonate more with victims. In addition to sentencing, the Malabo Protocol empowers the court to provide compensation to victims of international crimes through a trust fund.¹³⁸ The court may also issue communal reparations whereby the state in question is ordered to end violations through policies or programmes, possibly in collaboration with other AU institutions such as the Peace Fund. In addition, its jurisprudence may guide regional best practice and help strengthen domestic and hybrid courts.

The ACJHR may bridge the gap between local courts and the ICC, with the former lacking independence and often failing to enforce human rights and the latter being too distant and susceptible to geopolitics (Sirleaf 2017). Moreover, the geographic, historical, and cultural bonds between states and regional bodies may result in less resistance against the court's decisions. This was certainly the experience of the Special Court for Sierra Leone and the Extraordinary African Chambers which benefited from increased legitimacy in comparison to the ICC. However, the AU has often been accused of not taking a position on clear violations of human rights in member states. In this regard, the ACJHR could be open to the same criticism raised against the ICC for its lack of independence from the UN Security Council.

¹³⁸ Article 46M

This is particularly problematic given the controversial inclusion of an immunity clause in the Malabo Protocol. Article 46A grants immunity to “any serving AU Head of State or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure of office”. While the provision responds to African arguments around peace efforts and the sequencing of legal processes, it also elicits concerns from critics who believe it may give African leaders motivation to hold onto power (Clifford 2019). Sovereign immunity is a well established tradition in international relations. Its inclusion in the Malabo Protocol is derivative of immunities granted under customary international law. Over the years however, the norm has been eroded by judicial decisions and human rights norms such as R2P (Killingsworth 2017). Today, the granting of immunity is considered contrary to the very reason for the existence of courts – to uphold the rule of law by ensuring that no one, not even a state official, is above it. However, the granting of immunity occurs only for the duration of the official’s tenure in office. When the official exits office, Article 46A will no longer apply. Furthermore, the provision of immunity cannot stop a sitting head of state from being investigated or being called as a witness before the court (Clifford 2019).

The immunity clause is one of several concerns with the provisions of the Malabo Protocol and the ACJHR in general, which together with questions of funding have resulted in slow ratification. Thus far, 31 African countries have signed the Protocol merging the African Court with the African Court of Justice, but only six have ratified it. The Malabo Protocol has eleven signatures and no ratifications (African Union 2018).

Thus, despite its merits, the ACJHR is already facing several challenges, chief among them the question of finance. AU organs are already underfunded with well over half of the AU’s budget coming from international partners. International criminal trials have an estimated cost of \$10-15 million each (Ibid). Considering that the AU’s 2017 budget was \$435 million, with only \$10,315,284 being allocated to the ACHPR, there are serious doubts as to whether the AU’s current budget can support the establishment and operation of another court, especially of this size (African Union 2017). One of President Kagame’s ambitious AU reforms includes the financing of the body by member states, through a 0,2% levy on all eligible goods coming into Africa. Although some states are already collecting this levy, it is still too early to tell what the impact of the reform on the ACHPR will be. The hope is that more funds will be directed to the court under Kagame, who has been an outspoken critic of the ICC since its establishment (Clifford 2019).

Just as has been the case with the ICC, financially, it will be challenging for the ACJHR to investigate and prosecute complex international crimes in a manner that meets the high standards of international criminal justice if it does not have access to adequate resources. And just as has been the case with the ICC, this could undermine the court’s credibility and cause delay.

The combination of international law, human rights law and international criminal law under the jurisdiction of a single court is unprecedented in judicial history and also raises several substantive and procedural concerns (Clifford 2019) This was a challenge for the hybrid

courts discussed in the previous chapter. At a regional level, it is likely to be more complicated.

Moreover, there is confusion around the operation of the ACJHR alongside the ICC, an issue which has been left unaddressed in the Malabo Protocol. The existence of two courts, which have the same mandate, will undoubtedly create complications for those African states that wish to remain members of the ICC (Kemp 2016). A failure to address the overlap and possible discrepancies can only result in further division in Africa regarding international criminal justice. International law knows no hierarchy, calling into question the primacy of one court over another (Asaala 2016). Although the creation of an African court has several implications for the ICC, the principle of complementarity as included in the Rome Statute supports the idea of a regional court (Clifford 2019). However, even if the Malabo Protocol receives the required number of ratifications, international obligations for African states in respect of the ICC will not simply disappear. Since all African states are members of the UN, they still have an obligation to cooperate in situations that have been referred by the UN Security Council. This will be the case even if all African states withdrew from the ICC (Le Roux 2016).

