

Positive Reinforcement: Advocating for International Criminal Justice in Africa



Positive Reinforcement: Advocating for International Criminal Justice in Africa

May 2013

Positive Reinforcement: Advocating for International Criminal Justice in Africa

© 2013 Southern Africa Litigation Centre

Cover Photograph: J Carrier

Design: Nicework

ISBN (print): 978-0-620-56589-9

ISBN (ebook): 978-0-620-56590-5

About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC) promotes human rights and the rule of law through litigation support and training in Southern Africa. SALC's International Criminal Justice Programme monitors international justice and its development in Southern Africa. SALC's objective is to ensure that Southern African states are fully aware of their legal obligations and through litigation, research and advocacy encourages Southern African states to give effect to these obligations.

This Report was written by Christopher Gevers of the University of KwaZulu-Natal and Alan Wallis and Caroline James from SALC, with input and guidance from SALC's executive director, Nicole Fritz. The Report was edited by Lorraine Kearney.

SALC would like to thank Freedom House and Trust Africa for supporting this initiative. It would also like to thank those organisations that provided valuable insight which assisted in the preparation of this Report.

For more information or to request a copy of this Report please contact:

The Southern Africa Litigation Centre
2nd Floor, President Place
Hood Avenue
Rosebank
Johannesburg
South Africa
Website: www.southernafricalitigationcentre.org
Email: enquiries@salc.org.za
Telephone: +27 11 587 5065

Foreword

Judge Sanji Mmasenono Monageng

The entry into force of the Rome Statute of the International Criminal Court in 2002 is likely the most significant event in the coming-of-age of international criminal justice. Many have thought this because it established the first ever permanent court tasked with adjudicating international crimes. Certainly this is an enormous development. But the greater significance of the Rome Statute may be its recognition that the primary location in which international criminal justice is to be secured is the state most directly affected. Only if that state is unwilling or unable genuinely to carry out investigations and prosecutions is the ICC authorised to intervene. It is this – called the principle of complementarity – that is the real hallmark of international criminal justice today.

That complementarity is meaningfully realised requires not only that states ratify the Rome Statute, but that they implement domestic legislation, and that they appoint and apportion sufficient resources to persons and bodies, who have the requisite expertise, tasked with the specialised functions of conducting domestic investigations and prosecutions. That these steps happen, and once put in place, that they aren't merely for show but are properly used, requires political will. Civil society's efforts are absolutely crucial to securing that political will.

This report is to be welcomed for demonstrating how civil society actors across the African continent have, through different initiatives, successfully intervened to secure domestic realisation of international criminal justice. The objective of the report is to inspire other civil society actors to more forcefully enter this field, by showing how they might induce their governments – through engagement and advocacy, and sometimes through litigation – to meet the obligations of complementarity.

The report's focus is on Africa and African civil society – not because there is any belief that the focus of international criminal justice should exclusively be Africa. Of course, it shouldn't and can't be. But too much of the debate on international criminal justice and Africa has been presented in negative terms. The fact is that Africa has made a substantial intellectual investment in the international criminal justice project: vocal during the Rome Statute negotiations, the Africa bloc was critical in fending off interventions that would have resulted in a less independent court. Africa also represents the largest regional bloc of states parties to the ICC. Its citizens are represented at all levels of the staff comprising the ICC. In the landscape of global governance, the ICC represents an unprecedented advance – it is a development in which Africa has had a chance to play a critical role and it has seized that chance.

It would be a tragedy were Africa to pull back on its substantial investment now. Not only for the global ramifications. Decades of underdevelopment have left African states with rule of law challenges, to greater and lesser degrees. Domestication of international criminal justice can serve not only to secure accountability for the most heinous crimes, but can also spur systematic legal reform, helping strengthen domestic legal systems and shore up the credibility of local institutions.

My hope is that this report helps make those gains apparent and emboldens state actors and civil society across the African continent to make international criminal justice a domestic reality.

Sanji Mmasenono Monageng
Judge of the International Criminal Court
May 2013

Table of Contents

| | |
|---|-----------|
| 1. Introduction | 2 |
| Overview of the Report | 2 |
| International Criminal Law – The Basics | 4 |
| What is International Criminal Law? | 4 |
| What are International Crimes? | 4 |
| International Criminal Law – A Brief History | 4 |
| Where does International Criminal Law Come From? – Sources of International Criminal Law | 6 |
| 2. International Criminal Justice – A Matter of National Importance | 7 |
| Why Punish International Crimes? | 9 |
| 3. The Rome Statute and the International Criminal Court – An Introduction | 12 |
| Introduction | 12 |
| The Rome Statute of the ICC: From Paper to Practice | 13 |
| Cases Before the ICC | 18 |
| The Role of States under the Rome Statute – Cooperation and Complementarity | 22 |
| 4. International Criminal Justice and Africa – The State of Play | 24 |
| International Criminal Justice in Africa – A Snapshot | 24 |
| Deconstructing the Relationship between Africa and the International Criminal Justice Project | 26 |
| African States | 27 |
| The AU | 27 |
| The UN Security Council | 27 |
| The ICC | 27 |
| Disaggregating the Issues in the Africa-ICC Relationship | 29 |
| Africa v The ICC or AU v Security Council? | 30 |
| Is the ICC Targeting Africa? | 30 |
| The Current State of Affairs | 31 |
| 5. The Role of Civil Society | 37 |
| Civil Society: A Force to be Reckoned With | 37 |
| Conversations with African Civil Society – Challenges | 39 |
| Bottom-Up – Bringing International Criminal Justice Home | 40 |
| International Criminal Justice in Africa – Problems of Perception and Political Unwillingness | 41 |
| The African Network on International Criminal Justice – Strength in Numbers | 43 |

| | |
|---|-----------|
| 6. Building Legal Architecture, Human Capacity and Political Will | 44 |
| ICC Implementing Legislation in Africa – An Overview | 44 |
| South Africa | 47 |
| Kenya | 47 |
| Uganda | 48 |
| Mauritius | 48 |
| Senegal | 48 |
| Burkino Faso | 48 |
| Getting More Implementing Legislation Drafted | 49 |
| Bringing the Rome Statute Home | 49 |
| The National Implementing Legislation Database | 50 |
| The Next Step: Building the Institutional Architecture, Human Capacity and Political Will | 51 |
| | |
| 7. Ensuring Cooperation with the ICC | 54 |
| Introduction | 54 |
| The Cooperation Record of African States | 55 |
| The Role of Civil Society: The Bashir Example | 55 |
| Addressing Non-Compliance | 56 |
| The AU Non-Cooperation Decisions | 57 |
| Bashir Travel Map: The Bad | 58 |
| Chad | 59 |
| Kenya 2010 Visit | 59 |
| Djibouti 2011 Visit | 59 |
| Malawi 2011 Visit | 59 |
| Bashir Travel Map: The Good | 60 |
| South Africa Arrest Warrant | 61 |
| Kenya Arrest Warrant | 61 |
| Malawi, Botswana and the AU Summit | 61 |
| CASE STUDY 1: KENYA – THE BASHIR ARREST WARRANT: COOPERATION IN THE COURT ROOM | 62 |
| Background | 62 |
| Kenya Section of The International Commission of Jurists v Attorney General & Another: | 62 |
| The Judgment’s Significance and Key Findings | |
| The Rome Statute is Part of Kenyan Law | 62 |
| Civil Society may apply for a Provisional Arrest Warrant under the International Crimes Act | 63 |
| The Relevance of Immunity | 64 |
| The Relevance of the AU Decisions and Regional Stability | 65 |
| Lessons Learnt | 65 |

8. Bringing Justice Home: Complementarity and Capacity Building – Civil Society In Action

68

| | |
|--|----|
| CASE STUDY 2: SOUTH AFRICA – COMPLEMENTARITY IN THE COURT ROOM: THE ZIMBABWE TORTURE DOCKET | 70 |
| Background | 70 |
| SALC & Another v NDPP & Others : The Judgment’s Significance and Key Findings | 72 |
| The Judgment – Key Findings and Significance | 72 |
| The Legal Standing of Civil Society to Bring Challenges of this Nature | 73 |
| The Nature and Extent of the Obligation on the South African Authorities to Investigate and Prosecute International Crimes | 73 |
| The Threshold for Investigations | 74 |
| The Jurisdictional Remit of South Africa's Investigating and Prosecuting Authorities | 74 |
| The Relevance of Political Concerns | 75 |
| The Significance and Impact of the Decision | 76 |
| South African Government Appeals Zimbabwe Torture Case | 76 |
| Lessons Learnt | 77 |
| A Decision Relevant Beyond South Africa? | 78 |
| CASE STUDY 3: DRC – COMPLEMENTARITY IN ACTION: THE MOBILE GENDER COURTS | 79 |
| Background | 79 |
| How Do they Work? | 79 |
| What Were the Project’s Goals? | 80 |
| What Jurisdiction Do they Have? | 80 |
| Have there Been Many Prosecutions? | 80 |
| Are the Courts Empowered to Apply International Law? | 80 |
| What Aspects of the DRC Legal System Enable these Courts to Prosecute International Crimes? | 80 |
| A Case that Stands Out: Fizi | 80 |
| What other Impact – Beyond Prosecutions – Has the Project Had? | 81 |
| What Makes these Courts so Ground-Breaking? | 81 |
| What are the Tangible Consequences and Successes of the Courts? | 81 |
| Can this be Replicated for other International Crimes in the Region? | 82 |
| Lessons Learnt | 83 |
| CASE STUDY 4: KENYA – OUTREACH: TAKING INTERNATIONAL CRIMINAL JUSTICE TO THE PEOPLE | 84 |
| Background | 84 |
| Kituo Cha Sheria's Outreach | 85 |
| Lessons Learnt | 85 |

| | |
|---|-----------|
| CASE STUDY 5: SENEGAL – THE TRIAL OF HISSENE HABRE: A PROSECUTION ON THE HORIZON | 86 |
| Background | 86 |
| Senegal | 86 |
| Belgium | 86 |
| The AU | 86 |
| The Standoff Between Belgium and Senegal | 86 |
| African Regional Courts | 87 |
| International Court of Justice | 88 |
| The Structure of the Court Pre-Trial Phase | 88 |
| Opportunities for Civil Society | 88 |
| | |
| 9. Moving Forward | 91 |
| Civil Society: The Possibilities are Endless | 92 |
| | |
| 10. Concluding Remarks and Recommendations | 93 |

Abbreviations and Acronyms

| | | | |
|-----------------|--|----------------|---|
| ACJHR | African Court of Justice and Human Rights | ICJ | International Court of Justice |
| ANICJ | African Network on International Criminal Justice | ICD | International Crimes Division (Uganda) |
| AU | African Union | ICC | International Criminal Court |
| ABA/ROLI | American Bar Association/ Rule of Law Initiative | ICTR | International Criminal Tribunal for Rwanda |
| ASP | Assembly of States Parties | ICTY | International Criminal Tribunal for the former Yugoslavia |
| CAR | Central African Republic | KJD | Kenyans for Justice and Development |
| CARL | Centre for Accountability and Rule of Law (Sierra Leone) | NDPP | National Director of Public Prosecutions (South Africa) |
| CHRR | Centre for Human Rights and Rehabilitation (Malawi) | NILD | National Implementing Legislation Database |
| CHESO | Children Education Society (Tanzania) | NPA | National Prosecuting Authority (South Africa) |
| CSO | Civil Society Organisation | NGO | Non-Governmental Organisation |
| CICC | Coalition for the International Criminal Court | OHCHR | Office of the United Nations High Commissioner for Human Rights |
| CAAJ | Congolese Association for Access to Justice (DRC) | OSISA | Open Society Initiative for Southern Africa |
| CATS | Crimes Against the State (South Africa) | OSJI | Open Society Justice Initiative |
| DRC | Democratic Republic of the Congo | PGA | Parliamentarians for Global Action |
| DIRCO | Department of International Relations and Cooperation (South Africa) | PCLU | Priority Crimes Litigation Unit (South Africa) |
| ECOWAS | Economic Community of West African States (West Africa) | SACCORD | Southern African Centre for the Constructive Resolution of Disputes |
| ISS | Institute for Security Studies (pan Africa) | SADC | Southern African Development Community |
| IGAD | Inter-Governmental Authority on Development (East Africa) | SALC | Southern Africa Litigation Centre |
| ICGLR | International Conference on the Great Lakes Region (Central and East Africa) | SCSL | Special Court for Sierra Leone |
| | | UN | United Nations |
| | | MONUSCO | United Nations Stabilization Mission in the DRC |
| | | ZEF | Zimbabwe Exiles Forum |

CHAPTER I: INTRODUCTION

International criminal law deals with the darkest side of humanity. [T]he magnitude of this task is such that there is no single response to the multifarious aspects of international criminality.

ANTONIO CASSESE¹

An Overview of the Report

International criminal law, its application and enforcement plays out in an environment where law, politics, international relations, diplomacy and justice intersect. It is a playing field that involves many actors – governments, regional organisations, international institutions, victims and civil society.

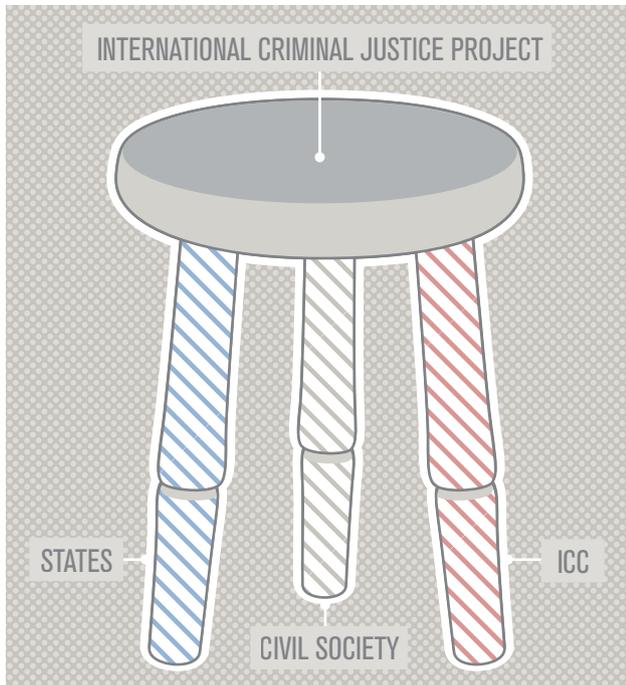
Positive Reinforcement – Advocating for International Criminal Justice in Africa assesses this playing field as it manifests itself in an African context and from the perspective of African civil society organisations (CSOs). The Report highlights the role and potential of CSOs to secure principled support for international criminal law in Africa. The Report explores the challenges that African CSOs face and demonstrates how these can be overcome both domestically and regionally. It seeks to be a resource, guide and advocacy tool, understanding that African civil society will need to take leadership in the development of international criminal justice on the domestic level and regionally. Not only does the Report seek to provide CSOs with the requisite skills to assume such leadership but it introduces them to a network of organisations already supplying such leadership, working tirelessly to see justice done.

The objectives of this Report are three-fold:

- First, to provide an introduction to the fundamental elements of international criminal law and its status in Africa, so as to provide CSOs with an appreciation of not only international criminal law but the dynamic and varied components of Africa's relationship with the international criminal justice project.
- Second, to highlight the areas in which African CSOs should focus their efforts – cooperation and complementarity.
- Third, to highlight initiatives undertaken by CSOs and identify the lessons learnt in order to demonstrate the role and potential of such organisations to enforce international criminal justice in Africa. The Report concludes with recommendations on what civil society can and should do to further advance the international criminal justice project in Africa so as to ensure justice for victims, and an end to the cycle of impunity.

The Report begins by setting the scene and providing an overview of international criminal law. It goes on to discuss the **three legs of international criminal justice** – states, the International Criminal Court (ICC) and CSOs – in more detail, demonstrating how the continued support and engagement of each is vital for the project's success.

The first leg is the states themselves, on whom the primary responsibility rests in terms of investigating and prosecuting international crimes, and which also play a vital support role in respect of the work of the ICC.



The second leg is the ICC, the “revolutionary institution” established at the turn of the century to dispense justice for international crimes when states are unwilling or unable to do so themselves.

To contextualise these developments, the Report considers **the state of play of international criminal justice in Africa**. After recalling the important and continuing role played by African states in the development of the current international criminal justice system, attention then turns to deconstructing the somewhat challenging relationship between this system (and its flagship institution, the ICC) and African states. Having done so, the claim that the ICC is biased against African states is addressed.

The report then goes on to consider **the role of civil society – the third leg** of the international criminal justice system – which has and continues to play a vital role in establishing and supporting the legal, institutional and political frameworks necessary for the successful pursuit of international justice both internationally and domestically.

Both the domestic and international avenues of enforcement require considerable resources and political will. The Report also considers the role that civil society has played in building the legal architecture, human capacity and political will within states in order to ensure that these obligations are met.

Moving forward, all stakeholders will have to work towards the pursuit of international criminal justice through two distinct but related processes: cooperation and “positive complementarity”. The report demonstrates the realisation of these processes through case studies of best practice, with a strong focus on the role of CSOs.

Cooperation: obligations placed on states parties to ensure cases before the ICC proceed smoothly. States parties are required to establish procedures to facilitate these obligations.

In respect of **cooperation**, the Report focuses on the steps taken (and not taken) by states to cooperate with the ICC when asked to do so in relation to specific cases. In particular, it looks at the failures of certain African states parties to assist the ICC in arresting the president of Sudan, Omar al-Bashir (Bashir), and the efforts on the part of CSOs to encourage states to live up to their obligations.

Complementarity: the use of domestic courts as courts of first instance in the prosecution of international crimes. The Rome Statute envisions the role of the ICC as a court prosecuting international criminals only when national jurisdictions are unwilling or unable to do so. This places weighty obligations on states parties to the Rome Statute to undertake such prosecutions.

In respect of **positive complementarity**, where domestic courts are required to do the heavy lifting, the Report discusses a number of different examples in which civil society has supported, and at times cajoled, states to make good on their obligations through innovative and novel approaches: including the Zimbabwe Torture Case in South Africa, the Mobile Gender Courts in the Democratic Republic of Congo and the Hissène Habré trial in Senegal.

The Report also underscores the importance of community outreach to ensure that African citizenry understands the purpose and importance of international criminal justice, through a case study in Kenya.

It is hoped that this publication will serve as a catalyst for the development of further national and regional strategies that will result in Southern African and African CSOs acting in concert to reverse the tide of impunity for the perpetrators of international crimes.

War crimes

Occur during **armed conflicts**.
Serious violations of **international humanitarian law**.

Examples:

- The unlawful targeting of civilians and wounded;
- The severe mistreatment of both soldiers and civilians;
- The use of prohibited methods of warfare such as the excessive use of force, the use of human shields and hostage-taking;
- The use of prohibited means of warfare such as weapons that cause unnecessary suffering.

Crimes against humanity

Occur during **peace or armed conflicts**.
Acts committed against a civilian population as part of a widespread or systematic attack.

These can include:

- Murder;
- Torture;
- Sexual violence;
- Deportation;
- Enslavement;
- Enforced disappearances.

Genocide

Occur during **peace or armed conflicts**.
Acts committed with the intent to destroy in whole or in part, an ethnic, racial, religious, or national group.

This includes:

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

International Criminal Law – The Basics

What is international criminal law?

The term “**international criminal law**” is used to describe the body of rules that enables the prosecution of **international crimes** by both domestic and international courts. Today, international criminal justice is one of the most highly developed fields of international law and a key feature of international and domestic politics. Its rise to prominence is testament to the global community’s commitment to combatting impunity for the most serious human rights violations and atrocities, wherever they occur.

What are international crimes?

There are three core international crimes: war crimes; crimes against humanity and genocide (see sidebar.)

International Criminal Law A Brief History

The first international prosecution of international crimes took place after World War II, when the International Military Tribunal in Nuremberg was established by the Allied powers (Britain, France, the United States and Russia) in 1945 to try the major war criminals of the European Axis for violations of the laws of war, crimes against the peace and crimes against humanity². The Nuremberg trial had a profound effect on the development of international criminal law, such that many consider it to represent the “birth certificate”³ of the discipline. It was followed in 1946 by the International Military Tribunal in Tokyo, set up “for the just and prompt trial and punishment of the major war criminals in the Far East”.⁴

Following the Nuremberg and Tokyo tribunals, the polarisation of the international community as a result of the Cold War meant that the next international criminal courts were established nearly half a century later. However, the precedent set by Nuremberg and treaties adopted in its aftermath – chiefly the four Geneva Conventions of 1949 and the 1948 Genocide Convention – placed the responsibility on states to ensure that crimes against humanity, genocide and war crimes did not go unpunished.

In the 1990s, international criminal justice underwent something of a revival. First, the United Nations (UN) Security Council created two ad hoc tribunals to prosecute international crimes committed in the former Yugoslavia (the International Criminal Tribunal for the former Yugoslavia, or ICTY) and during the 1994

1945

International Military Tribunal at Nuremberg which tried the Nazi and other Axis powers for crimes committed during the Second World War. This tribunal is considered to represent the birth certificate of international criminal law.

1948

A Genocide Convention adopted which recognised genocide as a crime under international law, and that international cooperation is required to prevent it.

1993

International Criminal Tribunal for the former Yugoslavia established by the UN Security Council under Chapter VII of the UN Charter – which tasks the Council with the maintenance of international peace and security – to prosecute international crimes committed in the former Yugoslavia.

1998

UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court held. This was the result of a draft statute completed by the International Law Commission in 1994.

1 JULY 2002

The Rome Statute entered into force after Senegal was the first country to ratify it.

2007

A hybrid tribunal, the Special Tribunal for Lebanon, was established by an agreement between the UN and the Lebanese Republic to prosecute those responsible for the assassination of Prime Minister Rafiq Hariri, and attacks between 1 October 2004 and 12 December 2005 that were related to the assassination.

1946

International Military Tribunal at Tokyo which tried the military leaders responsible for crimes committed in the Far East during the Second World War.

1949

Three earlier Geneva Conventions adapted, and a fourth adopted which established international law standards for the treatment of military personnel, civilians and prisoners during wartime.

1994

International Criminal Tribunal for Rwanda established by the UN Security Council to prosecute international crimes committed during the Rwandan Genocide.

2002

A hybrid tribunal, the Special Court for Sierra Leone, was established by the government of Sierra Leone and the UN to try those responsible for serious violations of international humanitarian law and Sierra Leonean law since 30 November 2006.

2003

A hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia, was established after an agreement between the Royal Government of Cambodia and the UN to try serious violations of Cambodian Penal Law, international humanitarian law and custom and violation of international conventions recognised by Cambodia between 17 April 1975 and January 1979.

Rwandan genocide (the International Criminal Tribunal for Rwanda, or ICTR). These ad hoc tribunals were established by the Security Council acting under Chapter VII of the UN Charter, which tasks the Council with the maintenance of international peace and security. These were followed by a number of “hybrid tribunals”, such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. These courts are hybrid because they are neither purely domestic nor international; rather their founding documents, jurisdiction, composition and funding are a mixture of the two. At the same time, the project to establish a **permanent international criminal court** – which began well over a century ago in 1872 when Gustave Moynier (one of the founders of the International Committee of the Red Cross) proposed the establishment of an international tribunal to punish violations of the Geneva Convention of 1864 – was revived.⁵ In 1994, the International Law Commission completed a draft of what would become the Rome Statute, which led the UN General Assembly to convene the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome from 15 June to 17 July 1998 to negotiate and agree upon the final text of a treaty establishing a permanent international court. As a result of these marathon efforts, on 17 July 1998, 120 states adopted the Rome Statute of the International Criminal Court (Rome Statute).⁶ Senegal was the first state to ratify the Statute, which entered into force on 1 July 2002.

1989
END OF THE
COLD WAR

Where does International Criminal Law Come From? Sources of International Criminal Law

International criminal law is a subset of public international law and the general rule is that, like all international law, its development, application and enforcement finds its origins in:

- International conventions, establishing rules expressly recognised by signing states;
- International custom, as evidence of a general practice accepted as law;
- General principles of law;
- Judicial decisions and academic writings.

TREATY LAW

Agreements between states criminalising/prohibiting certain conduct:

- Rome Statute of the International Criminal Court;
- The Geneva Conventions and Additional Protocols;
- The Convention on the Prevention and Punishment of Genocide;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- The Pact on Security, Stability and Development in the Great Lakes Region and its Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity

CUSTOMARY INTERNATIONAL LAW

Whereas treaties only bind those states that are party to them, customary international law is binding on all states.

A customary international law exists if two conditions are met:

- It must reflect an established and accepted state practice (usus). This refers to actual behaviour of states in relation to a particular practice, assessed against the following:
 - Duration;
 - Consistency;
 - Repetition; and
 - Generality
- States accept to be bound by the rule or law in question (opinio juris)

JUDICIAL DECISIONS

These include decisions of Tribunals such as the:

- ICTY;
- ICTR;
- SCSL
- ICC

Judicial pronouncements of international criminal tribunals provide content to obligations and develop and inform the criminal law norms and principles that are found in treaties and those that have been elevated to customary international law norms.

Through the agreement of international conventions and treaties dealing with international crimes; the establishment, and resultant jurisprudence, of the ICTY and the ICTR; and the coming into force and the establishment of the first permanent international criminal court (ICC) it is clear that the international community has placed a premium on the punishment of international crimes, to the extent that binding obligations on states to combat impunity for international crimes exist under customary and treaty law.

These efforts have led to acceptance that genocide, crimes against humanity and war crimes are crimes under customary international law.

These sources of law share a dynamic relationship. Overlaps in respect of these sources of law exist. Customary international law can originate in treaties and treaties can constitute evidence of custom. Treaties can aid the interpretation of custom. Often the same rule will be found in treaty law and customary international law. Treaties may codify existing customary law. A judgment may influence the development of a treaty and customary law.

Endnotes

1. A Cassese "The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality" in C Romano, A Nollkaemper & JK Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, And Cambodia* (2004) 1, 13.
2. Article 1, International Military Tribunal (1945).
3. G Werle *Principles of International Criminal Law* (2005), 6.
4. Article 1, International Military Tribunal for the Far East Charter (1946).
5. G Moynier "Note Sur la Création d'une Institution Judiciaire Internationale Propre à Prévenir et à Réprimer les Infractions à la Convention de Genève" Bulletin International des Sociétés de Secours aux Militaires Blessés (1872) Comité International 11, 122.
6. Seven voted against the final text, with 21 abstentions.

CHAPTER 2: INTERNATIONAL CRIMINAL JUSTICE: A MATTER OF NATIONAL IMPORTANCE

International criminal justice is usually perceived as justice delivered by international courts ... Yet there are reasons to believe that the popular equation of international criminal justice with prosecution by international criminal courts is foreshortened, and may be misleading. In fact, the contribution of states to the enforcement of ICL [international criminal law] is crucial. History ... shows notable domestic efforts to address international crimes by means of criminal law – notable in terms of the numbers of trials and convictions as well as in terms of their significance for the development of ICL.

FLORIAN JESSBERGER¹

There is a tendency among various actors engaged in the international criminal justice project to focus on its **international character**, and downplay the role of its domestic underpinnings.

Undoubtedly, the trials in Nuremberg and Tokyo and the UN ad hoc tribunals of the 1990s were crucial moments in the development of the field.² Yet historically domestic prosecutions have had an equally formative influence on the field's development.³ As a result of this overemphasis on international developments as defining moments in the field, often insufficient attention is given to the important role played by domestic prosecutions and institutions in establishing the substantive norms, and in enforcing, international criminal law. In fact, these activities have sometimes been regarded as setbacks in the progression towards "true" international criminal law (i.e. the prosecution of international crimes by international courts).

Truth be told, for much of the 20th century international criminal law was primarily the concern of domestic courts.⁴ In the absence of an international enforcement mechanism for international crimes, "the international community [resorted] ... to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states the duty to criminalise the prohibited conducts, and organising judicial cooperation for their repression".⁵ In this way, "international law was used as a tool for the co-ordination of the exercise of criminal jurisdiction by states".⁶ This has been termed **indirect enforcement of international criminal law**. This was done primarily through treaty provisions calling for domestic prosecutions of international crimes. For example, the 1948 Genocide Convention contains a provision stating:

*"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."*⁷

Similarly, all four of the 1949 Geneva Conventions contain similar provisions requiring state parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches".⁸

Unfortunately, these provisions remained dormant for the most part during the Cold War and it was only the resurgence of the international justice project in the 1990s, and in particular the formalisation of the principle of complementarity, that brought the responsibility of states back into focus.

Since 1998, in order to give effect to the principle of complementarity, a number of states have amended their laws to allow for the prosecution of core international crimes within domestic courts. South Africa, Kenya, Uganda, Burkina Faso and Senegal have all done so either through specialised Acts of Parliament or through amendments to their criminal codes

Since 1998, in order to give effect to the principle of complementarity, a number of states have amended their laws to allow for the prosecution of core international crimes within domestic courts. In Africa, South Africa, Kenya, Uganda, Burkina Faso and Senegal have all done so either through specialised Acts of Parliament or through amendments to their criminal codes, with a number of other countries in the process of doing the same. In order to facilitate these national prosecutions, international law has evolved to allow states to exercise **universal jurisdiction** over individuals accused of international crimes. Traditionally, states' ability to prosecute and punish crimes (i.e. to exercise criminal jurisdiction) has been limited to crimes that take place within their borders. The exercise of criminal jurisdiction by a state over events that take place outside its borders was limited to circumstances where there was some other link between the state and the crime in question: such as when the accused or the victim of the crime was a citizen of that state. However, under the principle of universal jurisdiction, states can exercise criminal jurisdiction "based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction".⁹ Recently, the African Union (AU) adopted a Model Law on Universal Jurisdiction designed to allow African states "to overcome the constraints in exercising the principle of universal jurisdiction".¹⁰

It is important to note that domestic prosecutions of international crimes have impacted upon the substantive aspects of the field through the development of custom: both in terms of the existence and nature of particular crimes and their general principles. The significance of domestic prosecutions is illustrated by the general principles relied upon and developed further by the Nuremberg Tribunal. While it regarded itself as enforcing existing international law, in fact these principles must have originated from domestic antecedents. As such, the significance of the indirect enforcement of international criminal law norms by domestic courts, together with relevant institutional milestones (such as Nuremberg and Rome) – as evidence of both state practice and *opinio juris* – in the formation of customary international criminal law cannot be overstated.

The "imbalance" in the attention paid to domestic versus international enforcement is not just historical; it continues to colour perceptions as to how the field is configured today, with international criminal justice presented as justice delivered ideally by international courts and only exceptionally by domestic courts. Notwithstanding that skewed perception, the Rome Statute's "**principle of complementarity**" places the emphasis precisely the other way around.¹¹

This "**internationalising impulse**"¹² risks misrepresenting the construction of the Rome system in at least two ways:

- First, it creates the false impression that the domestic prosecution of international crimes is a new phenomenon and downplays the responsibility of domestic courts to prosecute these crimes under the principle of "complementarity". On this reading, there is the risk that complementarity is not regarded as an organising principle of the Rome system, but rather as an unfortunate concession to state sovereignty or as a practical compromise driven by scarce resources.

- Second, and more importantly, if too much weight is placed on the ICC – an institution that is not beyond reproach¹³ – in the application and development of international criminal law, its failings will be projected on to the project as a whole. This has already happened to some extent in an African context, where there is a tendency to confuse and conflate criticisms of the ICC (or the Security Council, in fact) with criticisms of the project generally insofar as Africa is concerned.

In the final analysis, international criminal justice and the application and development of its principles should not be understood as being restricted to the domain of international institutions. Instead, international and national prosecutions, rather than being regarded as alternatives, should be considered to be formally distinct, yet substantively intertwined mechanisms in pursuit of a common goal: the enforcement of international criminal law.

Why Punish International Crimes?

“There is an all too easy assumption that the principle of international criminal justice is accepted. There is a tendency, when talking about international criminal justice, to slip immediately into the technicalities – how to do it, who will do it, when will it be done. The “why” is ignored.

Yet the failure to answer this basic question “why” is the most significant drag on the failure to realise international criminal justice. At the end of the day, the failure to realise international criminal justice, is not only technical, or even mostly technical. There is a failure of will. Unless we are prepared to answer the objections to international criminal justice, we will not see it happen.”

David Matas¹⁴

The process of addressing international crimes is fraught with inherent challenges and political complexities. The international criminal justice project is one with more proponents than critics, however a variety of objections have been raised and, in some instances, used to justify noncompliance. While the enactment of the Rome Statute represents the international community’s acceptance of the need to address international crimes,¹⁵ questions remain as to why international criminal justice is a worthwhile exercise. In fact, for a project that has widespread acceptance and uptake among states, CSOs and society at large, there is surprisingly little consensus (or even consideration given) as to why there is a need to pursue international criminal justice. Perhaps it is because the need for justice in respect of crimes of the scale and nature of those international criminal law addresses appears self-evident. However, there are a number of reasons why the “why” question is important. For one, as the field expands and resources become stretched – particularly in a domestic setting – the question of purpose will become important to the allocation of scarce resources. Therefore it is necessary to consider the reasons commonly advanced for why we punish international crimes.

One commonly asserted reason for prosecuting international crimes is retribution, i.e. that the perpetrators of these crimes deserve to be punished. Similarly, but from the other side of the equation, is the argument that the victims of such crimes deserve to see justice done. Other explanations for why we punish international crimes focus on the effects such trials can have, such as deterrence. More broadly, many present international criminal justice as a more comprehensive means of addressing the challenges faced by societies emerging from conflict, allowing for the promotion and sometimes re-establishment of respect for rule of law and human rights.

Inherent Moral Value

There is an inherent moral value to international criminal justice. The preamble of the Rome Statute notes that the atrocities of the 20th century “deeply shock the conscience of humanity”. There is a demand for legal accountability for such crimes as a means of deterrence from committing similar atrocities in the future.¹⁶ Payam Akhavan argues that:

“Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power ... Political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow ... The vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of an easy escape or future political rehabilitation.”¹⁷

Justice as a Stabilising Force

International criminal justice can serve as a stabilising force in a post-conflict setting. It can facilitate disarmament, demobilisation and reintegration programmes that need to occur in order to create a stable post-conflict society. Furthermore, it is argued that international criminal justice has the ability to support peace processes by removing figures that may threaten to undermine these.¹⁸ In a post-conflict environment, a culture of justice is an important political asset in alleviating the temptation for destabilising practices of vengeance. Moreover, prosecutions under international criminal justice can act as incentives in peace-building efforts beyond the post-conflict society itself. Such prosecutions demonstrate to political leaders in other countries that there isn’t immunity in committing criminal acts.¹⁹

Strengthen Rule of Law

In a post-conflict context, where the political elite has often orchestrated the crimes in question, it is highly unlikely that accountability and rule of law will flourish. Accountability for international crimes underscores the importance of the rule of law, demonstrating that no one is exempt, providing the foundation for a more peaceful, law-abiding society to emerge. International criminal justice is inseparable from the development of standards of the rule of law in domestic legal practice. It often has the ability to serve as a catalyst for broader system rule of law reform²⁰:

“Holding fair criminal trials of those who commit atrocities places the issue of individual legal accountability squarely on the national agenda. These proceedings can be a focal point for networks of local and international non-governmental organizations who advocate for fair justice and accountability under the law. Hybrid and international courts can help empower and build capacity among civil society organizations working on issues of justice and accountability by convening a regular forum to engage with these groups, by offering workshops to local schools and organizations, and by reaching out to populations that might otherwise have limited access to justice or political power.”²¹

The reasons for pursuing international criminal justice, like those for securing domestic criminal justice, are varied. And different stakeholders are likely to offer disparate responses and prioritise differently.

Endnotes

1. F Jessberger "International v National Prosecutions of International Crimes" in A Cassese *The Oxford Companion to International Criminal Justice* (2009), 208.
2. See Chapter 1 of this Report "International Criminal Law: A Brief History".
3. See GJ Simpson's discussion on the so-called "hidden history of international criminal law" in *Law, War And Crime: War Crimes Trials and the Reinvention of International Law* (2007), 40.
4. These crimes were international in the sense that they were of concern to the international community as a whole and the subject of treaties that both created legal obligations to prosecute them and allowed states to exercise extraordinary universal jurisdiction over those who transgressed them.
5. P Gaeta "Internationalization of Prohibited Conduct" in Cassese supra note 1, 64.
6. Id.
7. Article VI, Convention on the Prevention and Punishment of the Crime of Genocide (1948). As Bianchi notes, "even when these [treaties] mention the possibility of establishing an international court (as do the Genocide and Apartheid Conventions) such compacts were drafted under the assumption that the international crimes they cover will be prosecuted by national courts". See A Bianchi "State Responsibility and Criminal Liability of Individuals" in Cassese supra note 1, 28.
8. Article 49, First Geneva Convention; Article 50, Second Geneva Convention; Article 129, Third Geneva Convention and Article 146, Fourth Geneva Convention (all 12 August 1949). Further, article 85(1), Additional Protocol I incorporates this provision by reference. These provisions in effect place an obligation on states parties to prosecute or extradite offenders who commit grave breaches.
9. Principle 1(1), The Princeton Principles on Universal Jurisdiction (2001). See also R O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" *Journal of International Criminal Justice* 2 (2004) 735.
10. AU Press Release Number 037/2012, "The African Union has a Clear and Unequivocal Mandate to Fight Impunity" 15 May 2012. The model law is available for download at <http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf>. Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, June 30 – July 1 2008, Doc. Assembly/ AU/14 (XI), Assembly/ AU/Dec. 199(XI). See also C Jalloh "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" *Criminal Law Forum* (2009) 21, 1 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526622.
11. In fact, under the Rome Statute the ICC will only be able to admit a case before it (where the other jurisdictional bases of nationality and territoriality are present) if the state party concerned is unwilling or unable to prosecute the offender nationally. See Preamble and article 17, Rome Statute.
12. Simpson supra note 3, 30.
13. See generally F Megret "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project" *Finnish Yearbook of International Law* 12 (2002) 195 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156086.
14. D Matas "The Case for International Justice" Revised remarks prepared for a seminar on Afghanistan's obligations under the Rome Statute of the International Criminal Court, Kabul, Afghanistan (4 March 2006) available at <http://www.cciij.ca/resources/papers/case-for-international-justice.pdf>.
15. Open Society Foundation "International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers" (2011), 22 available at <http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf>.
16. Id 22.
17. P Akhavan "Beyond Impunity: Can Internationals Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* (2001), 7.
18. Open Society Foundation supra note 15, 26.
19. Akhavan supra note 17, 8.
20. Open Society Foundation supra note 15, 28.
21. J Stromseth "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?" *Georgetown Law the Scholarly Commons* (2009) 87, 96.

CHAPTER 3:

THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT – AN INTRODUCTION

The ad hoc tribunals of Nuremberg and Tokyo, and more recently those for the former Yugoslavia and Rwanda, were important steps forward. But only a permanent Court with universal jurisdiction can finally lay to rest the charge that the international community is being selective or applying double standards in deciding which crimes to investigate and punish.

I believe the establishment of such a Court will be a fitting way to inaugurate the new millennium.

It puts the world on notice that crimes against humanity, which have disfigured and disgraced this century, will not go unpunished in the next. And it gives concrete expression to Francis Bacon's famous principle that not even the Sovereign can make "dispunishable" those crimes which are "malum in se" - evil in themselves, "as being against the Law of Nature".

The best chance humankind has ever had to end the "culture of impunity" is within our grasp. We must not let it fall.

KOFI ANNAN
FORMER SECRETARY - GENERAL OF THE UNITED NATIONS¹

Introduction

The adoption of the Rome Statute on 17 July 1998 by the UN General Assembly marked an extraordinary development in the area of international criminal law. It was the culmination of a process began more than a century before and expressed the confirmed international consensus of the need to prosecute and punish the most serious crimes of international law through a workable system of international criminal justice. It draws on the lessons learnt from the past and has laid the foundation for a coherent and uniform system of international criminal justice.

The most notable feature is perhaps the relationship that the ICC shares with the states that created it. It is a relationship characterised by cooperation and an appreciation that justice for international crimes is best dispensed domestically, and so the Rome Statute provides guidance on how states can and should take ownership of international criminal justice issues. The sustainability of the ICC and the credibility of the international criminal justice project depends on the support individual states are willing to give it.

Under the Rome Statute, the ICC is tasked with prosecuting **genocide, crimes against humanity** and **war crimes**. After the adoption in 2010 of an amendment to the Rome Statute, the ICC will also be able to prosecute the **crime of aggression from 2017**, when the amendment enters into force.

When a state becomes party to the Rome Statute it authorises the ICC to exercise jurisdiction over these crimes when they are committed by its nationals or on its territory after ratification.