The slow ratification rate is concerning. If African states are sincere about their commitment to delivering international criminal justice, they must prove this through action by adopting and ratifying both protocols on the ACJHR. Failure to do so will only confirm the fears of critics - that these so called 'efforts' are just a front for the protection of criminal leaders (Clifford 2019).

The ACJHR faces several obstacles which will likely take time to overcome. Concerns around funding, the provision of immunity, and the Court's operation alongside the ICC remain central. However, to plainly rebuke the court before its establishment is unhelpful. If the aforementioned concerns are addressed and the Malabo Protocol is ratified, the ACJHR could be a cogent African alternative to achieving justice for the victims of international crimes. The court is a step towards augmented accountability in Africa, while mitigating the effects of international interference (Ibid).

Conclusion

Africa's experience with international criminal justice recognises that responsibility for the prosecution of international crimes in the continent is broader than the ICC. Despite the pervasive view in existing literature that African legal systems are weak and ineffective, the fact that a legal system, based primarily on the protection and promotion of human rights for all Africans, exists needs to be acknowledged. However, the system must be supported by serious commitment and political will. Despite regional efforts, mass atrocities and violations of basic human rights continue (Bösl and Diescho 2009). With the AU came a prerequisite legal framework for a continent wide order, however that order is in its infancy and still has a long way to go. The ACJHR, bolstered by the Malabo Protocol, may expedite that process.

Since the ACJHR has not yet come into force, and the Malabo Protocol is yet to receive one ratification, it is premature to determine how the various provisions, many of which are novel to international criminal jurisprudence, will play out in practise. However, the potential flexibility of the court is an improvement on current practice. While not questioning the validity of retributive justice, it must be recognised that victims have varying demands for redress. This is especially true in contexts where justice is understood not just through trials and court rooms but through community restoration, forgiveness and reconciliation.

The Malabo Protocol extends the parameters of justice, forcing international criminal jurisprudence to think more creatively about what justice could look like. This encompasses the types of crimes that could be covered, the actors who could have access and the various methods of adjudication. It moves transitional justice away from the current approach that seeks only to address crime in one state and suggests that it can cover the region as a whole (Sirleaf 2017).

Chapter 5: Evaluation and Conclusion

This research set out to understand how and why Africa's relationship with international criminal justice has deteriorated over the years. As such, it identified some of the major criticisms raised by African states in relation to the ICC by conducting a literature review on the ICC's interventions in Sudan, Kenya and the DRC.

Areas of contention have emerged since the Court's inception and include questions of bias, immunity, universal jurisdiction and the power of the UN Security Council. Thus, some African states have become disillusioned with the Court, calling for its reform and refusing to cooperate with its requests. They have also engaged in increased efforts to establish regional and continental alternatives to the ICC.

This research began by explaining the outcome: the non-cooperation of African states with the ICC, and their pursuit of regional mechanisms for justice, and searched for causes through process tracing. It tracked the relationship between Africa and international criminal law to ask how some states have come to actively engage in non-cooperation with the ICC and whether their efforts to establish a continental alternative have responded to the criticisms raised.

The main research question was: what is the potential of regional criminal justice mechanisms in responding to criticisms raised against the ICC? Questions considered under this broad theme include:

- What are some of the major criticisms raised against the ICC?
- In the absence of membership to an international legal mechanism like the ICC, what alternative or complementary function do African human rights institutions offer to the ICC?

What are some of the major criticisms raised against the ICC and how have Africa's regional criminal justice mechanisms responded to them?

The ICC's relationship with Africa has changed significantly over time. The shift from Africa's initial support to its current campaign is a result of how political structures and uneven power relations are embedded in the ICC's legal framework, which has played out since the adoption of the Rome Statute in 1998 (Clarke, Knotterus, de Volder 2016).