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FROM PAPER TO PRACTICE

PREAMBLE

“Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognising that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasising in this connection that nothing in this Statute shall be taken as authorising any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice.”

CRIMES

WAR CRIMES (ARTICLE 8), CRIMES AGAINST HUMANITY (ARTICLE 7), GENOCIDE (ARTICLE 6) AND THE CRIME OF AGGRESSION (ARTICLE 8BIS – WILL COME INTO FORCE IN 2017) ARE CORE INTERNATIONAL CRIMES

CREATION OF THE INTERNATIONAL CRIMINAL COURT

THE ROME STATUTE CREATES THE WORLD'S FIRST PERMANENT INTERNATIONAL CRIMINAL COURT, WITH ITS SEAT IN THE HAGUE, THE NETHERLANDS.

JURISDICTION OF THE ICC

JURISDICTIONAL BASES

1. Personal Jurisdiction

A national of a state party commits an international crime.

2. Territorial Jurisdiction

An international crime is committed in a state party.

3. Ad Hoc Consent Based Jurisdiction

A non state party refers a matter to the ICC. The ICC will only be able to act in respect of the specific situation referred.

4. Conferred Jurisdiction

Security Council refers a matter to the ICC irrespective of whether the situation occurred in the territory of a state party or the crime committed was by a national or a state party.

EVEN THOUGH THE COURT HAS JURISDICTION OVER A PARTICULAR CRIME, THIS DOES NOT MEAN IT CAN AUTOMATICALLY EXERCISE JURISDICTION.

ITS JURISDICTION MUST BE TRIGGERED IN ONE OF 4 WAYS.

JURISDICTION OF THE ICC (CONTINUED)

TRIGGERING THE JURISDICTION OF THE COURT

1. Self Referral (article 14)

A state party refers a case to the ICC.

2. Prosecutor's Referral (article 15)

Permits the prosecutor of the ICC to initiate an investigation in a state party if authorisation is granted by the pre-trial chamber of the ICC.

3. United Nations Security Council Referral (article 13(b))

Permits the referral of a situation to the ICC even if the situation did not occur in a state party.

4. Non State Party Referral (article 12(3))

The ICC has NO jurisdiction over crimes committed before the Rome Statute came into force (July 2002).

COMPLEMENTARITY – ICC AS A COURT OF LAST RESORT – ARTICLE 17

The Rome Statute envisages international criminal justice being dispensed domestically, by national courts, taking the lead in the investigation and prosecution of serious international crimes. NATIONAL JURISDICTIONS are therefore the PRIMARY FORUM for the prosecution of international crimes.

The ICC will only intervene when a state is UNWILLING or UNABLE to institute proceedings domestically.

OBLIGATIONS OF STATES PARTIES

By signing the Rome Statute the state concerned agrees to a number of obligations stipulated in the Rome Statute.

IMPLEMENT THE ROME STATUTE DOMESTICALLY

States parties are required to enact legislation incorporating the Rome Statute into their domestic law.

Ensure sufficient capacity exists within prosecuting authorities, police services and judiciary to investigate, prosecute and adjudicate international crimes in national courts.

COOPERATION

States parties are required to cooperate fully with the ICC and this includes:

- Arresting and transferring indicted individuals to the ICC;
- Providing an environment that is safe and unimpeded for ICC investigators.

INTERNATIONALLY

NUMBER OF COUNTRIES THAT HAVE RATIFIED THE ROME STATUTE

122

NUMBER OF COUNTRIES THAT HAVE ENACTED DOMESTIC LEGISLATION PROVIDING FOR COMPLEMENTARITY OR COOPERATION WITH THE ICC

65

NUMBER OF SITUATIONS BEFORE THE ICC

8

NUMBER OF NON-AFRICAN CASES

0

NUMBER OF PRELIMINARY EXAMINATIONS RELATING TO SITUATIONS OUTSIDE AFRICA

5

IN AFRICA

34

NUMBER OF AFRICAN COUNTRIES THAT HAVE SIGNED/RATIFIED THE ROME STATUTE

6

NUMBER OF AFRICAN COUNTRIES THAT HAVE ENACTED DOMESTIC LEGISLATION PROVIDING FOR COOPERATION AND COMPLEMENTARITY WITH THE ICC.

8

THE NUMBER OF SITUATIONS BEFORE THE ICC, ALL OF WHICH ARE AFRICAN

1 PROSECUTOR'S REFERRAL
4 SELF REFERRALS
2 SECURITY COUNCIL REFERRALS
1 NON STATE PARTY REFERRALS

18

THE NUMBER OF AFRICAN CASES

2

NUMBER OF PRELIMINARY EXAMINATIONS RELATING TO SITUATIONS IN AFRICA

1

THE NUMBER OF VERDICTS HANDED DOWN BY THE ICC

OFFICE OF THE PROSECUTOR

Having received information that war crimes, crimes against humanity or genocide have been committed the prosecutor looks at several criteria to determine whether there is a reasonable basis to initiate an investigation.

DOES THE COURT HAVE JURISDICTION?

Are the crimes war crimes, crimes against humanity or genocide?

State Party

Were the crimes committed in a state party or by nationals of a state party?

Self-Referral

Was the referral made by a state party?

Ad Hoc Declaration

Did a state that is not party to the Rome Statute lodge a declaration with the ICC accepting its jurisdiction over a particular situation?

UN Security Council Referral

Did the UNCS refer a situation in a state that is not a party to the Rome Statute to the Prosecutor for investigation.

ADMISSIBILITY

Are there genuine national investigations or prosecutions in the country?

Do the crimes meet the gravity threshold?

INTERESTS OF JUSTICE

The Court will not investigate if it is not in the interests of justice or of the victims. **This would be highly unusual.**

NOTE: Interests of justice ≠ interests of peace and security. The prospect of peace negotiations is NOT a factor to be considered here.

PRELIMINARY INVESTIGATION

If these criteria are met the Prosecutor will open a preliminary investigation.

FORMAL INVESTIGATION

Based on the findings in the preliminary investigation the Prosecutor may decide to open a formal investigation.

CONFIRMATION OF CHARGES

If the Prosecutor believes that there is sufficient evidence against a suspect s/he will approach the ICC Pre-Trial Chamber to confirm the charges.

PROSECUTION AT THE ICC

Once the charges have been confirmed warrants of arrest may be issued, and the trial could begin.

SECURITY COUNCIL PROVISIONS

ARTICLE 16:

“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.”

ARTICLE 13(b):

“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 ... 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.”

IMMUNITY

ARTICLE 27(2):

“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

ORGANS OF THE ICC

PRESIDENCY

This organ is responsible for the overall administration of the Court. It is, however, not concerned with administration of the Office of the Prosecutor. The Presidency is composed of three judges of the Court.

Currently these are:

President: **Judge Sang-Hyun Song**
First Vice-President: **Judge Sanji Mmasenono Monageng (Botswana)**
Second Vice-President: **Judge Cuno Tarfusser**

OFFICE OF THE PROSECUTOR

Responsibilities:

Receiving referrals and substantiated evidence on crimes within the Court's jurisdiction; examining and investigating this evidence; prosecuting the trials.

Prosecutor: **Fatou Bensouda (Gambia)**
Deputy Prosecutor: **James Stewart**

PRE-TRIAL CHAMBER

There are two Pre-Trial Chambers – each staffed by three judges.

These chambers are concerned mainly with proceedings up until the charges have been confirmed against suspects.

TRIAL CHAMBER

There are three Trial Chambers – each staffed by three judges.

APPEALS CHAMBER

The Appeals Chamber consists of the President of the Court and four other judges.

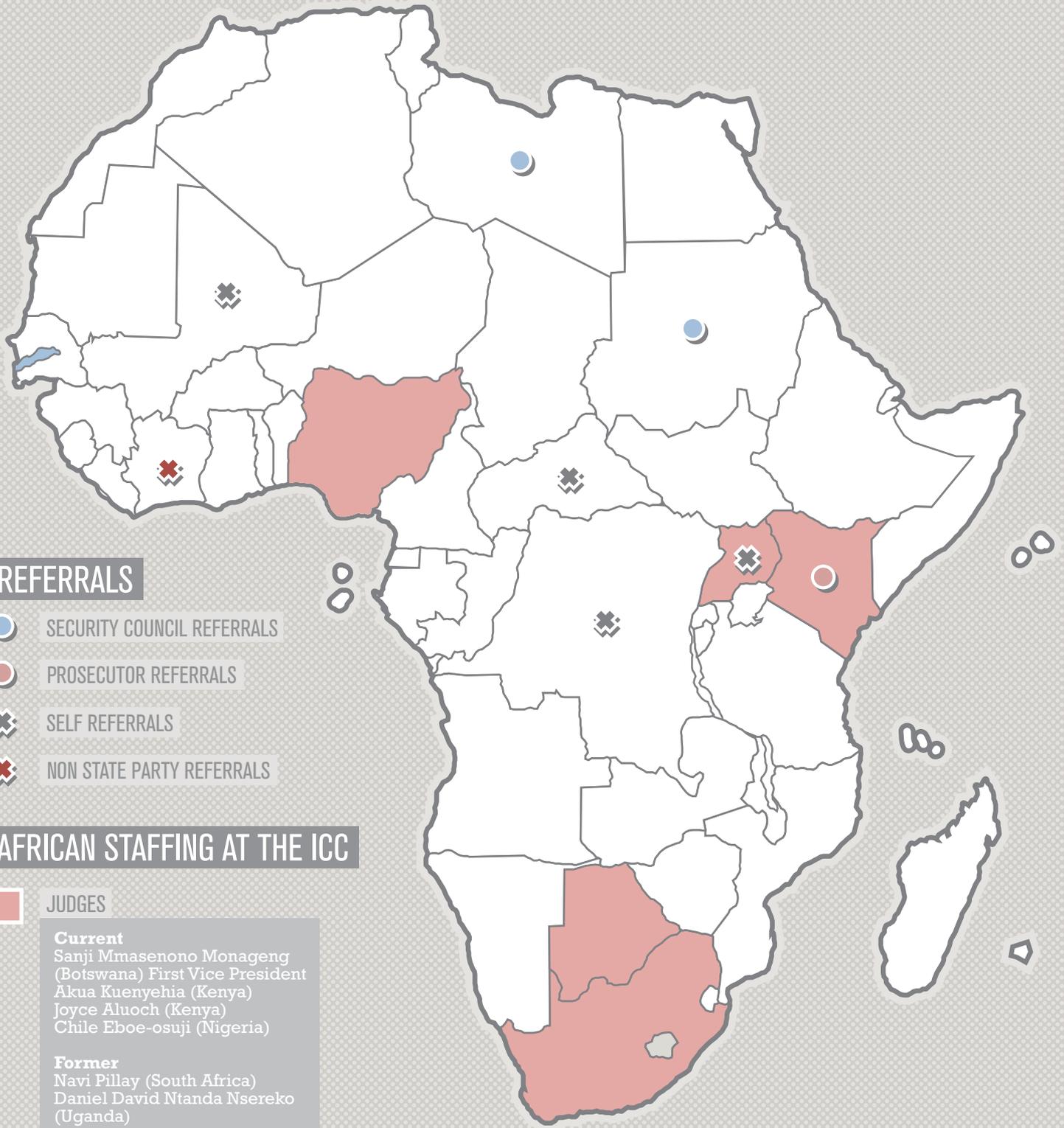
It hears all appeals from the Trial Chambers.

THE REGISTRY

This organ is responsible for all the non-judicial administration. It is headed by the Registrar – currently **Silvana Arbia** – who is under the authority of the President of the Court.

Office of Public Counsel for Victims

Office of Public Counsel for Defence



REFERRALS

-  SECURITY COUNCIL REFERRALS
-  PROSECUTOR REFERRALS
-  SELF REFERRALS
-  NON STATE PARTY REFERRALS

AFRICAN STAFFING AT THE ICC

-  **JUDGES**
 - Current**
 - Sanji Mmasenono Monageng (Botswana) First Vice President
 - Akua Kuenyehia (Kenya)
 - Joyce Aluoch (Kenya)
 - Chile Eboe-osuji (Nigeria)
 - Former**
 - Navi Pillay (South Africa)
 - Daniel David Ntanda Nsereko (Uganda)
-  **PROSECUTOR**
 - Fatou Bensouda (The Gambia)
-  **HEAD OF THE JURISDICTION**
 - Complementarity and Cooperation Division
 - Phakiso Mochochoko (Lesotho)

Cases Before the ICC

In its first ten years of operation, the ICC has opened investigations into eight “situations”, all of which are in Africa, and preliminary examinations are under way in a number of other countries.²



DECEMBER
2003
UGANDA

Situation

War involving the Lord’s Resistance Army (LRA) in Northern Uganda.

Crimes Investigated

Crimes against humanity and war crimes: murder; enslavement; sexual slavery; rape; inhumane acts; cruel treatment of civilians; intentionally directing an attack against a civilian population; pillaging; inducing rape; forced enlistment of children.

Method of Referral

Self-referral by President Yoweri Museveni. Uganda ratified the Rome Statute in June 2002.

Status of the Case

The ICC Pre-Trial Chamber has issued arrest warrants for five LRA commanders.

Two have died and the other three are still at large.

Notable indictees: Joseph Kony; Vincent Otti; Okot Odhiambo; Dominic Ongwen.



MARCH 2004
DEMOCRATIC
REPUBLIC OF
THE CONGO
(DRC)

Situation

All international crimes committed on its territory since the Rome Statute entered into force.

Crimes Investigated

Crimes against humanity and war crimes: Enlisting and conscripting of children; attacking civilians; killings; destruction of property; pillaging; rape and sexual slavery; persecution; mutilation.

Method of Referral

Self-referral by President Joseph Kabila. The DRC ratified the Rome Statute in April 2002.

Status of the Case

Five cases have been brought before the ICC, including the Court’s first completed case of Thomas Lubanga. There is one ongoing case, one has been dropped after the Pre-Trial Chamber refused to confirm the charges and two suspects remain at large.

Notable indictees: Thomas Lubanga Dyilo; Bosco Ntaganda; Mathieu Ngudjolo Chui; Callixte Mbarushimana; Sylvestre Mudacumura.



DECEMBER
2004
CENTRAL
AFRICAN
REPUBLIC
(CAR)

Situation

All international crimes committed on its territory since the Rome Statute entered into force.

Crimes Investigated

Crimes against humanity and war crimes: murder; rape; pillaging.

Method of Referral

Self-referral by the government. The CAR ratified the Rome Statute in October 2001.

Status of the Case

One case has been brought, against Jean-Pierre Bemba Gombo, the former vice-president of the DRC. The trial is ongoing.

Notable indictees: Jean-Pierre Bemba Gombo.



MARCH 2005
SUDAN

Situation

Crimes committed in the Darfur region of Sudan.

Crimes Investigated

Crimes against humanity, war crimes and genocide: murder; extermination; persecution; forcible transfer of population; rape; inhumane acts; imprisonment or severe deprivation of liberty; torture; intentionally directing attacks against the civilian population; attacking peacekeepers; destruction of property; pillaging; outrage upon personal dignity; violence to life and person; genocide by killing; genocide by causing serious bodily or mental harm; genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.

Method of Referral

Referred to the ICC by the Security Council, pursuant to its powers under article 13(b) of the Rome Statute, having determined that the situation constituted a threat to international peace and security.³

Status of the Case

The ICC has brought five cases involving seven individuals. Three suspects have appeared before the ICC voluntarily and the ICC confirmed the charges against two, but not against the other. Four suspects are still at large – including the president, Omar Bashir.⁴

Notable indictees: Ahmad Harun; Ali Kushayb; Omar Bashir; Abdallah Banda Abakaer Nourain; Saleh Mohammed Jerbo Jamus; Abdel Raheem Muhammad Hussein.



NOVEMBER
2009
KENYA

Situation

Crimes committed between 1 June 2005 and 26 November 2009, focusing on the post-election violence in 2008.

Crimes Investigated

Crimes against humanity: murder; deportation or forcible transfer of people; persecution; rape.

Method of Referral

The prosecutor sought permission from the ICC Pre-Trial Chamber⁵ to exercise his *proprio motu* powers after the Kenyan authorities failed to act.⁶ Kenya ratified the Rome Statute in March 2005.

Status of the Case

Two cases involving six individuals have been brought. The ICC confirmed the charges against four of the individuals and the trials are due to commence during the course of 2013.

Notable indictees: William Samoei Ruto; Joshua Arap Sang; Uhuru Muigai Kenyatta.



FEBRUARY
2011
LIBYA

Situation

Crimes committed in Libya after 15 February 2011.

Crimes Investigated

Crimes against humanity: murder; persecution.

Method of Referral

Referred to the ICC by the UN Security Council, pursuant to its powers under article 13(b) of the Rome Statute, having determined that the situation constituted a threat to international peace and security.⁷

Status of the Case

Arrest warrants were issued for three individuals, including for Muammer Gaddafi who is now deceased. Notable indictees: Abdullah Al-Senussi; Saif Al-Islam Gaddafi.



JUNE 2011
IVORY COAST

Situation

Crimes committed during the post-election violence in 2010.

Crimes Investigated

Crimes against humanity: murder; rape and sexual violence; persecution.

Method of Referral

The Ivory Coast had lodged a declaration in 2003,⁸ and notwithstanding on-going reports of abuses,⁹ the prosecutor maintained a watching brief over the situation. In 2011, he decided to request Pre-Trial Chamber III to authorise an investigation.¹⁰

Status of the Case

The ICC has issued arrest warrants for two individuals.
Notable indictees: former president Laurent Gbagbo and his wife, Simone.



JANUARY
2013
MALI

Situation

Crimes committed in its territory after January 2012.

Crimes Investigated

War crimes.

Method of Referral

Self-referral.

Status of the Case

A formal investigation was announced in January 2013.

PRELIMINARY INVESTIGATIONS



2006
COLOMBIA

Situation

War crimes committed in its territory after 1 November 2009 (when it ratified the Rome Statute, Colombia declared that it would not accept the Court's jurisdiction for seven years – that period ended on 1 November 2009).

Crimes Investigated

Crimes against humanity and war crimes: killings; enforced disappearances; rape and sexual violence; forcible transfer of the population; severe deprivation of liberty; torture; conscripting or enlisting children in hostilities.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation: the Office of the Prosecutor is monitoring Colombia's efforts to institute domestic prosecutions of those responsible for the international crimes that fall under the ICC's jurisdiction.



2007
AFGHANISTAN

Situation

Crimes committed in its territory or by its nationals from 1 May 2003 (the date Afghanistan ratified the Rome Statute).

Crimes Investigated

Crimes against humanity and war crimes: torture; attacks on humanitarian targets and the UN; attacks on protected objects; and recruitment of child soldiers; killing of civilians.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation.



2008
GEORGIA

Situation

Crimes committed in its territory or by its nationals after 1 December 2003 focusing predominately on the period after August 2008. Georgia ratified the Rome Statute on 5 September 2003.

Crimes Investigated

Crimes against humanity and war crimes: forced displacement of the Georgian population; attacks on peacekeepers; unlawful attacks; pillaging and destruction of property; torture.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation: the Office of the Prosecutor is monitoring Georgia's domestic efforts at prosecuting those responsible.



2009
GUINEA

Situation

Crimes committed in its territory or by its nationals after 1 October 2003, focusing predominately on crimes committed after September 2009 (the 28 September Massacre). Guinea ratified the Rome Statute on 14 July 2003.

Crimes Investigated

Crimes against humanity: killings and disappearances; rape and sexual violence; arbitrary detention; torture; persecution.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation: the Office of the Prosecutor is monitoring Guinea's domestic efforts at prosecuting those responsible.



2010
REPUBLIC
OF KOREA/
SOUTH KOREA

Situation

Crimes committed in its territory after 13 November 2002.

Crimes Investigated

War crimes: the shelling of Yeonpyeong Island on the 23 November 2010, which resulted in the killing and injuring of South Korean marines and civilians and the sinking of a South Korean warship, the Cheonan, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation: the Office of the Prosecutor is considering whether the crimes mentioned constitute war crimes and so fall under the ICC's jurisdiction.



2010
NIGERIA

Situation

Crimes committed in Central Nigeria since mid-2004.

Crimes Investigated

Crimes against humanity: killings, rape and sexual violence; and abductions.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation.



2010
HONDURAS

Situation

Crimes committed between June 2009 and January 2010.

Crimes Investigated

Crimes against humanity: killings; torture; rape and sexual violence; deportation; persecution; imprisonment.

Method of Referral

Prosecutor exercising his *proprio motu* powers.

Status of the Case

Preliminary investigation: the Office of the Prosecutor is monitoring Honduras's domestic efforts at prosecuting those responsible.

The Role of States under the Rome Statute - Cooperation and Complementarity

Cooperation and complementarity¹² are the cornerstones of international criminal justice as conceived in the Rome Statute. The ICC's guiding principle of complementarity means that international justice should in the ordinary course of events take place within domestic judicial systems. In fact, while the enforcement of international criminal law by international courts is usually given more media and scholarly attention – many seeing international criminal justice as “justice delivered by international courts”¹³ – for much of the 20th century international criminal law was primarily the concern of domestic courts. Complementarity requires the commitment of states to the international justice project and it requires supporting states to create willingness and the capacity to prosecute international crimes. These domestic processes are supplanted only when the state concerned is unwilling and unable to initiate the prosecutions.

“As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”

Luis Moreno-Ocampo¹¹

Looking ahead, given the case load of the ICC, and appreciating its limited resources, if it is to continue to be able to discharge its mandate, individual states must step up and avail their courtrooms to the prosecution of persons accused of international crimes. The focus of CSOs for the next ten years should be on empowering domestic systems to enable them to meet the demands of domestic prosecutions. Creating a dividing wall between international criminal justice and domestic criminal justice is artificial and threatens the sustainability of the international criminal justice project. It should not make a difference, provided it is done properly,

whether a perpetrator is prosecuted before a domestic or international court. The international criminal justice project is founded on the belief that everyone is subject to justice and therefore a shared commitment to fighting impunity and providing accountability is essential. The pursuit of international justice should be a collaborative national and international effort.

Endnotes

1. Kofi Annan's Statement at the Opening of the Preparatory Commission for the International Criminal Court, New York (16 February 1999) available at <http://www.ngos.net/un/icc.html>.
2. For an overview of all situations and cases see the ICC website available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.
3. United Nations Security Council Resolution 1593 (2005).
4. Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I ICC-02/05-01/09 (4 March 2009) (Bashir Arrest Warrant I). Bashir became the first sitting head of state to be indicted by the ICC. In their original ruling, the judges of the ICC's Pre-Trial Chamber issued an arrest warrant against Bashir for a total of five counts of war crimes and crimes against humanity, but the panel threw out charges of genocide that had also been requested by former prosecutor Luis Moreno-Ocampo. The prosecutor appealed this decision, and on 3 February 2010, the Appeals Chamber rendered its judgment, reversing, by unanimous decision, Bashir Arrest Warrant I, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide, which it duly did in July 2010. See Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I ICC-02/05-01/09 (12 July 2010) (Bashir Arrest Warrant II).
5. Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya Pre-Trial Chamber II (31 March 2010).
6. For further detail see Human Rights Watch "ICC: Judges Approve Kenyan Investigation" (31 March 2010) available at <http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation>.
7. United Nations Security Council Resolution S/RES/1970 (2011).
8. Republique de Cote d'Ivoire, Declaration de Reconnaissance de la Competence de la Cour Penale Internationale, 18 April 2003. This was done pursuant to article 12(3) of the Rome Statute which provides that "[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".
9. Cote D'Ivoire Security Council Update Report Number 3 (20 April 2011) available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2020%20April%202011%20Cote%20d'Ivoire.pdf>.
10. Office of the Prosecutor Request for Authorisation of an Investigation Pursuant to Article 15 ICC-02/11-3 (23 June 2011) at paras 1 and 40. The Pre-Trial Chamber authorised the investigation in 2011, but requested the prosecutor to "revert to the Chamber with any additional information that is available to him on potentially relevant crimes committed between 2002 and 2010". See Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Cote d'Ivoire ICC-02/11-14-Corr (3 October 2011) at paras 184-185. Pursuant to this, the prosecutor provided the chamber with additional information and the chamber duly expanded the scope of the investigation. See Office of the Prosecutor Prosecution's Provision of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 and 2010 ICC-02/11-25 (3 November 2011) and Pre-Trial Chamber III, Decision on the Prosecution's Provision Of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 And 2010 ICC-02/11-36 (22 February 2012).
11. Luis Moreno-Ocampo at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003).
12. C Stahn & M El Zeidy *The International Criminal Court and Complementarity: From Theory to Practice* (2011); W Burke-White "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 Harv Intl L J 53; M du Plessis "Complementarity: a Working Relationship between African states and the International Criminal Court" in Institute for Security Studies (M du Plessis ed) *An African Guide to International Criminal Justice* (2008) 123 available at www.issafrica.org.
13. F Jessberger "International v National Prosecutions of International Crimes" in Antonio Cassese *The Oxford Companion to International Criminal Justice* (2009), 208.

CHAPTER 4:

INTERNATIONAL CRIMINAL JUSTICE AND AFRICA THE STATE OF PLAY

In February 1999, Senegal became the first State Party to ratify the Rome Statute. This is not by chance. The ideals of international justice are contained in African seminal norms. The Constitutive Act of the AU provides that the organisation shall function consistently with "condemnation and rejection of impunity", among other principles and – quite extraordinarily – also provides for the right of the AU to intervene in a Member State in the event of war crimes, genocide and crimes against humanity. This is a unique provision in the founding document of an intergovernmental organisation.

FATOU BENSOUDA¹
PROSECUTOR OF THE ICC

International Criminal Justice in Africa – A Snapshot

In Africa, 34 states have ratified or signed the Rome Statute, accounting for more than half the continent. All eight situations before the ICC are in Africa. African countries have already contributed greatly to ensuring accountability for atrocities committed on the continent. The work of the ICTR, the SCSL, broad African membership of the ICC, and recent progress in the case of Hissène Habré are testament to a willingness on the part of Africa to support efforts to secure accountability for international crimes.

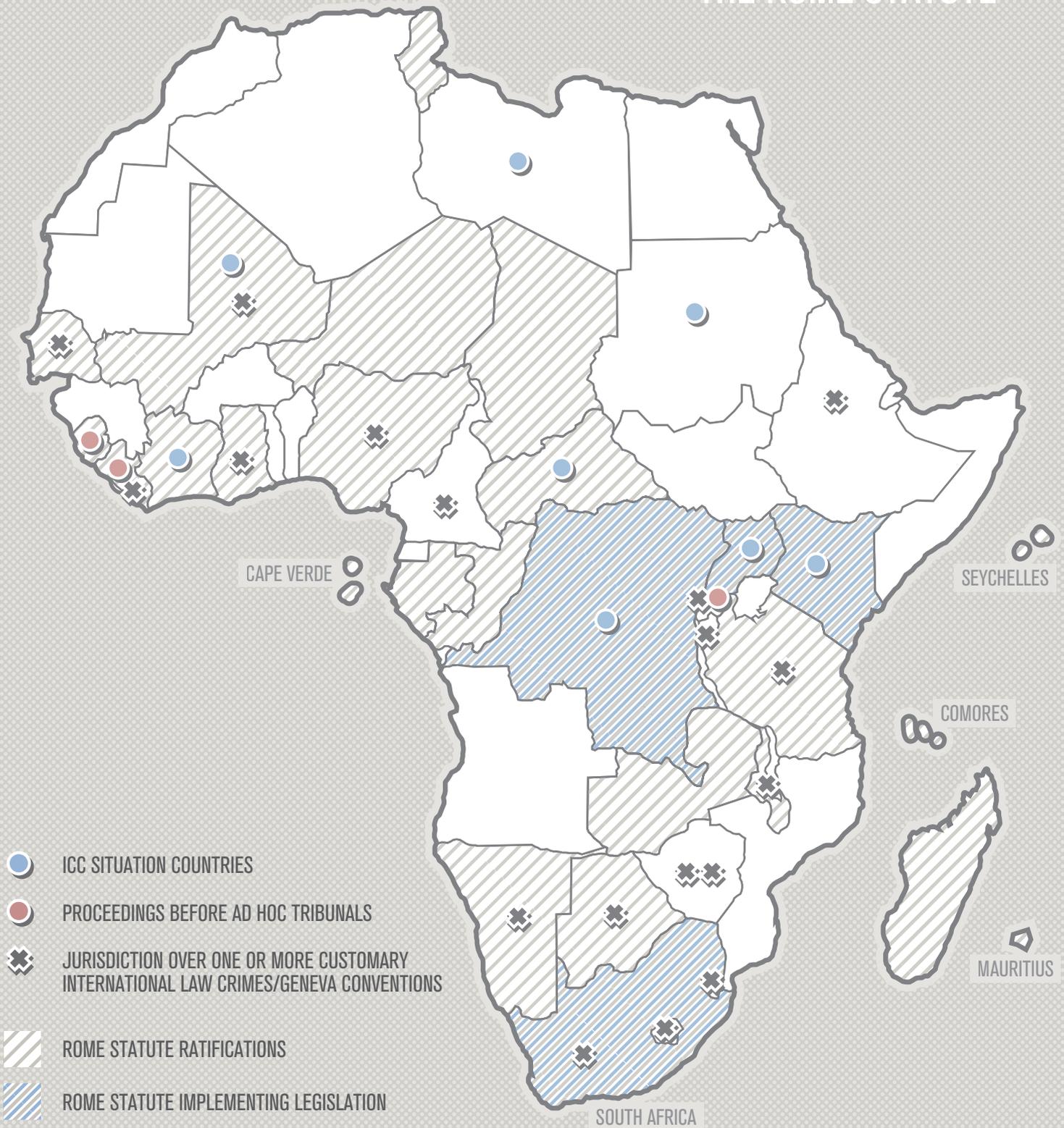
At the continental, regional and national level there is, at least on paper, a commitment to ensure accountability for international crimes, both within the framework of the Rome Statute and in respect of other international conventions and national criminalisation of international crimes in domestic penal codes. This commitment, although not always uniform and, unfortunately, not often acted upon, provides both a legal and moral basis to ensure Africa is proactively involved in the international criminal justice project.

African states took the opportunity presented by the Rome Conference in 1998 to participate fully in the creation of the first permanent international criminal court, and this active participation has been well documented.² As Mochochoko notes:³

“Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.”

This support during the drafting process was continued once the Rome Statute was opened for ratification. Senegal was the first state to ratify the Statute, and to date 34 African states have followed suit. Since then, African states have continued to play a key role in operationalising and strengthening it, most recently through their participation in the Kampala Review Conference where in 2010, against international expectations, agreement on the definition of the crime of aggression was reached. There are a number of judges from Africa elected on to the ICC and in 2012,

34 OUT OF 54 HAVE RATIFIED THE ROME STATUTE



the new prosecutor, Fatou Bensouda, who hails from The Gambia, was elected. At the same time that states were negotiating the Rome Statute that changed the structure of the international order, African states were restructuring the regional order through the transition from the Organisation of African Unity (OAU) into the AU. One of the cornerstones of this new regional organisation was the need to prevent and punish international crimes: the AU's Constitutive Act (article 4(h)) proclaims as a founding principle "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 and crimes against humanity".⁴ Recently, in its report on universal jurisdiction, the AU's Office of Legal Counsel noted that article 4(h) "provides the basis of the practice of the African Union on universal jurisdiction over war crimes, genocide and crimes against humanity".⁵ To this end, the AU is currently working on a Model Law on Universal Jurisdiction for international crimes. The AU is also currently considering an amendment to the continent's human rights architecture that will grant the African Court of Justice and Human Rights (ACJHR/the African Court) jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes.⁶

This commitment to collective responsibility (and accountability) for the prevention and punishment of international crimes is carried through into sub-regional organisations as well. Most notably, the International Conference on the Great Lakes Region (ICGLR)⁷ – established in 2006 – recognised that "genocide, war crimes, and crimes against humanity are crimes under international law and against the rights of peoples", and required member states to take specific measures to prevent and punish these crimes.⁸ Furthermore, the ICGLR's *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*

(Great Lakes Pact) contains a provision on combating impunity that further elaborates on member states' obligations in this regard. This includes a provision that the status of an official shall not be a bar for a member state complying with a request for surrender from the ICC, or another state.⁹

While progress has been made at the national level, some work remains to be done. Of the 34 African states that have ratified the Rome Statute, few have adopted the necessary legislation to implement the obligations under the Statute and provide for the prosecution of international crimes in domestic courts.¹⁰ Furthermore, domestic practice remains sparse. Save for the hybrid SCSL and Rwanda, African states have not for the most part been active in prosecuting international crimes domestically – despite ample opportunities to do so. More notably, African states have been unwilling to exercise universal jurisdiction in respect of crimes committed in neighbouring countries, let alone further abroad. However, as discussed below, CSOs have been instrumental in turning the tide on this pattern of inactivity in African states, and prosecutions are under way or imminent in the DRC, Senegal and South Africa.¹¹

Deconstructing the Relationship between Africa and the International Criminal Justice Project

In recent years, the relationship between Africa and the ICC has come under increasing strain. To understand the state of play, it is important to appreciate that the international justice project involves a number of actors, each of which share a unique relationship with one another:

- African states
- The AU
- The UN Security Council
- The ICC

African States

Africa is made up of 54 sovereign and independent states, 34 of which have agreed to be bound by the Rome Statute and are obliged under international law not only to cooperate with the ICC but also not to act in a manner which would defeat its object and purpose. Among African states there are a number of different positions on the ICC. Notably, relatively few states have adopted outright negative stances towards the ICC. Those that have done so, such as Sudan and to some extent Kenya, are often motivated by domestic considerations related to the ICC's current caseload, or possible future prosecutions. In contrast, a number of states have come out independently in support of the ICC (most vocally Botswana), while others have voted with their feet by choosing to refer crimes committed in their territory to the ICC: Uganda, DRC, Central African Republic, Ivory Coast and Mali. However, the nuances of different positions held by African states on the ICC have been lost in the consensus-based decision-making process at a continental level.

The AU

The AU was formed in 2002 to replace the OAU. To properly understand the AU's apparently hostile relationship with the ICC, it is necessary to separate the body into its constituent parts. On the one hand, there is the AU Commission – the autonomous “Secretariat of the AU” under the leadership of the chairperson of the Commission. Until recently, the AU Commission was headed by Jean Ping, who became the ICC's most vocal critic during his tenure. In 2012, Ping was replaced by South Africa's Nkosazana Dlamini-Zuma. Separate from the Commission is the AU Assembly of Heads of State and Government, the “supreme organ” of the AU, a plenary body made up of representatives of all African states. While the Assembly has adopted a number of decisions critical of the ICC, it is important to note that its decisions are usually adopted by consensus, which has resulted in the silencing of dissenting and more moderate voices on the ICC at times.¹² In addition to this, the influence of the AU Commission in the drafting of Assembly decisions has been raised in the past as a contributing factor to the anti-ICC rhetoric contained therein.

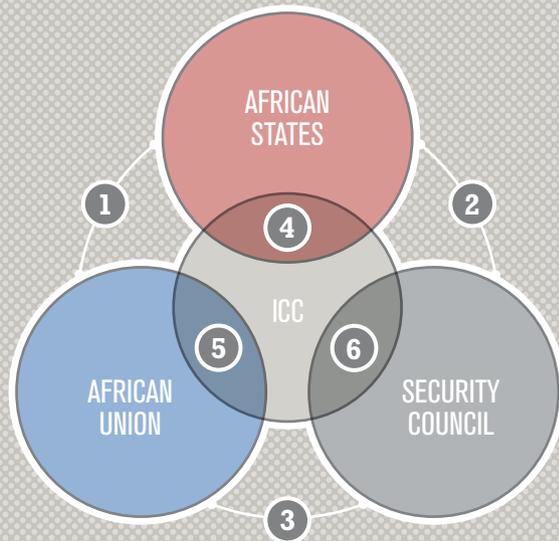
The UN Security Council

The UN Security Council is a political body, entirely separate from the ICC, comprised of representatives of the five permanent member states (China, France, Russia, the United Kingdom and the United States), and ten non-permanent seats, filled by states from around the world on a rotational basis. Under the UN system, the Security Council is tasked with maintaining international peace and security, and is given extraordinary power to do so. Under the Rome Statute,¹³ the Security Council may use this power to “refer” a state to the ICC for investigation and prosecution, even if that state is not party to the Rome Statute or “defer” an ongoing investigation temporarily in the interests of international peace and security.¹⁴ As discussed below, African states' positions on the ICC are a combination of complaints about, inter alia, the make-up of the Security Council, the powers given to the council under the Rome Statute, and the way the powers of referral and deferral are exercised.

The ICC

The judicial functions of the ICC are discussed in detail above; however, it is worth pointing out that the relationship between the ICC and African states has been influenced by non-judicial factors as well. Chiefly, the former prosecutor was accused of being “rude” and undiplomatic in his dealings with African states. This “failure of diplomacy” contributed to, and was compounded by, the AU's decision to delay the establishment of a liaison office for the ICC at its headquarters in Addis Ababa.

THE INTERNATIONAL CRIMINAL JUSTICE PROJECT IN AFRICA: THE BIGGER PICTURE



1. African States and the African Union

- The AU has called on African states to not arrest Bashir
- Mali, Chad, Djibouti, Kenya, and Malawi have hosted Bashir

2. African States and the Security Council

On the two occasions that the Security Council referred African situations to the ICC African countries voted in favour of the referrals:

- Sudan referral: Benin and Tanzania
- Libya referral: South Africa, Gabon and Nigeria

3. African States and the ICC

- 34 African states have ratified the Rome Statute
- 8 African situations are before the ICC:
 - 4 Self referrals (CAR, Uganda, DRC, Mali)
 - 1 request for ICC assistance (Ivory Coast)
 - 1 Prosecutor referral (Kenya)
- ICC Prosecutor is from the Gambia
- 4 African judges serve at the ICC

- 6 African countries have implemented the ICC Act
- Malawi, Kenya and South Africa have cooperated in respect of the arrest warrant against Bashir
- Mali, Chad, Djibouti, Kenya and Malawi have hosted Bashir on different occasions

4. The ICC and the African Union

- The AU has accused the ICC of targeting Africa.
- The AU has called for African states not to cooperate with the ICC in respect of arrest warrants for Bashir.
- The AU accuses the ICC of undermining its efforts of promoting peace and security.
- The AU has indicated its intention to approach the International Court of Justice (ICJ) for an advisory opinion on the question of immunity.
- The AU intends to vest the African Court of Human and Peoples Rights with international criminal jurisdiction.

5. The ICC and the Security Council

The Security Council has referred 2 situations to the ICC pursuant to Article 16:

- Sudan
- Libya

6. The Security Council and the African Union

- The Security Council has the power to refer situations occurring in countries that are not party to the Rome Statute to the ICC. This power is exercised when the Security Council believes that a referral is in the interest of international peace and security.
- The Security Council can defer proceedings before the ICC, if it believes that it is in the interest of justice to do so.
- The AU's anti-ICC rhetoric is largely due to the manner in which the Security Council has used its referral power (in respect of Libya and Sudan) and failure to use its deferral power, at the request of the AU, in respect of Sudan.
- The Security Council is accused of not utilising its power properly and consistently, and that political motives drive decision making.
- Referrals and deferrals are made without the input of the ICC

Disaggregating the Issues in the Africa-ICC Relationship

The fact that all eight situations before the ICC are African and a perception that European states are abusing the universal jurisdiction principle in respect of senior African politicians, has led to the allegation of a bias against Africa. This has resulted in states questioning the international criminal justice project altogether. The low-point of this testy exchange has undoubtedly been the decisions of the AU Assembly of Heads of State and Governments instructing African states not to cooperate in the arrest and surrender of President Bashir to the ICC, which damaged the relationship between the ICC and African states (discussed in infographic).

The claim that the ICC is biased towards crimes committed in Africa is a serious one.

However, the first thing to note is that the charge of an African focus by the ICC is over-blown. The majority of situations currently before the ICC were instigated by African states themselves referring alleged crimes to the prosecutor (See Uganda, DRC, CAR and Mali). Although the Ivory Coast and Kenya proceedings were instigated by the prosecutor, both were done with the support of the states concerned (although the Kenyan support later waned). Alternatively, viewed from a different perspective, this bias towards Africa is a positive one in that it favours victims of international crimes committed in Africa.

In truth, there are reasonable explanations for the fact that all the active situations before the ICC are in Africa: there is a preponderance of conflicts in Africa; and as the biggest regional bloc of states the chances of cases being generated from Africa are high. There are also hostile political conditions and jurisdictional limitations that prevent the ICC from pursuing several deserving cases from other parts of the world (such as Gaza and Syria).