There are numerous challenges that may impede the effectiveness of Africa's legal framework for international criminal justice, both current and future. It is beyond the scope of this thesis to address those challenges. Instead, this chapter aims to demonstrate how innovations in the system potentially respond to African criticisms of the ICC.

Lessons from Sudan, Kenya and the DRC

The growing rift between Africa and the ICC may be traced back to the UN Security Council's referral of Sudan in 2005. Much of the controversy surrounding the Sudan referral has to do with the fact that Sudan has not ratified the Rome Statute and rejects the jurisdiction of the ICC. Sudan's position is supported by the AU, whose political and diplomatic approach to the Sudanese conflict highlights central features and characteristics of Africa's international relations. Its long and violent process of decolonisation has enshrined core principles of sovereignty and territorial integrity in inner state affairs in Article III(2) of the OAU Charter.

The principle of non-intervention gradually eroded under the international and domestic promotion of human rights, and was eventually replaced altogether by the principle of non-indifference. If, morally, African states felt obliged to protect human rights, now it was required by law. This may explain some of Africa's initial enthusiasm for the establishment of the ICC. However, the court's intervention in Sudan highlighted one key deficiency - its inability to enforce cooperation from member states.

While the Rome Statute empowers the ICC to make requests for cooperation from both state and non-state parties,¹³⁹ the court has struggled to maintain Sudan's assistance in terms of investigation and it has struggled to enforce member states' obligation to arrest and surrender wanted persons to the Hague. Al-Bashir has travelled to several African countries without incident, despite a 10 year old warrant for his arrest. Similarly, the Kenyan government offered limited cooperation, leading eventually to the withdrawal of the case against Kenyatta altogether.¹⁴⁰ It is widely accepted that non-cooperation by member states has been a major factor preventing the ICC from fully delivering on its mandate (Akande de Souza Dias 2019).

How could Africa's legal framework address this? The African Court is empowered, through its Protocol, to enforce its judgments. State parties have undertaken to "comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".¹⁴¹ Should a state fail to do so, the court is empowered to note this in its annual report to the Assembly of Heads of State and Government.¹⁴² The Protocol also requires that the OAU Council of Ministers be notified of the court's judgments and be charged with monitoring their execution on behalf of the Assembly.¹⁴³ This does not mean

¹³⁹ Article 87, Rome Statute

¹⁴⁰ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta

¹⁴¹ Article 30, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

¹⁴² Article 31, Ibid

¹⁴³ Article 29, Ibid

that the Council or the Assembly can take action against non-complying states, but political pressure could be employed to force compliance, by, for example, passing a resolution at the AU. These provisions strengthen the authority of the court, making it difficult for states to disregard its judgments as has been seen with the ICC.

However, like the ICC, the African Court has no police force or institutional features of its own and African states are well-known for adopting progressive protocols and not complying with their provisions, with few consequences. Nigeria's arrest and surrender of Charles Taylor to the Special Court for Sierra Leone in 2006 is encouraging in this regard. While no law existed forcing Nigeria to do so, the moral weight of the situation proved powerful and is a valuable lesson for the African Court.

The ICC's mismanagement of the Sudan and Kenya cases was repeated in the DRC. The investigation was marred with administrative and procedural issues. Practically, because of its proximity to the crimes, the ACJHR could experience enhanced effectiveness in terms of accessing the scene, collecting evidence, finding witnesses and having them testify safely. The Malabo Protocol, like the Rome Statute, contains provisions for ensuring the safety of witnesses and their testimonies, but the African Court could also learn from the experience of the Extraordinary African Chambers and the Special Court for Sierra Leone, which both heard cases built on the testimonies of 90 and 30 witnesses respectively.

The prosecution's experiment with indirect forms of responsibility in the DRC was also unsuccessful. Here, the expansion of the acts which constitute a crime of genocide to include rape or any other form of sexual violence (Article 28B (f) of the Malabo Protocol) is notable, especially given the prevalence of sexual violence as a weapon in conflicts in Africa. The African Court could again learn from the experience of the hybrid courts studied. Both courts successfully prosecuted individuals on charges of indirect responsibility on the basis that although they did not commit the crimes themselves, they knew the crimes were being committed by armed rebels/soldiers acting under them and yet took no steps to stop them from being committed.