However, while these responses may serve to temper the force of the anti-African charge against the ICC, they should not detract from the legitimate and well-founded concerns raised by African states regarding the ICC. Chief among these is the role the UN Security Council plays in the operation of the ICC through article 13(b) and article 16 of the Rome Statute respectively.¹⁵ These concerns are not novel; rather, the role played by the Security Council was the most divisive issue during the drafting of the Rome Statute. For their part, African states were not happy with any role for the Security Council, even a limited one, but in 1998 many viewed this Faustian bargain as necessary in order to enable the court to come into being and secure the support of certain powerful states. In recent years, however, this compromise has become increasingly less tenable to African states. As such, the role of the Security Council remains the seminal concern of African states today. This complaint is broader than international criminal justice and implicates the very structure of the international legal order. Nevertheless, it is a valid one.

Africa v the ICC or AU v Security Council?

When assessing the international criminal justice project in Africa, it is an unfair generalisation to say that Africa is anti-ICC. To adopt this view ignores the multiple actors involved, and the specific elements and decisions that have given rise to some of the criticisms. When one talks about the international justice project in Africa it is important to be aware of a number of aspects that speak to both the support and criticism that is to be found in Africa.

- The AU's criticisms against the ICC are not an accurate reflection of the support for international criminal justice in Africa. Individual state support has been shown by a number of countries.
- The AU blames the ICC for the actions of the Security Council. The ICC and the Security Council are two independent and completely separate institutions and cannot be considered as a single entity. The ICC cannot be blamed for decisions made by the Security Council and cooperation with the ICC by African states should not be withheld because of unpopular decisions taken by the Security Council.

Is the ICC Targeting Africa?

CSOs working in the area will be confronted with these criticisms, and must be prepared to address them in the course of their work if they are to build support for the international criminal justice project. ICC prosecutor Fatou Bensouda addresses these concerns:

“Let me turn squarely to the question you would like me to answer today. All the persons accused by the ICC are African. That is true. Why?”

Because the Rome Statute says that we should select the gravest situations under the Court's jurisdiction. There are also more than 5 million African victims displaced, more than 40 000 African victims, hundreds of thousands of African victims transformed into killers and rapists, thousands of African victims raped.

You are still asking why we are in Africa?

Because the Rome Statute says the Court shall only step in when the domestic authorities do not pursue accountability themselves. And in all the cases we selected there were no such proceedings. When the legal criteria are met, the Office of the Prosecutor shall open investigations.

You are still asking why?

Do you know that African leaders requested the Court to intervene in six of our situations: President Museveni in Uganda referred the situation in Uganda to the Office of the Prosecutor; President Kabila referred the situation in the DRC to the Office of the Prosecutor; President Bozize referred the situation in CAR; Benin and Tanzania voted in the UN Security Council to refer the Darfur situation; South Africa, Gabon and Nigeria voted in the Security Council referral of the Libya situation to the ICC; and in Ivory Coast both presidents Gbagbo and Ouattara accepted jurisdiction of the ICC. These decisions, taken by African states, reflect leadership and commitment to ensuring that international crimes do not go unpunished.

Perhaps you are now asking why we are not investigating possible crimes in Lebanon, Syria, Iraq, Sri Lanka, Burma, Nepal, Yemen, Bahrain, Zimbabwe, USA, China, Russia, or Pakistan.

These states are non-States-Parties. As I have explained, we can only open an investigation where we have jurisdiction. We would only have jurisdiction over these particular countries where there was a referral by the UN Security Council or through the acceptance of the jurisdiction of the state concerned. Naturally, the state could also decide to join the Rome Statute.

The Court is a judicial institution and any decision to proceed with an investigation is guided solely by assessing the facts on the basis of the criteria set out in the Rome Statute. We are not influenced by any factors relating to geographical or political balance.”¹⁶

The Current State of Affairs

The first decade of the ICC has demonstrated the reinvigorated relevance of international criminal law. While challenges will continue, it is important not to lose sight of the opportunities; the international criminal justice project is at a critical moment in its development and should be nurtured.

In 2012, the ICC secured its **first conviction** – that of **Thomas Lubanga Dyilo**. While this is an important milestone, it was too long in coming and there were a number of avoidable difficulties along the way.¹⁷

The year 2012 also saw the changing of the guard, with the new chief prosecutor, Fatou Bensouda taking office.¹⁸ Her predecessor – Luis Moreno Ocampo – was a controversial figure. While he undoubtedly put the ICC on the map, his abrasive style alienated many, both within his office and beyond, and he was the target of African criticism regarding the selection of only African situations. The new prosecutor has the unenviable task of bringing the ICC's relationship with African states back from the brink, which will require feats of both style and substance. Thankfully, she enjoys the support of a broad cross-section of civil society in undertaking this task.

From the perspective of African states and CSOs, more efforts must be made to improve their relationship with the international criminal justice project – in which they and their electorates have so much invested. Here too there has been a change at the top that augurs well for supporters of the ICC. South Africa's Nkosazana Dlamini-Zuma was elected as the AU's new chairperson in July 2012. While her standpoint on the ICC remains unclear, the man she replaced – Jean Ping – was not a great supporter of the ICC, nor of Ocampo. Dlamini-Zuma's steerage of the AU will be crucial in respect of two of its international criminal justice related initiatives on the horizon.¹⁹

African civil society has taken the opportunity to raise issues with the new leadership at these institutions.²⁰

At the regional level, a development that has raised concerns is the **proposed amendment of the statute of the African Court to grant it jurisdiction over the international crimes**²¹ of genocide, war crimes and crimes against humanity, as well as several transnational crimes. The draft protocol has been approved and has been recommended to the AU Assembly for adoption. Currently, the AU is waiting for a report on the financial

“I am humbled by the privilege, responsibility, and vote of confidence bestowed upon me by the Assembly of States Parties and the wider international community. I am particularly thankful for the confidence the African Union had in me and its support for my candidature. This is yet another clear demonstration of the continent's commitment to international justice and the fight against impunity. The one thing that I can assure every one of you is that I will be the prosecutor for all the 121 States Parties, acting in full independence and impartiality.

The world is increasingly understanding the role of the Court; Africa understood it right from the start. As Africans, we know that impunity is not an academic or abstract notion. This African commitment to ending impunity is a reality, and we have to find a way to focus our attention on it.”

ICC prosecutor Fatou Bensouda interview with New African Magazine

and structural implications of expanding the African Court's jurisdiction.²² Commentators have been critical of the expansion of the continent's human rights court's jurisdiction to international crimes generally, and the current draft protocol's text specifically. The chief concern is the uncertain relationship between the expanded African Court and the ICC, with some suggesting that the move by the AU is designed to displace the jurisdiction of the ICC as a result of concerns about the ICC's work in Africa.²³ While some of these concerns are valid, it is worth recalling that the origins of the expansion of the African Court's jurisdiction lie in the Hissène Habré debacle, with this option being mooted as one way of sharing the prosecutorial responsibility, financial and otherwise. It remains to be seen whether this proposal is viable, both legally and practically, and civil society must work with the new AU chairperson to ensure that whatever the outcome, it results in the strengthening of the international criminal justice architecture.

REGIONAL AND INSTITUTIONAL ADVOCACY

15/11/2012

On 15 November 2012 twenty CSOs wrote to the ICC prosecutor, Fatou Bensouda.

The organisations noted that:

“a critical challenge for the OTP, and the ICC more generally, is its relationship with Africa, and particularly the African Union (AU). Many of our organizations campaigned for the establishment of the ICC.”

They pointed out that, “[d]espite tensions between the ICC and the AU, there also have been recent indications of the more positive view of the ICC among African governments. As you know, Malawi’s new president, Joyce Banda, made it clear in May 2012 that Malawi would fulfill its ICC obligations and arrest al-Bashir if he attended the African Union Summit there. Other states—including Botswana, South Africa, Burkina Faso, and Niger—also have reaffirmed publicly the need to arrest ICC suspects on their territories.”

The following recommendations were made:

- 1. That a more proactive approach to be taken by the OTP to explain the parameters under which the ICC can and cannot act in relation to different country situations.**
- 2. That the OTP actively encourages, in public and private communications, the importance of complementarity and the role of African states and the AU in promoting complementarity.**
- 3. That the OTP undertake more and improved overall outreach.**

The organisations concluded that:

“Over the past 10 years, some of our organizations have substantially contributed towards the work of the court through disseminating information about the work of the OTP and the ICC generally. We believe increased outreach and public information efforts by the OTP at all levels, from the grassroots to the AU, in collaboration with the ICC’s outreach office, is vital to facilitate better relations with African states and greater clarity on the involvement of the ICC in Africa.

We also encourage your office to regularly engage local civil society in countries where the ICC is conducting investigations. We believe this will enhance your office’s understanding of concerns from the communities most affected by the crimes, and allow your office to make information available on country situations under the OTP’s purview that is responsive to local concerns, thereby enhancing the court’s impact. Your recent visit to Kenya provides a good example of such type of interaction; this was welcome and should be continued.”

17/01/2013

On 17 January 2013 140 African CSOs and international organisations with a presence in Africa wrote to the AU commission chair on combatting impunity. The letter congratulated the chair on her appointment, urged her to take up the cause of justice for victims of the gravest crimes - genocide, war crimes, and crimes against humanity - and offered observations and recommendations that they believe would be useful to promote that objective.

These observations and recommendations included:

- The importance of taking account of Africa's role in calling for ICC involvement in African countries.
- The need for AU support to promote domestic capacity to prosecute serious crimes committed in violation of international law.
- Appreciating and recognising the show of support by a number of African countries for the ICC.
- And expression of concern about the expansion of the jurisdiction of the African Court.
- That communications be improved between the AU and the ICC.

In light of their key role in the establishment and implementation of African regional human rights mechanisms and the ICC and their interactions with victims, CSOs have critical expertise to offer to the AU. However, in the past there has been unwillingness on the part of the AU to engage with civil society in a transparent and cooperative manner.

It is hoped that with Chairperson Dlamini-Zuma at the helm of the AU, the institution will be more accessible to civil society, and that she will foster a constructive relationship with civil society, facilitating increased public participation and engagement between African civil society, AU institutions and working groups.

To read the letters, visit www.southernafricalitigationcentre.org.za

AN AFRICAN CRIMINAL COURT: WANT V NEED?

In July 2012, at the 19th Summit of the Assembly of the AU, African heads of state agreed to postpone the adoption of a draft amendment protocol on the Statute of the African Court. The draft amendment protocol proposes giving the African Court criminal jurisdiction for the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as trafficking in persons and drugs, terrorism, piracy, unconstitutional changes of government and corruption.

South African CSO, the Institute for Security Studies (ISS) released an evaluation of the implications of expanding the African Court's jurisdiction, noting that this move is, "fraught with many legal and practical complexities."

Key concerns highlighted include:

- Expanding the jurisdiction of the African Court to include criminal matters could negatively impact on the current work of the African Court to promote and protect human rights.
- The International Criminal Law Section of the African Court will be expensive to establish and maintain.
- There are many legal substantive and procedural shortcomings in the current draft protocol on the African Court relating to, for example, jurisdiction, complementarity and international treaty law.
- There is a general lack of awareness on the part of governments and other stakeholders about the practical implications for domestic law and international law obligations.
- The process thus far has been rushed and lacks significant political commitment from AU member states.
- There is potential for duplication of current international criminal justice institutions and the lack of clarity on issues of complementarity could result in the African Court competing with the ICC.

\$278,226,622

TOTAL BUDGET OF THE AFRICAN UNION

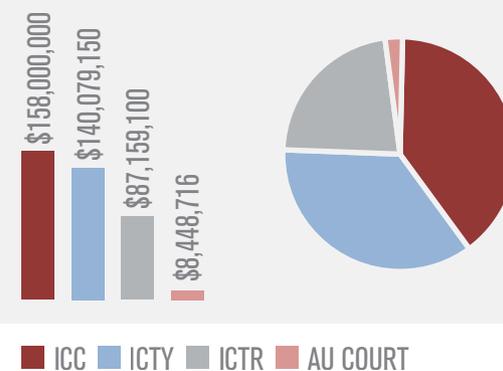
\$122,866,637

MEMBER STATE CONTRIBUTION OF TOTAL AU BUDGET

\$155,359,986

INTERNATIONAL PARTNERS CONTRIBUTION OF TOTAL AU BUDGET

CURRENT BUDGET OF THE AU COURT COMPARED TO THE ICC, ICTY, ICTR



The plan to expand the jurisdiction of the existing African Court continues to advance. The draft amendments to the protocol are set to be considered in 2013 once the budgetary implications – a concern raised by South Africa – are assessed further, the only aspect that has been raised at the AU.

If the budget of the African Court is likely to be the only impediment to the proposed expansion, a proper assessment will need to be carried out, and civil society is encouraged to prepare a shadow budget. One only has to look at the budget of the ICC, ICTR and the ICTY to get a sense of the high cost of dispensing international justice. The AU will certainly have to increase the funds it allocates to the African Court. The AU will also have to bear in mind that unlike existing criminal tribunals, which only have jurisdiction to hear a limited number of crimes, the African Court will encounter an additional financial burden brought about by the proposed inclusion of a number of non-core international crimes.

Furthermore this will impact on the financial contributions African states make to the African Union (the 34 African states parties to the Rome Statute already contribute to the ICC). Additionally, more than half the AU's budget comes from outside of Africa from institutions such as the European Union, and they may be reluctant to fund an initiative such as an African criminal court.²⁵

The second important initiative is the AU proposal to seek an advisory opinion from the ICJ regarding the immunities of state officials under international law. The AU Commission was asked to explore the possibility of this at the AU's 18th Summit of Heads of State and Government in January 2012, and at the July 2012 summit, the AU further clarified that the opinion was to be sought "on the question of immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC ..."²⁴

It is essential that debates around international criminal justice be properly contextualised. If individual states are to be encouraged to embrace the principle of complementarity and take steps domestically to ensure that they are able to investigate and prosecute international crimes, the AU's position must be understood as one which has been adopted in respect of specific instances and not the international criminal justice project in its entirety.

Turning to the ICJ should be welcomed (and encouraged) as a positive step towards a legal solution to a problem with immense political significance. More broadly, it is testament to both the relevance of international law, and the value that African states place on its ability to resolve matters of international concern in a fair and predictable manner.

It is essential that debates around international criminal justice be properly contextualised. If individual states are to be encouraged to embrace the principle of complementarity and take steps domestically to ensure that they are able to investigate and prosecute international crimes, the AU's position must be

understood as one which has been adopted in respect of specific instances and not the international criminal justice project in its entirety. It will be demonstrated throughout this Report that the AU's position does not reflect the position of every African country. The AU's calls for noncooperation, have only been followed by certain countries – largely in respect of Bashir – while other countries have chosen to adhere to their Rome Statute obligations. There should also be a distinction made between countries that fail to give full effect to their international obligations because they are unable to, and those that are unwilling to cooperate.

Endnotes

1. F Bensouda "International Media Conference on the Battle Against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?" (6 July 2011) Gaborone, Botswana available at <http://www.wayamo.com/courses/botswana-07-2011.php>.
2. See M du Plessis "The ICC that Africa Wants" (2010) Institute for Security Studies available at <http://www.issafrica.org/uploads/Mono172.pdf>; P Mochochoko "Africa and the International Criminal Court" in E Ankumah & E Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005), 243; F Bensouda & H Jallow "International Criminal Law in an African Context" in (M du Plessis ed) *An African Guide to International Criminal Justice* (2008) 15 available at www.issafrica.org.
3. Mochochoko supra note 2.
4. Established in 2001 to replace the OAU. See Constitutive Act of the AU (2001) available at http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm.
5. Report on Model Law, Office of the Legal Counsel of the African Union (on file with author).
6. This merged court will replace the current African Court on Human and Peoples' Rights when sufficient states have ratified its founding instrument.
7. See the ICGLR website available at <https://icglr.org/index.php>.
8. Article 8, Great Lakes Pact. The organisation is composed of eleven member states, namely: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia.
9. Article 24(2), Great Lakes Pact.
10. See Chapter 6 of this Report.
11. See Chapter 8 of this Report.
12. Article 7(1), AU Constitutive Act states: "The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority."
13. For an overview of the relationship between the ICC and the Security Council see International Peace Institute "The Relationship Between the ICC and the Security Council: Challenges and Opportunities" (March 2013) available at http://www.ipacademy.org/media/pdf/publications/ipi_e_pub_relationship_bet__icc_and_sc__2_.pdf.
14. Rome Statute, Article 13(b).
15. Article 13(b) permits the Security Council to refer a situation of a non-ICC

- state party to the ICC. Article 16 permits the Security Council to defer proceedings. Both powers are exercised when it is in the interests of peace and security to do so.
16. Bensouda *supra* note 1.
 17. See K Ambos “The First Judgment of the International Criminal Court (Prosecutor v Lubanga): A Comprehensive Analysis of the Legal Issues” (2012) 12 *International Criminal Law Review* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030751. See also “The Prosecutor v Thomas Lubanga Dyilo – a Turbulent but Promising Retrospective” (2011) available at <http://www.haguejusticeportal.net/index.php?id=12989>. For an excellent overview of this case and its implications see “The Lubanga Trial” at the ICC portal available at <http://www.lubangatrial.org/about/>.
 18. A Ngari “Africa Looks Forward to “The Fatou Effect”” *The South African Reconciliation Barometer* available at <http://reconciliationbarometer.org/newsletter/volume-ten-2012/africa-looks-forward-to-the-fatou-effect/>. See also “Fatou Bensouda: ‘We Are Not Against Africa’” in which *New African Magazine* interviewed Bensouda following her election as prosecutor, available at <http://www.newafricanmagazine.com/features/politics/fatou-bensouda-we-are-not-against-africa>.
 19. R Brown “African Union Elects Woman Chair – Possible ICC Implications” *International Justice Project* available at <http://www.internationaljusticeproject.com/2012/07/16/african-union-elects-woman-chair-possible-icc-implications-2/>.
 20. See CSO letters addressed to new prosecutor Fatou Bensouda available at <http://www.southernafricalitigationcentre.org/2012/11/22/african-civil-society-write-to-the-new-icc-prosecutor/>; and AU chairperson Dlamini-Zuma available at <http://www.southernafricalitigationcentre.org/2013/01/18/african-civil-society-unites-140-african-ngos-write-to-au-chairperson-nkosazana-dlamini-zuma-on-issues-of-impunity-for-intl-crimes/>.
 21. Decision made pursuant to African Union Assembly decision, Assembly/AU/Dec.213 (XII) of February 2009, raising concerns over the abuse of universal jurisdiction. The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights is available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>.
 22. Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc. PRC/Rpt(XXV), Assembly of the Union Twentieth Ordinary Session 29 – 30 January 2012 Addis Ababa, Ethiopia, available at http://summits.au.int/en/sites/default/files/EX%20CL%20Dec%20726-766%20%28XXII%29%20_E_0.pdf.
 23. See M du Plessis “Implications of the AU Decision to give the African Court Jurisdiction over International Crimes” (2012) *Institute for Security Studies* available at www.issafrica.org/pgcontent.php?UID=31600%2621; Letter endorsed by 49 African CSOs addressed to the chairperson of the AU in May 2012 available at http://iccnw.org/documents/Letter_on_African_Court_May_2012_FINAL.pdf; M du Plessis, A Louw & O Maunganidze “African Efforts to Close the Impunity Gap” (2012) *Institute for Security Studies* available at <http://www.issafrica.org/pgcontent.php?UID=31915>. The authors argue that the short time frame which the AU has provided for the complex task of drafting the protocol occurs against the backdrop of the fractured relationship between the AU and ICC. The process of expanding the ACJHR jurisdiction is fraught with complexities and has implications for the international, regional and domestic levels. All these implications need to be considered, particularly the impact on domestic laws and obligations, and the relationship between African states parties to the Rome Statute of the ICC, the ICC itself and the ACJHR; A Wallis “AU Initiative Courts Controversy” *The Star* (7 June 2012) available at <http://www.iol.co.za/the-star/au-initiative-courts-controversy-1.1314112#.UTWwgK5SriQ>.
 24. Decision on The Progress Report of The Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. Ex.Cl/710(Xx), Assembly of The Union Eighteenth Ordinary Session 29 – 30 January 2012 Addis Ababa, Ethiopia available at [http://summits.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20\(XVIII\)%20_E_0.pdf](http://summits.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20(XVIII)%20_E_0.pdf).
 25. See M du Plessis “Implications of the AU decision to give the African Court Jurisdiction over International Crimes” *supra* note 23.

CHAPTER 5: THE ROLE OF CIVIL SOCIETY

I think it is clear that there is a new diplomacy, where NGOs, peoples from across nations, international organisations, the Red Cross, and governments come together to pursue an objective. When we do – and we are determined, as has been proven in the land mines issues and the International Criminal Court – there is nothing we can take on that we cannot succeed in, and this partnership ... is a powerful partnership for the future.

KOFI ANNAN¹
FORMER UN SECRETARY-GENERAL, 1999

Civil Society: A Force to be Reckoned With

“In a globalising world, preventing violent conflict and building sustainable peace requires complex strategies. These need to address structural causes of conflict, many of which may be inherent in the global system. To do so effectively **requires cooperation between civil society actors at the local, national, regional and global levels and with governments, intergovernmental organisations** and, in some cases, businesses.

CSO-led processes are often focused on enabling ordinary people to articulate what they really need and then working to find a common ground from which they can work to establish peaceful co-existence. Instead of the use of force, civil society actors generally rely on their creativity by stimulating a new sense of what is possible and how it can be achieved. This capacity is rooted, ultimately, in a sense of agency: the ability to act together with others to change the world.

They often **combine formal legal strategies with approaches that aim to foster public awareness** and the transformation of conflict attitudes and relationships. CSOs can bear witness to violations and undermine the moral authority and legitimacy of abusers. The very act of public disclosure and/or denouncing the situation can make the truth evident in ways that are very difficult to ignore and may empower people to take action to change the situation. This exposure sometimes stimulates conditions that lead to the collapse of regimes over the long term. **They can also dissuade the wider public from accepting or anticipating in acts that enable abuse and oppression.**

Civil society groups can analyse the situation, formulate recommendations, develop policy options and engage in policy dialogue to address conflicts. They can also mobilise advocacy campaigns to generate political will among decision-makers and implement strategies to achieve the desired results. **Thus civil society efforts at raising public awareness about a particular set of problems is intertwined with efforts to motivate political decision-makers to take action to address them”.**²

The revival of the international criminal justice project in the 1990s was due in large part to a global movement of CSOs committed to the creation of an international criminal court to address the problem of impunity. CSO involvement began after the General Assembly requested the International Law Commission in 1989 to reconsider the issue of establishing an international court. These forces coalesced around the Coalition for an International Criminal Court (CICC) – an umbrella body of 31 international CSOs including Amnesty International, Human Rights Watch and the Fédération Internationale des Ligues des Droits de l’Homme, established in 1995 to support the development of the ICC. The Coalition was instrumental throughout the drafting and adoption of the Rome Statute, and without the active involvement of these CSOs, and the co-ordination of their efforts through the Coalition, it is likely that the ICC would not have been formed at all or, if it had been, it would have been significantly less independent and powerful.

As the drafting process for the Statute unfolded, CSOs formed partnerships with states on issues of mutual concern, in particular to counteract efforts to derail the process by a small number of powerful states unhappy with the current draft, and the related issues of the ICC’s jurisdiction and the role of the Security Council in its operation.³ In addition, CSOs began to drum up support

for the court globally through the dissemination of information and strategic advocacy.⁴

This gradual evolution of CSO involvement continued until the Rome Conference, at which time the Coalition consisted of over 800 organisations from all over the globe, 236 of whom were accredited to participate in proceedings.⁵ Ahead of the conference the Coalition – in conjunction with the Like Minded Group of States, a coalition that included a number of African states – agreed on a list of guiding principles that were to inform their participation in the different working groups. These included securing universal jurisdiction for the ICC over international crimes, the principle of complementarity, an independent prosecutor, no role for the Security Council, provisions for victim participation and fair trial guarantees.⁶

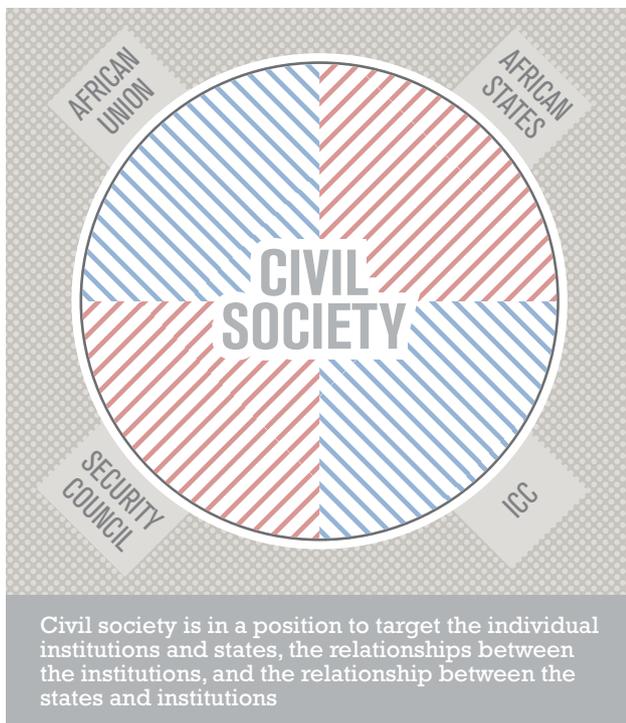
The extensive role played by CSOs in Rome was commended and Kofi Annan noted the “unprecedented level of participation by civil society in a law-making conference”.⁷ While the CSOs were unable to secure every position they set out to achieve at Rome, their influence is clear in the final outcome, particularly insofar as the independent prosecutor and a limited role for the Security Council is concerned.

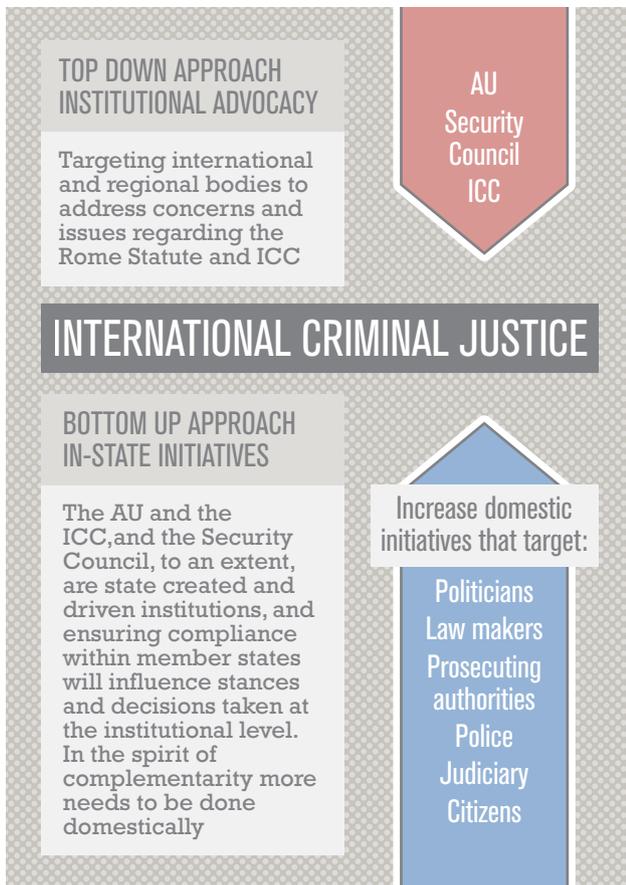
Equally important was the impact this process had on the role and function of CSOs within the international diplomatic sphere more generally. As Pace and Schense note:⁸

“The constructive evolution of coordination among governments, and between governments, civil society and international organizations, and the influence of their cumulative contributions to the [ICC] signal a significant success for this new approach to international diplomacy.”

This “new diplomacy” – “where NGOs, peoples from across nations, international organizations, the Red Cross, and governments come together to pursue an objective”⁹ – has continued into the operationalisation of the Rome Statute and the implementation of the international criminal justice project generally. After the adoption of the Rome Statute, the Coalition’s attention quickly turned to securing universal ratification of the Statute.

The success and impact of the Rome Statute and ICC, however, cannot be sustained on signatures and ratifications alone. Paper promises will not see justice done and the biggest challenge is ensuring that states





that are party to the Rome Statute implement the principle of complementarity and cooperate with the ICC. The Open Society Foundation aptly notes that:

"[I]t is clear that the ICC will only ever be able to process a handful of cases at a time. It can serve as a court of last resort for the worst and most difficult cases, where local capacity and (usually the greater hurdle) political will to deal with them are absent. But without the proliferation of other credible forums, there will be insufficient justice for victims of most international crimes, even where the ICC has launched investigations. Fulfilling the Rome Statute's aspiration that 'the most serious crimes of concern to the international community as a whole must not go unpunished' requires broad efforts to enable local justice mechanisms to address war crimes, crimes against humanity, and genocide."¹⁰

Following the successful adoption of the Rome Statute, CSOs' attention turned to campaigning for its universal ratification and ensuring that the Statute's objective of punishing those individuals most responsible for international crimes is carried out impartially and

effectively. This requires activism in respect of both the work of the ICC, as well as the domestic prosecution of international crimes under the principle of positive complementarity. Such is the impact that CSOs had on the revival of the international criminal justice project, and continue to have in respect of its implementation, that they are rightly considered the third leg of the International Criminal Justice stool – without which the project could not stand.

Conversations with African Civil Society – Challenges¹¹

As the ICC enters its second decade, CSOs should question where best to focus their efforts.

While the discourse on issues of international criminal justice is extensive, it is clear after speaking to CSOs from the DRC, Malawi, Sierra Leone, Zambia, Kenya, Tanzania, Nigeria and South Africa, that knowledge of the international criminal justice project is limited, especially within governments and among African citizens.

Regional and institutional advocacy has been relatively consistent to date. However, while it is true that what happens at a regional and institutional level – AU, ICC and Security Council – is an indication of the state of the support for the international criminal justice project, it is not the sole determinant of the project's success or even a true indicator of where individual countries stand. There is a lot of space for civil society to advocate for international criminal justice issues, and there is a dynamic relationship which demonstrates that the international criminal justice project is made up of a number of components, each providing opportunity for CSO involvement. Already, a number of CSO initiatives and advocacy campaigns have been launched in respect of the AU's relationship with the ICC. It is, however, essential that CSOs do not under-advocate in other areas.

Preoccupation at the intra-institutional level, while necessary, should not detract from the promotion of international criminal justice initiatives at the domestic level. Targeted action must occur at both the institutional and regional level (**top down**) but also within the states that constitute the institutions and regional organisations. Greater advocacy within countries for support for the Rome Statute is needed (**bottom up**) and will inevitably inform and possibly influence the debate within the deliberations of the bodies and institutions concerned.

Bottom Up – Bringing International Criminal Justice Home

Although the ICC has been in operation for over ten years, there still appears to be little awareness of it within African societies. Support for the ICC requires the buy-in of governments and civil society but building this support base requires educating all sectors of society on the basics of international criminal law. Ibrahim Tommy, the director of the Centre for Accountability and Rule of Law (CARL) in Sierra Leone, noted that international criminal justice, “is still a fairly new concept and will require time to get wider public acceptance. The uneven application of [international criminal justice], in the views of many, is also a reason for the general sense of suspicion that characterises our efforts.”¹²

There is clearly a need for outreach in countries that are emerging from conflict but perhaps even more pressing is ensuring that the general African public appreciates and understands the importance of the international criminal justice project, even if they themselves are not victims. Tommy, who has been involved in international criminal justice issues in Sierra Leone since the end of the conflict that led to the establishment of the SCSL, has worked extensively with government officials, CSOs and the general public.

He cogently explains why international criminal justice has not been embraced:

*“Their views can be summed up in three expressions: **inadequate knowledge, suspicion and irrelevance**. Ordinary citizens and civil society need more education, while government officials are plainly suspicious of efforts to promote [international criminal justice] on the continent. Their suspicion has led them to even question its relevance, arguing that it’s more important to focus on the ‘serious economic challenges’ facing the continent.”¹³*

The principle of complementarity envisages a system in which national jurisdictions take the lead in the investigation and prosecution of international crimes. Analysis of international criminal justice must also take place at the national level and there is a need to foster domestic debate. Obby Chilumba from the Southern African Centre for the Constructive Resolution of Disputes (SACCORD) in Zambia, and Luke Tembo of the Centre for Human Rights and Rehabilitation (CHRR) in Malawi, observed that because Zambians and Malawians were not the victims of international crimes, the international criminal justice project was not seen as an issue that warranted national concern. The belief that

only countries in which international crimes are being committed need concern themselves with international criminal justice, has resulted in many countries not engaging with these issues.

This view is shared by Georges Kapiamba, the director of the Congolese Association for Access to Justice (CAAJ). He is of that opinion that:

*“The difficulty, I think, is convincing those countries – their governments, their people and civil society – that think that they do not need to focus on international criminal justice because they live in relative peace. They must remember that peace today is no guarantee for peace tomorrow. What happened in Kenya, Syria, Mali and the Ivory Coast was not predicted. **A national appreciation for international criminal justice can guarantee some form of protection and justice for future generations that may fall victim to instability and civil unrest. It is a safety net, one which I hope no country ever has to use.**”¹⁴*

Tembo noted that without an acceptance of and appreciation for international criminal law, when a country’s obligations were triggered, civil society was not prepared to handle the situation. He said that this became starkly apparent when the CHRR learnt that indicted Sudanese president, Bashir, was due to visit Malawi:

*“There were a lot of challenges that we faced but prime amongst them **was capacity of most civil society organisations in Malawi, both technical and financial**. The issue of the ICC and how it operates in Malawi is still not well comprehended within the CSO and government machinery. There is a need to have CSO efforts consolidated in Malawi.”¹⁵*

The result is that international criminal justice only features if and when the need arises and the work in relation to international criminal justice has been intermittent and lacking comprehensive recourse and skills capacitation.

According to Kapiamba, in post-conflict states such as the DRC, there is perhaps a greater appreciation for institutions like the ICC (and the same can be said of the SCSL and the ICTR), and in his work he has found “that people are interested in the role of [international criminal justice] in the promotion and protection of human rights, instead of using violent means, but victims believe that only the ICC can respond to their claims”,¹⁶ underscoring the need for a credible domestic

process. But even when there is an appreciation of international criminal justice, capacity related challenges and political willingness hamper tangible progress.¹⁷

International Criminal Justice in Africa – Problems of Perception and Political Unwillingness

In SALC’s discussions with civil society, it is clear that anti-ICC rhetoric has been used to justify states’ refusal to adhere to their obligations under the Rome Statute.

Tembo believes that:

“The most important thing about international criminal justice in the African context is that it still faces resistance because of the ‘western driven aimed at African leaders’ tag. There is a need to deal with this tag before it is fully embraced in Africa. There is a need to scale up projects and programmes to reach out to as many people as possible so they can start appreciating how it works and why Africa needs it.”¹⁸

Tommy of CARL in Sierra Leone agreed, noting that:

“African civil society should help ‘heal’ the deep-seated distrust between African governments and the ICC. This should be priority number one. There’s massive need for public education in order to bring the rest of the peoples of the continent onboard the ICJ wagon.”¹⁹

The DRC’s Kapiamba believes that this can be overcome and that civil society should “**strengthen legislative advocacy**”. Outreach and sensitisation must extend to “**political actors**” because they too should “**be educated on the benefits of the domestication of the ICC Statute**”.

Nicole Fritz, the executive director of SALC, believes that these challenges can, to an extent, be addressed by ensuring that domestic jurisdictions are the primary forum for dispensing international criminal justice.

“The primary realisation of international criminal justice must be domestically based – through complementary initiatives – upholding and strengthening domestic legal systems to the advantage not only of the international criminal justice system but rule of law generally.”²⁰

The key challenges facing civil society actors are:

Political unwillingness as a result of:

- A lack of understanding of international criminal law;
- Acceptance of arguments that the ICC is biased against Africa;
- The belief that other priorities are more pressing for African states;
- The general public is unaware of international criminal justice and its importance; and
- Civil society does not have the technical or financial capacity to communicate and advocate for greater support of international criminal justice nationally.

This **Report** will hopefully be a starting point for organisations working on issues of international criminal justice in Africa. It is intended that this Report will assist CSOs in communicating the value of international criminal justice in their work and to highlight and demonstrate that they are not alone on this journey.

Specifically, the Report aims to capacitate civil society (to **create awareness, combat political unwillingness, involve citizens and affected persons and inform both government actors and citizens** of the benefits of embracing and supporting the international criminal justice project) so that they might strengthen individual states’ support for international criminal justice which, in turn, will ensure that African countries:

- Are able and willing to cooperate with the ICC when called upon to do so, and
- Give effect to the principle of complementarity through the investigation and prosecution of international crimes in domestic courts.

WHAT CAN CIVIL SOCIETY DO?



“Instead of just focusing on the leaders, as has so often been the case, we need to bring the public along through extensive public education and advocacy efforts.”
Ibrahim Tommy, Centre for Accountability and the Rule of Law, Sierra Leone

“Communities are not informed about the ICC and ICJ - awareness levels are very poor.”
Obby Chibuluma, SACCORD, Zambia

“Priorities of African civil society for the next two years should be public awareness of the activities of the ICC and of the role of political leaders on strengthening domestic justice to fight impunity at the local level. The ICC will not take care of all cases. We need to strengthen legislative advocacy. Political actors and society should be educated on the benefits of the domestication of the ICC Statute.”
Georges Kapiamba, Congolese Association for Access to Justice, DRC

“Currently in Malawi there are no initiatives directed at public awareness of international criminal justice. The importance of community education on international criminal justice cannot be overemphasised as it will greatly help in bringing the court to the people. There is need to bring international criminal justice to the people and let them relate to it first-hand.”
Luke Tembo, Centre for Human Rights and Rehabilitation, Malawi

“Effective awareness raising, advocacy and support initiatives to the general public and relevant stakeholders are fundamental to ensure meaningful realisation of international criminal justice in Tanzania.”
Richard Shilamba, Children Education Society, Tanzania

The African Network on International Criminal Justice – Strength in Numbers

Who Can Help?

African CSOs have been at the coalface insofar as enforcing international criminal justice is concerned. The vanguard of this movement has been the African Network on International Criminal Justice (ANICJ), an “informal network comprising African and international civil society organisations dealing with human rights, the rule of law and international criminal justice” founded in order to “improve the ability of civil society to help end impunity and to protect human rights by promoting accountability for international crimes at national, regional and international level”.

The ANICJ was established at the instigation of the Institute for Security Studies (ISS) in 2009. The initial meeting was attended by representatives from: Advocates for Public and International Law (Uganda), Africa Legal Aid (Ghana), Association Africaine de Defense de Droits de l’Homme (DRC), Central African Republic Coalition of the International Criminal Court, East African Law Society, Human Rights Watch, ISS, Southern African Development Community (SADC) Lawyers Association, SALC and the West African Bar Association.

The ANICJ aims to raise awareness about international criminal justice and its role in promoting peace, stability and the rule of law in Africa among the public, the media, criminal justice officials, policy makers and political leaders. It also aims to encourage decision makers to support the principles of international criminal justice and to take steps to enable its functioning at national, regional and international level.

To date, the ANICJ has been a success both in terms of securing support for the Court generally, and in responding to specific challenges to the Court’s work. These include preventing President Bashir of Sudan – the subject of an ICC arrest warrant – from visiting states parties when such states are under an obligation to arrest him.

In addition, the ANICJ plays a secretariat function, through the ad hoc exchange of information and documents as well as advocacy and lobbying initiatives.²¹

Endnotes

1. UN Press Release SG/SM/6973 “Secretary-General Calls Partnership of NGOs, Private Sector, International Organizations and Governments Powerful Partnership for Future” (29 April 1999).
2. C Barnes “Agents for Change: Civil Society Roles in Preventing War and Building Peace” European Centre for Conflict Prevention available at <http://www.gppac.net/documents/130221585/0/Agents+for+Change.pdf>.
3. W Pace & J Schense, “The Role of Non-Governmental Organisations’ in Cassese, Gaeta & Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary-Volume 1* (2002), 113.
4. Id 114.
5. Id 115.
6. Id 124.
7. Id 125.
8. Id.
9. UN Press Release supra note 1.
10. Open Society Foundation “International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers” (2011), 17 available at <http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf>.
11. Based on questionnaires SALC (SALC Questionnaire) sent to CSOs in Southern, East and West Africa.
12. SALC Questionnaire, CARL, 22 November 2012, transcript on file with the author.
13. Id.
14. SALC Questionnaire, CAAJ, 27 November 2012, transcript on file with the author.
15. SALC Questionnaire, CHRR, 12 January 2013, transcript on file with the author.
16. CAAJ Interview supra note 14.
17. Id.
18. CHRR Interview supra note 15.
19. CARL Interview supra note 12.
20. Interview with Nicole Fritz, 10 November 2012, transcript on file with the author.
21. Details about the ANICJ and its members can be found at <http://www.issafrica.org/anicj/>.