Another point of contention between Africa and the ICC, highlighted through the case studies, is the issue of immunity. The Rome Statute does not address immunity and commentators argue that this is because drafters of the Rome Statute never intended for immunity to trump the ICC's jurisdiction (Dugard 2002).

The same cannot be said for the Malabo Protocol, which grants immunity to "any serving AU Head of State or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure of office". While the provision responds to African arguments around peace efforts and the sequencing of legal processes, it also elicits concerns from critics who believe it may give African leaders motivation to hold onto power (Clifford 2019). Sovereign immunity is a well established tradition in international relations. Its inclusion in the Malabo Protocol is derivative of immunities granted under customary international law. Over the years however, the norm has been eroded by judicial decisions and human rights norms such as the R2P (Killingsworth 2017). Today, the granting of immunity is considered contrary to the very reason for the existence of courts – to uphold the rule of law by ensuring that no one, not

even a state official, is above it. However, the granting of immunity occurs only for the duration of the official's tenure in office. When the official exits office, Article 46A will no longer apply. Furthermore, the provision of immunity cannot stop a sitting head of state from being investigated or being called as a witness before the court (Clifford 2019). Still, its inclusion in Africa's legal framework has been controversial and since the Malabo Protocol is yet to come into force, it is premature to determine how the granting of immunity will play out in practise.

Following the ICC's intervention in Kenya, claims that the court is biased against Africa have been gaining traction. The OTP and ICC supporters justify the court's focus in Africa on the basis of legal arguments - the court is simply pursuing referrals, tracking the most serious atrocities and intervening where national judicial systems are weakest (Kemp 2016). This was the argument when in 2010, the OTP charged Uhuru Kenyatta with five counts of crimes against humanity as a "co-perpetrator" in cases of murder, deportation or forcible transfer, rape, and persecution during the 2007/2008 election violence in Kenya.¹⁴⁴

This research suggests that the ICC is not inherently biased. Rather, the court has been unable to prosecute and investigate in states that are shielded by the diplomatic might of the UN Security Council (specifically the P5) and are thus limited to Africa, where objections to its involvement are less consequential. However, that Kenyatta was able to exploit the bias rhetoric was problematic. Cacciatori (2014) opines that if Kenyatta's claims were isolated, they may easily have been dismissed as a front to protect himself from prosecution. However, other African leaders had long been expressing their concern about the ICC's operation.

Almost immediately after its establishment, the court was already facing threat from the US, who refused to relinquish jurisdiction to the ICC during its war on terror. The OTP's survival strategy was to target seemingly meaningless African violence. Its first investigations were not those of Iraq or Afghanistan, which were experiencing raging wars at the time, but the DRC, followed soon by Darfur. Branch (2017) has argued that only in Africa could the ICC pretend that violence had no politics and self-evident victims. Indeed a brief glance at the ICC's own promotional standards indicates a preference for a certain ideal image of victimhood - victims who show no power or means. The problem with this is that it reinforces stereotypes which classify some victims as more important than others (Schwöbel-Patel 2017).

These stereotypes can also be identified in the way the ICC identifies perpetrators and assigns guilt. The image of Kenyatta matched the international perception of the "African perpetrator" whose actions were in need of international judicial management. The court's approach did not consider legal time, which has resulted in a gap between the ICC's legal presumption of responsibility and the grass roots conception of who was actually criminally responsible for the acts of violence.

¹⁴⁴ The Prosecutor v Uhuru Muigai Kenyatta

In consideration of the bias argument, it is therefore also important to consider how far the court reinforces neo-colonial stereotypes about victims and perpetrators, a habit which surely restricts its ability to investigate beyond Africa.

Like the sovereignty argument, the bias argument would be a hard one to raise in relation to investigations initiated by the African Court given that it has the express jurisdiction over all human rights instruments ratified by the states concerned, including all regional, bilateral, multilateral and international treaties. Thirty states have ratified the Protocol establishing the African Court, including Kenya, thereby knowingly opening themselves up for prosecution. If the ACJHR comes into force with the Malabo Protocol, the mandate will grow to include criminal prosecution.

One issue that the African Court may struggle with just as the ICC has, is the politicisation of cases. The ICC's interventions in Africa have often fuelled, intentionally or otherwise, the idea that injustice has occurred, either as a result of its "neo-colonialist" approach, or because of the impunity of African leaders who cling to power. (Lynch 2018).

This issue is one that the African Court and the ACJHR (if it comes into force) will also likely encounter, especially when investigations and prosecutions involve heads of state or prominent public figures. Legally, it is unclear what provisions could be employed to address this.

More than these operational concerns, there are foundational issues regarding the interpretation and application of international criminal law and justice as the ICC sees fit. Within the context of the traditional politics versus law argument, the ICC has shown that it is unable to rise above the conflicts inevitable in the politics of state cooperation, rational considerations and self-interest (Asin 2016). Here, the failure of some African states to arrest al-Bashir, despite the possible legal repercussions and criticism, demonstrates the relationship between law and politics in relation to state cooperation; but it also speaks to the wider discrepancy between the norms of international criminal law and actual state behaviour. The ICC, operating at the heart of a political arena, is continuously limited by politics (Clifford 2019).

The criticisms of the ICC by Africa should not however be seen as a rejection of the principles of international criminal justice. Several developments signify support for efforts to guarantee accountability in respect of international crimes. No continent has paid more than Africa for the lack of legitimate institutions of law and justice. Against a culture of impunity, Africa has made commendable efforts to institutionalise justice mechanisms. If African states are sincere about their commitment to delivering international criminal justice, they must prove this through action by adopting and ratifying the Protocols on the ACJHR. Failure to do so will only confirm the fears of critics that these so called 'efforts' are just a front for the protection of criminal leaders (Ibid). If executed correctly, Africa has an opportunity here to move the concept of criminal justice away from the limited definition as contained in the Rome Statute, which aims only to punish perpetrators of crimes, towards a broader concept which recognises the impact of crimes and includes a process of reconciliation (Rodman 2014).

The full debate around peace versus justice was beyond the scope of this thesis however certain points were highlighted to show that the pursuit of both peace and justice can and should work hand in hand.

International criminal justice includes both retributive justice and restorative justice. The former focuses on guilt-based outcomes while the latter focuses on establishing truth and reconciliation (Ncube 2017). The correct sequencing of the two have occupied debates in international criminal law for some time. The ICC and the theory of international law which guides it, advocates for justice before peace (Kersten 2013). Judicial processes, including those at the ICC, are based on the idea that justice is best achieved by arresting, punishing and convicting the guilty.

However, Clarke (2010) and others have argued that this method does not take into consideration the root causes of violence. The emphasis on judicial process assumes that law is the sole way to achieve justice. In fact, it is only part of the story. People's sense of justice can be achieved through a range of means including economic redistribution, rebuilding the legal or political infrastructure, or ending sexual violence.

It is for this reason that some African states have argued that reconciliatory processes conducted within countries are more efficient in bringing justice closer to the people. As such, some believe temporal immunity should be granted to state officials or rebel leaders to ensure their participation in peace negotiations. It is interesting to note that apart from a complementarity and immunity clause included in the Malabo Protocol, existing texts within the AU's legal order do not contain provisions to ensure that peace efforts are placed above efforts for justice.

However, the geographic, historical, and cultural bonds between the states, their citizens and the ACJHR means that the court could be in a better position to establish systems of redress which resonate more with victims. In addition to sentencing, the Malabo Protocol empowers the court to provide compensation to victims of international crimes through a trust fund.¹⁴⁵ The court may also issue communal reparations whereby the state in question is ordered to end violations through policies or programmes, possibly in collaboration with other AU institutions such as the Peace Fund.

¹⁴⁵ Article 46M

Attention should also be paid to the two hybrid court's handling of this debate. They have shown that the pursuit of both peace and justice can (and should) occur side by side.

There are real concerns on both sides of the spectrum which require immediate attention. While there is a need for balance between the search for justice and political stability, the ICC cannot be used as the scapegoat for continued disappointments in several African countries, which predate the ICC's existence. International criminal justice is, at this stage, a non-negotiable and debates need to go beyond the typical for or against rhetoric to ask what standard of international justice the present system can provide, and how it can be improved upon (Clifford 2019).

African institutions in particular need to be at the forefront of clarifying that justice for international crimes should be pursued. This would go a long way in addressing the perception amongst select African states that international criminal justice is "Western" or less important than political or developmental goals.

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