CHAPTER 6: BUILDING LEGAL ARCHITECTURE, HUMAN CAPACITY AND POLITICAL WILL

The process to import the core international crimes of genocide, crimes against humanity and war crimes into national criminal law is an issue of critical importance to the emerging system of international criminal justice. The architecture of this system rests on the principle of complementarity, which provides that the International Criminal Court may have to investigate and prosecute cases that are not dealt with genuinely by national criminal justice systems. This entails a two-fold requirement of national preparedness to deal with core international crimes.

First, states should have some institutional capacity to investigate and prosecute genocide, crimes against humanity and war crimes cases within the national jurisdiction. If there are insufficient resources to have a separate unit for such crimes, then the state should facilitate that some members of the criminal justice system develop expertise in this area through suitable competence building measures, including training and access to specialised electronic resources.

Secondly, states should develop legislative capacity to prosecute and adjudicate core international crimes cases before national courts. This includes provisions in national criminal law explicitly criminalising genocide, crimes against humanity and war crimes.

MORTEN BERGSMO¹

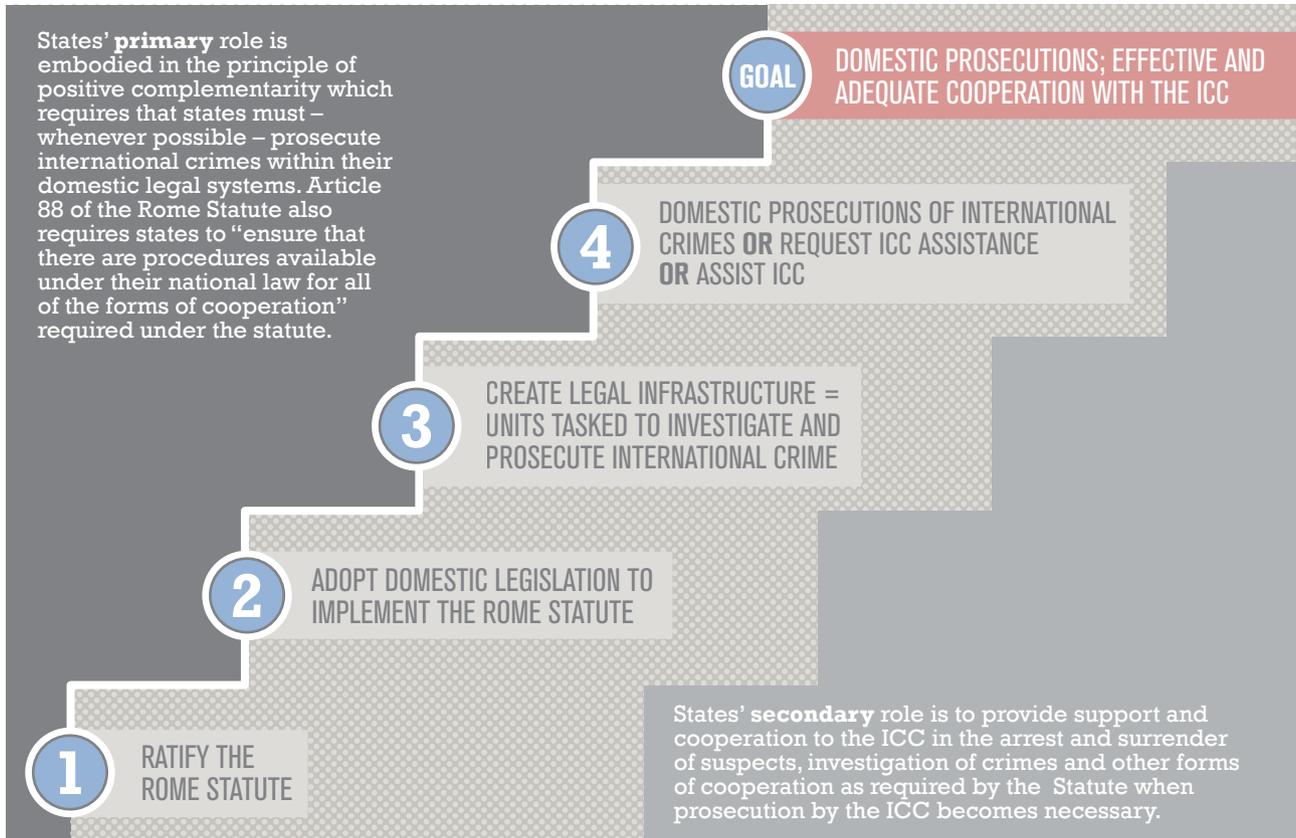
Under the Rome Statute, states are required to play both **leading** and **supporting** roles.

To perform these functions it is preferable, and in some cases imperative, for states to pass implementing legislation – domestic laws – giving effect to their obligations under the Rome Statute.

- Such legislation is imperative in dualist states that require legislation as a matter of domestic law in order for international norms to be applied domestically.
- Implementing legislation is preferable in monist states as, although international norms are automatically applicable within these legal systems, such legislation makes cooperation with the court more efficient and effective.

Many states do not currently have the necessary legal frameworks for the prosecution of international crimes, which burdens the ICC as it creates difficulties for states, particularly dualist ones, in undertaking such prosecutions. The adoption of domestic legislation is therefore key to the functioning of the ICC as a court of last, rather than first, resort.

The existence of implementing legislation has also proved vital as a pressure point for civil society in South Africa and Kenya to ensure their governments cooperate with requests for arrest and surrender of ICC suspects and the initiation of domestic proceedings, as the legislation creates a specific legal and political avenue through which to pressure states to adhere to these obligations.



Given this, it is no surprise that to date, implementing legislation has been a key focus area of civil society. Unfortunately, African states' enthusiasm for ratifying the Rome Statute has not carried over into the adoption of implementing legislation and only a handful of African countries have adopted domestic legislation to give effect to cooperation obligations, or complementarity, or both.

Notably, in the countries that have adopted implementing legislation – such as South Africa, Kenya, Uganda, Mauritius, the DRC and Senegal – CSOs have been instrumental in the drafting and adoption process. It is not enough only to have implementing legislation; its specific provisions need to be well drafted.

The existence of implementing legislation has also proved vital as a pressure point for civil society in South Africa and Kenya as it creates a specific legal and political avenue through which to pressure states to cooperate with requests for arrest and surrender of ICC suspects and the initiation of domestic proceedings.

Here too civil society is active. At present, there are a number of CSOs working towards getting implementing legislation adopted in a number of other African states.

In this section, the existing African implementing legislation will be discussed briefly – focusing on the role that CSOs have played in the drafting and adoption of this legislation. Where applicable, special consideration will be given to the manner in which the implementing legislation has given effect to the cooperation and complementarity obligations of states parties. Thereafter, the way forward will be discussed along with some lessons learnt.

Creating an environment conducive to the realisation of the principle of complementarity requires political will in the state concerned.

A state that has not signed the Rome Statute or implemented its provisions into domestic law is not prohibited from dispensing international criminal justice. Under the principle of **universal jurisdiction** it is accepted that in the context of core international crimes, a state is entitled to exercise jurisdiction absent the traditional bases of jurisdiction (such as territoriality and nationality).

“I have learnt, among other things, that the weaknesses in national accountability mechanisms undermine efforts at promoting international criminal justice. Ultimately, African countries need to strengthen national accountability mechanisms.”

Ibrahim Tommy
Centre for Accountability and Rule of Law, Sierra Leone

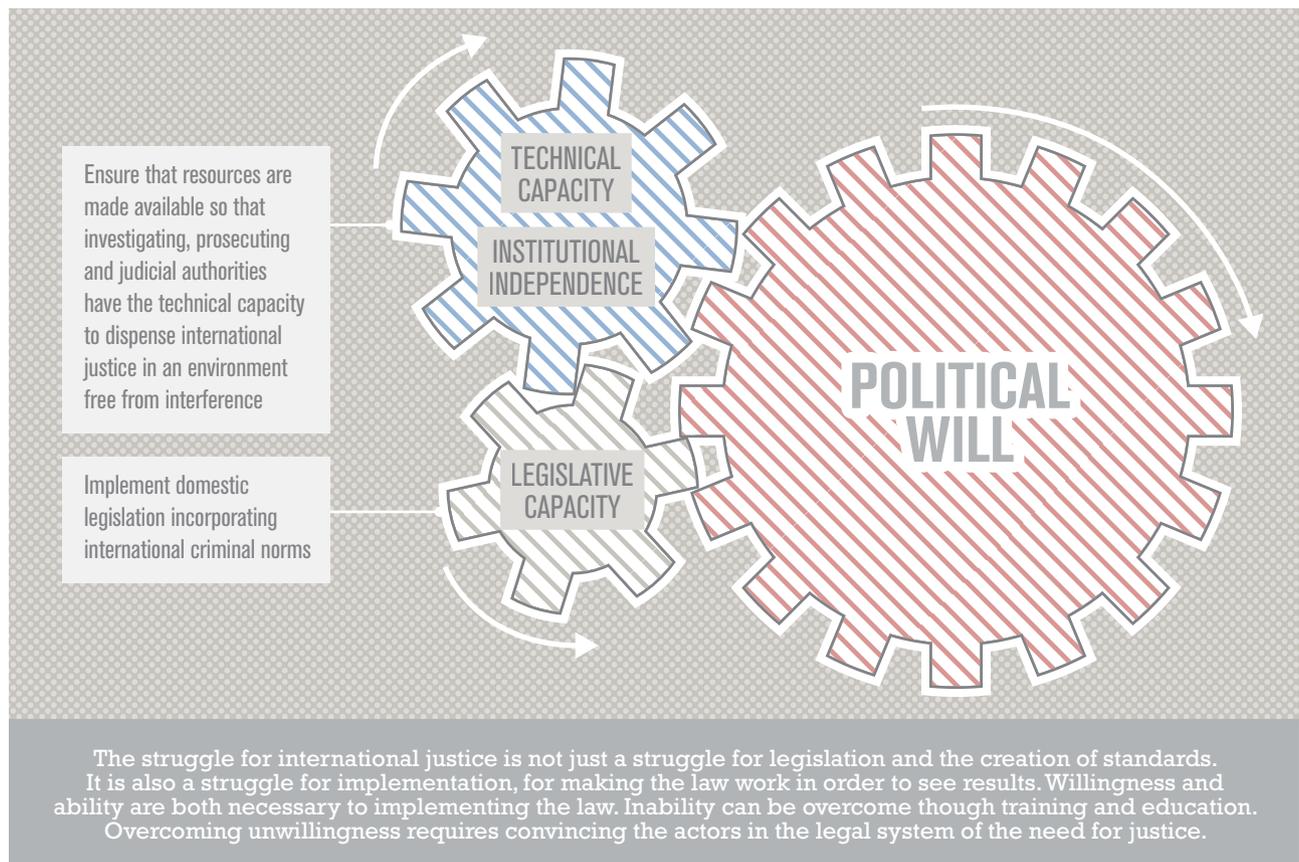
However, the international consensus is that the principle of universal jurisdiction over international crimes is **an option, not an obligation on states.**²

There has been a reluctance to assert universal jurisdiction in the absence of national legislation. State practice demonstrates that because international law permits the exercise of universal jurisdiction but does not prescribe its mechanisms, without national legislation the investigating, prosecuting and judicial

authorities have no framework to guide, constrain or stipulate the mechanics of investigations and prosecutions. National legislation is also an opportunity to give concrete content to universal jurisdiction principles and so helps to ensure that prosecutions adhere to international standards applicable to the investigation and prosecution of international crimes. A legislative framework also enables states to address any deficiencies in their capacity and expertise as it can create the mechanisms necessary to hold credible investigations and prosecutions.

The regime created by the Rome Statute can assist states to avoid these difficulties. It is the blueprint for a legal framework that defines the crimes, their elements and modes of liability, and it sets procedural thresholds for investigations and prosecutions that meet internationally accepted fair trial standards.

The Rome Statute’s international endorsement means that an agreed upon and uniform international criminal justice framework exists for those states that have ratified it.





Legislation: Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002.

ICC Cooperation Provisions

Section 8 requires South Africa to refer any requests from the ICC for the arrest and surrender of a person wanted by the ICC to the director general of justice and constitutional development with the necessary documentation to satisfy a local court that there are sufficient grounds for the surrender of the person to The Hague.³ The director general must then forward the request to a magistrate to endorse the ICC warrant of arrest for execution in any part of the Republic.⁴

Immunity Provisions

There are no specific provisions relating to immunity in respect of cooperation with the ICC. Section 4(2)(a) states that notwithstanding “any other law to the contrary, including customary and conventional international law, the fact that a person [...] is or was a head of state or government, a member of a government or parliament, an elected representative or a government official [...] is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.”

Domestic Prosecution Provisions

Section 4(1), which holds that “[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence”, and the incorporation of the Rome Statute crimes through a schedule confirm that international crimes are deemed to be crimes in South Africa.⁵ There are four grounds upon which South African courts can exercise jurisdiction over international crimes: if the perpetrator is a South African citizen or ordinarily resident in South Africa; if the crime was committed against a South African citizen or person ordinarily resident in the country; and if the perpetrator is present in South Africa after the commission of the crime.⁶



Legislation: International Crimes Act, 2008.

ICC Cooperation Provisions

Requests for assistance must be communicated to the minister of justice or the attorney general, depending on the nature of the request.⁷ The procedure to be followed for urgent requests is also set out.⁸

Immunity Provisions

Section 27(1) confirms that the official capacity of a person shall not constitute a ground for refusing or postponing the execution of a request for cooperation with the ICC, holding that a person is ineligible for transfer to the ICC or another state wishing to prosecute him/her or holding that a person is not obliged to provide the assistance sought. However, section 27(1) is subject to section 115, which allows for the minister to postpone cooperation in respect of requests *involving conflict with other international obligations*.⁹ The Act excludes article 27 of the Rome Statute in its entirety from the list of *General Principles of Criminal Law* contained in Part 3 of the Rome Statute that apply in such circumstances, which is remarkable as nowhere else in the Act is the question of immunity addressed as far as domestic prosecutions are concerned.

Domestic Prosecution Provisions

Section 8 provides that “[a] person who is alleged to have committed an [international crime] ... may be tried and punished in Kenya for that offence” if certain jurisdiction prerequisites are met. These include if the alleged crimes were committed in Kenya, the perpetrator or victim was a Kenyan citizen, or the person is present in Kenya after commission of the offence. Section 7 incorporates most of the *General Principles of Criminal Law* contained in Part 3 of the Rome Statute, “with the necessary modifications” for the purposes of domestic prosecutions under the Act and gives these General Principles precedence over the relevant Kenyan laws.



UGANDA

Legislation: International Criminal Court Act of 2010.

ICC Cooperation Provisions

Sections 21 and 22 state that requests for assistance shall be made to the minister of justice who shall consult with the ICC without delay if there is or may be a problem with its execution.

Immunity Provisions

Section 25 provides that the official capacity of a person is not an excuse for refusing or postponing a request. However, section 25 is subject to section 24, which provides that if the “[J]ustice Minister is of the opinion that the circumstances set out in article 98 of the [Rome] Statute apply to a request for provisional arrest, arrest and surrender or other assistance, he or she shall consult with the ICC and request a determination as to whether article 98 applies”. The Act explicitly excludes article 27 from the *General Principles of Criminal Law* incorporated from the Rome Statute into the domestic prosecution regime.

Domestic Prosecution Provisions

Section 18 provides for the domestic prosecutions of international crimes committed after the date the act came into effect (25 June 2010), and on Ugandan territory, or outside Uganda when the alleged perpetrator or victim is a citizen or permanent resident, the person is employed by Uganda or the person is present in Uganda after the commission of the offence.

Note: In 2008, before this Act was enacted, the Ugandan government established a War Crimes Division within the High Court for the purpose of prosecuting international crimes. In addition, special units were established within the Uganda Police Force and the Directorate of Public Prosecutions



MAURITIUS

Legislation: The International Criminal Court Act, 27 of 2011.

ICC Cooperation Provisions

Section 11 states that ICC arrest warrants are to be communicated to the attorney general who will pass them on to a judge to be endorsed, without exception. Section 13 prohibits the attorney general from postponing the execution of a request for arrest and surrender at any time before the surrender of the person, “unless the request would interfere with an investigation or prosecution in Mauritius involving a different offence from that for which surrender is requested.”

Immunity Provisions

Section 6(1) of the Act provides that official capacity shall not be “a defence to an offence ... nor a ground for a reduction of sentence for a person convicted of an offence.”

Domestic Prosecution Provisions

Section 4 of the Act empowers Mauritian courts to prosecute international crimes when the perpetrator or one of the victims is a citizen or ordinary resident of Mauritius, or when the perpetrator is “present in Mauritius after the commission of the crime”.



SENEGAL

Legislation: An amendment to its Penal Code and an amendment to its Procedural Code, 2007.



BURKINA FASO

Legislation: An amendment to its Penal Code and an amendment to its Procedural Code, 2008.

Immunity Provisions

Article 7 states that official capacity – including that of head of state – is irrelevant for the purposes of prosecutions. Article 14 states that such crimes do not prescribe, nor are amnesties permitted in respect of them.

Domestic Prosecution Provisions

The legislation provides the basis for prosecuting Rome Statute crimes (as well as crimes under the Geneva Conventions and its Additional Protocols).

Getting More Implementing Legislation Drafted

Ensuring that the remaining African states parties to the Rome Statute adopt implementing legislation is crucial. At present, such legislation is in the pipeline in Benin,¹⁰ Botswana, Burundi,¹¹ the CAR, the Comoros,¹² the DRC, Gabon,¹³ Ghana,¹⁴ Lesotho,¹⁵ Madagascar,¹⁶ Namibia,¹⁷ Nigeria,¹⁸ Republic of Congo¹⁹ and Sierra Leone.²⁰ In most of these countries, domestic and international CSOs have been vital in promoting and supporting this process. However, the existence of draft bills is by no means a guarantee that such legislation will be forthcoming. One need only consider the marathon attempt by civil society to get such legislation adopted in the DRC to see the unpredictable and difficult challenges it faces in this regard.²¹

The DRC first introduced draft implementing legislation for the Rome Statute in 2002, in order to “integrate the norms of the Statute of the International Criminal Court into Congolese applicable law following the ratification of March 30, 2002”.²² The draft involved the adoption of a number of legislative amendments and additions relating to the penal code and procedure, the judiciary, as well as introducing a cooperation regime with the ICC. Throughout the drafting process international and domestic CSOs were involved, prompting Amnesty International to praise “the transparency and consultation with civil society with which the government has drafted this legislation”.²³ So thorough was the process that there were a number of versions (in 2002, 2003 and 2005).²⁴ In 2005, the government adopted the draft bill and it was sent to the president of the National Assembly for consideration and adoption. Unfortunately, the project stalled in 2006 with the dissolution of parliament. The Bill was re-introduced into parliament in 2008 with a number of amendments addressing the concerns of civil society, including the removal of the death penalty and the removal of the defence of superior orders.²⁵ However, despite continued efforts to finalise the law – including a parliamentary vote in November 2010 declaring the Bill admissible and sending it to the National Assembly for deliberation – the implementing legislation remains in its final stages, allegedly because of a lack of support from the military.²⁶

Bringing the Rome Statute Home

The reasons for the delay, or in the case of some states refusal, to adopt implementing legislation are numerous.

Broadly speaking, they fall into two categories: states that are unwilling to do so (often for domestic political reasons); and states that are unable to do so for lack of capacity or technical expertise. In addition, a few states argue that implementing legislation is unnecessary as the provisions of the Rome Statute are self-executing.²⁷

In the future, civil society must continue to address both the states that are unwilling to enact such legislation, as well as those that have not been able to do so yet. In some instances this reticence on the part of states is based on misunderstandings regarding the ICC, such as the reach of its temporal jurisdiction over past crimes, which can be addressed through dialogue. In other instances it is based on more complex political dynamics that require concerted and targeted lobbying from civil society, both domestically and internationally.

Assisting those states that are willing to adopt such legislation but suffer from a lack of resources or expertise is more straightforward but is not without its own challenges. CSOs’ difficulties in providing this assistance is compounded by the fact that there has been no single approach for states to follow in adopting implementing legislation, nor is there universal agreement as to what it should entail.

The CICC has provided some advice in respect of the process to be followed:

“While there is no single best methodology for drafting implementing legislation, any implementation process should be transparent and inclusive. Prior successful efforts have involved the use of government inter-ministerial committees and included close consultation with civil society.”

Even more so than with ICC ratification efforts, implementation efforts must take place at least in part at the grass-roots level. National and local groups must have ownership in the implementation process, as the process itself is dependent upon country-specific legal and political circumstances that nationals will best understand. Even where direct involvement in drafting is not possible, these groups' advocacy efforts will be instrumental to the passage of strong and effective legislation. Moreover, the groups must understand the legislation so that they can play a role in its application should cases arise in their respective countries under one of the ICC crimes, or should the ICC make a cooperation request.”²⁸

Even once the will and capacity exists to adopt such legislation, there are challenges as to what it should look like. There are a number of different examples from which to choose (see textbox), with the recently revised Commonwealth Model Law perhaps being the most favoured.²⁹ Among those African states that have adopted implementing legislation, there have been two main versions: for example, Uganda followed the Kenyan model, while Mauritius relied heavily on the South African one. Looking ahead, the AU's Model Law on Universal Jurisdiction may also be a source of guidance in this regard.³⁰

In terms of the content of the implementing legislation, two key issues have to be addressed. The first is whether the “positive complementarity” regime will provide for the exercise of universal jurisdiction (such as in South Africa). The second, more contentious issue is what role immunity will play in the prosecution of international crimes domestically, and in complying with cooperation requests from the ICC. The existing African implementing legislation is contradictory (or ambivalent) on the issue; however, the AU has taken the position that immunity should continue to apply when it comes to cooperation requests from the ICC. In contrast, the most recent version of the Commonwealth Model Law includes a provision that removes such immunity when the state concerned is a state party, or is the subject of a Security Council referral.³¹

The National Implementing Legislation Database

One important tool available for civil society insofar as the drafting and adoption of implementing legislation is concerned is the National Implementing Legislation Database (NILD). Initially, the database was used as a tool for the Human Rights Law Centre at the University of Nottingham, which was training individuals responsible with drafting ICC-related legislation in a number of countries. Through this process it became clear that “[f]or many States, the lack of resources, personnel and international criminal law expertise, combined with the fact that the ICC may not be a top priority, impacts on the speed and quality of the adoption of legislation”, as a result there was a need for “precise, accurate legal information to be easily accessible to those who are considering implementation”.³²

Today, the NILD contains:

- A comprehensive catalogue of all official versions of national ICC implementing legislation, broken down to fine-grain decompositions (“spans”), which have been “tagged” with corresponding keywords selected from a list of approximately 800 purposely designed keywords;
- A list of key state attributes, which impart a broader picture of particular state choices; and
- Legal analysis of those provisions that are of particular interest either because they are wider or narrower than the relevant ICC Statute provision, or because they introduce new concepts or notable aberrations.

According to one of its creators:

“The NILD aspires to map emerging trends in implementation through the breakdown and analysis of existing legislation, enabling the identification of the requisite standards for the enactment of effective national implementing legislation. It aims to provide guidance to States that have yet to engage in the implementation process, materialising the complementarity promise, assisting NGOs in targeting their advocacy campaigns and serving multiple research purposes.”³³

The Next Step: Building the Institutional Architecture, Human Capacity and Political Will

In the case of African states that have adopted implementing legislation, the next step is to build the institutional architecture and human capacity to carry out the various tasks required by it. While there is an obvious need for further ratification and domestication of the Rome Statute by Southern African countries as well as for relevant law reform, these steps alone do not give effect to actual state compliance with international law obligations. Once again, civil society has an important role to play. In some countries, the capacity building needs are immense.

Investigating and prosecuting serious international crimes on any basis of jurisdiction can be costly, time-consuming and complex, requiring a significant amount of experience and expertise of all authorities involved. Political willingness of governments is needed to provide the necessary resources and to create an environment that is conducive to successful prosecutions. In Africa, overburdened and under-resourced judicial systems, combined with skill shortages, make any prosecution of serious international crimes very challenging.

Mauritius – the most recent African state to adopt implementing legislation – listed the following needs when asked what it needed to ensure more effective cooperation with the ICC:

“Legal training and non-legal technical expertise and assistance to the police force, relevant government departments, prosecuting authorities and members of the Judiciary as regards their respective involvement (in particular, cooperation requests and judicial assistance, arrest and surrender requests, investigation and collection of evidence, protection of witnesses and victims as well as their participation in proceedings, prosecution of international crimes, and enforcement of sentences). Dissemination of information to government and non-governmental organisations as well as to the public generally so as to enable them to cooperate without delay with the authorities.”³⁴

These provide indicators of where civil society, in partnership with governments, can lend its assistance.

This process has already begun in some countries, providing an opportunity for lessons to be learnt. For example, in 2003, after the adoption of implementing legislation, South Africa created a specialised unit within the National Prosecuting Authority (NPA) for the prosecution of international crimes, the Priority Crimes Litigation Unit (PCLU).³⁵ In addition, specialised units within the police service are tasked with assisting the PCLU: specifically, the Crimes Against the State (CATS) unit, located within the Directorate for Priority Crimes Investigation, performs the investigative function under the direction of the head of the PCLU.³⁶ In Uganda, the institutional framework to prosecute international crimes was established in 2008 in the form of a specialised division of the High Court: the International Crimes Division (ICD).³⁷ The ICD consists of five judges, a registrar and six prosecutors, supported by five investigators.³⁸

These institutions in South Africa and Uganda face numerous challenges. In South Africa, the political environment has made the initiation of prosecutions in some cases difficult, while Uganda's ICD has challenges in respect of resource-availability. One challenge that both South Africa's PCLU and Uganda's ICD continue to face is skills development. In this instance, CSOs can and have played a vital role in training the members of these specialised units. In South Africa, since 2008, the ISS has trained members of the South African prosecuting authority and the police service and members of Uganda's ICD in the investigation and prosecution of international crimes. However, much remains to be done in these and other countries, and civil society involvement will continue to be crucial.

Last but not least, CSOs will have to ensure that political will is created among key actors to ensure that their countries support the prosecution of international crimes and cooperate fully with the ICC. In this regard litigation is an effective tool in tackling political unwillingness. Courts are therefore a useful tool for compelling governments to comply with their international and domestic obligations, but an equally important role for CSOs is to garner support for international criminal justice initiatives among domestic political actors.

Endnotes

1. M Bergsmo, M Harlem & N Hayashi (eds) *Importing Core International Crimes into National Criminal Law*, *FICJC Publications No. 1* (2007), 3.
2. J Dugard *International Law – A South African Perspective* 3 ed (2005) 157.
3. Implementation of the Rome Statute Act 27 of 2002 (ICC Act), section 8(1).
4. ICC Act, section 8(2). Notably, the ICC Act is silent on the relevance of immunity in relation to cooperation requests and the relationship between articles 27 and 98. Contrary to implementing legislation in Kenya and Uganda, the ICC Act's immunity provision focuses on the impact of immunity in domestic prosecutions and makes no mention of immunity in relation to cooperation with the ICC. However, in practice the South African government has taken the position that immunity is not a bar to cooperation, as evidence by the belated (and begrudging) revelation that the Bashir arrest warrant had been endorsed by a South African magistrate, is active in the Republic and that Bashir would be arrested should he be present in the Republic.
5. Part 1 of Schedule 1 to the ICC Act replicates the definitions of genocide, crimes against humanity and war crimes in articles 6, 7 and 8 of the Rome Statute, respectively. Importantly, while the ICC Act incorporates the definitions of these crimes into South African domestic law, neither the Act nor Schedule 1 refers specifically to the ICC Elements of Crimes.
6. Sections 4(3)(b) and (d) of the ICC Act respectively. Notably, nationality and active personality jurisdiction may be founded on citizenship or if the person concerned (either the perpetrator or victim respectively) is "ordinarily resident in the Republic".
7. Section 21, International Crimes Act.
8. Section 22, International Crimes Act.
9. Section 115(1), International Crimes Act: "If a request by the ICC for assistance to which this Part applies concerns persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement, the Attorney General shall inform the ICC to enable it to direct its request to the other State or international organisation." Section 115 expressly refers to article 98 of the Rome Statute and in doing so it arguably adopts an interpretation of the article 27/98 relationship that implicitly rejects the common article 27 waiver argument. Section 115 is by no means perfect; it appears to imperfectly conflate article 98(1) and article 98(2) by referring to requests relating to "persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement". This is different from article 98(1), which refers to "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State". What is more, the reference to persons, property or information "subject to the control of another State" is novel and potentially casts the net far wider than traditional immunity *ratione personae*. However, these difficulties aside, section 115 clearly does not distinguish between persons coming from states parties to the Rome Statute, as the article 27 waiver argument requires.
10. The CICC Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC) (CICC Chart), available at http://www.coalitionfortheicc.org/documents/Global_Ratificationimplementation_chart_May2012.pdf states that "[t]he draft (available) is in circulation. It covers both complementarity and cooperation. On June 2008, the President of Benin sought the legal opinion of the Supreme Court. On September 2009, the draft was reviewed and handed over to the government for consideration of the amendments made by the Supreme Court. Once the Council of Ministers adopts the implementation legislation bill, the government will then send the draft bill to the National Assembly for enactment."
11. "Work on the cooperation law is in progress. A new draft of the penal code is before the National Assembly, and the UN is contributing to the drafting of a new Criminal Procedural Code. However, certain improvements to Burundi's Implementation legislation by comprehensively embracing all clauses, including the relevant clauses on complementarity and cooperation, are still necessary." Id.
12. "A draft bill covering complementarity and cooperation resulting from a joint workshop civil society/government held in September 2008 has been adopted by the Council of Ministers. Due to the government's openness, many stakeholders, including AI [Amnesty International] and PGA [Parliamentarians for Global Action], have provided input and observations which have been widely incorporated into the draft. The draft is presently before the Parliament awaiting deliberations, which will lead to the implementation of the draft into law. In December 2011, Parliament adopted the implementation bill. Following administrative matters, the Bill will be transmitted to the President for his concurrence. Previously, a bill on cooperation which was not comprehensive was enacted by Parliament." Id.
13. "Since June-July 2008, there has been a draft bill on Gabon's penal code which has been made available but only covers some aspects of complementarity. Presently, the government has given the go ahead for a review by national and international experts in order to come up with a more comprehensive draft that will cover both complementarity and cooperation clauses. The situation has encountered a stalemate with the important political changes resulting from the death of former President Omar Bongo." Id.
14. "The draft was completed without civil society input and it is currently before the Cabinet for approval before being presented to Parliament for enactment. The draft is not yet available to the public." Id.
15. "A draft implementation bill exists and is in the possession of the Cabinet, but has not yet been made public." Id.
16. "Presently, the government is in the process of gathering information and expertise that would help to complete the implementation process. The government is open to implementation of the [Rome Statute] and working with civil society groups throughout the process. It is believed that the persistent political crisis and rampant human rights violations have played a major role in delaying the completion of the implementation process despite the enthusiasm demonstrated by civil society towards the [Statute]." Id.
17. Namibia has a draft bill that is currently being revised.
18. "The 2006 Rome Statute (Ratification and Jurisdiction) Bill was passed by both houses of the National Assembly but was not harmonized for assent by the President before the end of the last civilian administration in May 2007. The bill is to be resubmitted by the Ministry of Justice." CICC Chart, *supra* note 10.
19. "A draft bill including both cooperation and complementarity provisions has been reviewed by the Supreme Court for improvement and

- amendments on the government request. The draft bill is currently with the government, which will incorporate as appropriate the amendments and observations from the Supreme Court and thereafter send the draft bill to the Parliament for enactment." Id.
20. "Since April 2008, the Minister of Justice has been working on the draft bill which is not yet public. It is expected that the draft will be open to civil society input once finalized and approved by the Cabinet, prior to being transmitted to the Parliament." Id.
 21. As the DRC is a monist country, the Rome Statute was technically implemented on 5 December 2002, the date that it was published in the Government Gazette. However, in a monist system legislative amendments are generally required in order to practically implement the law domestically. For more information see "The Repression of International Crimes by Congolese Jurisdictions", Le Club des Amis du Droit du Congo, available at http://www.iccnw.org/documents/CAD_TheRepressionofInternationalCrimes_Dec2010_EN.pdf.
 22. CICC Chart supra note 10.
 23. Amnesty International, "Democratic Republic of Congo: Parliament must reform and enact International Criminal Court bill", Public Statement, AI Index: AFR 62/002/2006 (3 February 2006) available at <http://www.amnesty.org/en/library/asset/AFR62/002/2006/en/4e5190db-fa0d-11dd-b1b0-c961f7df9c35/afr620022006en.pdf>. During the drafting process concerns were raised regarding the inclusion of the death penalty for genocide and crimes against humanity, the exclusion of certain war crimes contained in the Rome Statute, the inclusion of the defence of superior orders, insufficient pre-trial safeguards, as well as ambiguity in some of the language.
 24. See Amnesty International "Loi Modifiant et Completant Certaines Dispositions du Code Penale, du Code d'Organisation et de la Competence Judiciaires, du Code Penal Militaire et du Code Judiciare Militaire, en Application du Statut de la Cour Penale Internationale, République Démocratique du Congo: Commentaires et Recommandations du Projet de Loi de Juillet 2003 Portant Mise en Oeuvre du Statut de Rome de la Cour Pénale Internationale", AI Index: AFR 62/008/2004 (28 May 2004) and Amnesty International "République Démocratique du Congo: Commentaires et Analyse du Projet de Loi de la RDC Portant Mise en Oeuvre du Statut de Rome de la Cour Pénale Internationale" AI Index: AFR 62/031/2003 (29 September 2003).
 25. While the project is on-going, CSOs have been instrumental in these efforts to draft and adopt implementing legislation in the DRC. As Askin notes "[c]ivil society has played a major role in the effort to pass Rome Statute implementing legislation through the National Assembly. The International Center for Transitional Justice worked in coordination with other NGOs including Avocats sans Frontières and the Coalition for the International Criminal Court (CICC) to draft proposed elements of the legislation and educate parliamentarians about the Rome Statute. PGA has played an educational role and its Congolese membership has provided a core group of MPs from different parties who can push for adoption of the draft law. The United Nations Joint Human Rights Office's 'fight against impunity' unit has also advocated passage of the implementing legislation." K Askin "Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya" (2011) Open Society Foundation, 22. available at <http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>
 26. The Office of the UN High Commissioner for Human Rights (OHCHR) "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003" (August 2010), 433-4. In 2011, the DRC government announced that it would establish a Specialised Mixed Court for the Prosecution of Serious International Crimes in the Democratic Republic of Congo from 1990 until 2003. Once again, CSOs were at the forefront of this process. According to the Common Position adopted by local and international CSOs, which welcomed the establishment of the specialised mixed court, the draft statute of the mixed court required certain amendments in order to be truly independent, effective, and credible. These included extending its jurisdiction to crimes that took place after 2003, increased and effective international participation, increasing the role for victims and improving trial rights of accused.
 27. "Government officials in Liberia ... argue that international instruments ratified by Liberia are self-executing and may not require further implementation. There is no hostility vis-à-vis the ICC but the government is not showing willingness to speed up the implementation process." CICC Chart supra note 10.
 28. Id.
 29. Commonwealth Secretariat "Model Law To Implement the Rome Statute of the International Criminal Court" (May 2011), Annex B International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions, available at <http://www.thecommonwealth.org/files/238381/FileName/LMM%2811%2917PICCStatuteandImplementationoftheGenevaConventions.pdf>.
 30. AU Model Law on Universal Jurisdiction (copy on record with author).
 31. Commonwealth Secretariat Model Law supra note 29.
 32. O Bekou, "Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database", In M Bergsmo (ed) *Active Complementarity: Legal Information Transfer in Criminal Justice for Atrocities* (2011) 153-180.
 33. Id.
 34. Response of Mauritius to "Plan of Action Questionnaire on Implementing Legislation", issued by the Secretariat of the Assembly of States Parties to the International Criminal Court, available at http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action/2010+_+Plan+of+Action_ASP9.htm.
 35. Presidential Proclamation made in terms of section 13(1)(c) of the National Prosecuting Act 32 of 1998 (24 March 2003) A copy of the Proclamation is on file with the author.
 36. "Like the PCLU which has a much broader mandate than just international crimes, the CATS unit is tasked with investigating a range of other serious offences such as acts of terror, offences related to the unlawful use or transfer of firearms and other deadly weapons, organised crime, and acts which may pose a serious threat to the security of the state such as treason and sedition." M du Plessis, A Louw & O Maunganidze "African Efforts to Close the Impunity Gap" (2012) Institute for Security Studies available at <http://www.issafrica.org/pgcontent.php?UID=31915>.
 37. Id.
 38. Id.

CHAPTER 7: ENSURING COOPERATION WITH THE ICC

The most serious threat to the credibility, and indeed the very essence, of the Tribunals [ICTY and ICTR] has come from politically inspired delays in the arrest of indicted war criminals.

RICHARD GOLDSTONE¹

The arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials; no development of the law by the courts; and ultimately, no international justice.

GAVIN RUXTON²

Introduction

The late Judge Antonio Cassese – the first president of the ICTY – described that court as “**a giant without arms and legs – it needs artificial limbs to walk and work**”.³ He was referring to the Tribunal’s lack of direct enforcement mechanisms which meant it had to rely on the cooperation of states in order to investigate, arrest, try and sentence individuals who committed international crimes.⁴ Despite some states’ wishes, that metaphor remains as relevant for the ICC, if not more so. The ICC must also rely on the cooperation of states to “walk and work” and, unless the Security Council explicitly states otherwise in a referral to the ICC (which it has not done to date), the basis for the obligation on states to cooperate is a normal treaty obligation under the Rome Statute, not an elevated UN Charter obligation. This, in fact, makes the ICC even less mobile than the ICTY – which was established by a resolution of the UN Security Council, under Chapter VII of the Charter.⁵

As a result, states that ratify the Rome Statute accept a number of cooperation obligations. First of all, states are under a general obligation under article 86 to “cooperate fully with the Court”. In order to facilitate the cooperation of states, the Rome Statute requires states parties to “ensure that there are procedures available under their national law for all of the forms of cooperation”⁶ which are specified under the Rome Statute. All states parties are required to carry out arrest warrants issued by the ICC should the suspect be in their territory.⁷ In addition, the Rome Statute requires states parties to provide the following other forms of cooperation to the ICC in relation to its investigation and prosecution of crimes within its jurisdiction:

- The identification and whereabouts of persons or the location of items;
- The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC;
- The questioning of any person being investigated or prosecuted;
- The service of documents, including judicial documents;
- Facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
- The examination of places or sites, including the exhumation and examination of grave sites;
- The execution of searches and seizures;
- The protection of victims and witnesses and the preservation of evidence; and
- The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.

“Tanzania offers both to receive convicts of the International Criminal Court (ICC) to serve their jail terms in Tanzania prisons and to accommodate an ICC regional office in Arusha.”

Richard Shilamba
Children Education Society (CHESO),
Tanzania

Finally, after convicting and sentencing an offender, the ICC will designate the state where the term is to be served and states are requested under the Statute to “share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution”.⁸

In the event of non-compliance by a state party with a request to cooperate from the ICC, the Court may “make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council”.⁹

Unfortunately, African states parties have not always been forthcoming in their cooperation with the ICC, partly as a result of domestic political considerations, as well as because of the AU’s hostility towards the ICC. In this environment, African CSOs have had to come up with innovative measures to pressure these states to comply with their Rome Statute obligations.

If states remain the limbs of the ICC, then CSOs have become its central nervous system – spurring these sometimes lethargic limbs into action.

The Cooperation Record of African States

African states’ record of cooperation with the ICC has been mixed, particularly in respect of the surrender of individuals wanted by the ICC. On the positive side, the DRC handed over Germain Katanga and Mathieu Ngudjolo Chui to the ICC in October 2007 and February 2008 respectively, and in November 2011, the Ivory Coast surrendered Laurent Gbagbo. In an unexpected turn of events, three rebels from the Sudanese Justice and Equality Movement – Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus – voluntarily surrendered to the ICC.¹⁰ These rebels appeared pursuant to a summons issued by the ICC in respect of the attack in September 2007

against the AU peacekeeping mission in Sudan at the Haskanita Military, in which ten peacekeepers were killed and a number were wounded.

However, a number of suspects remain at large with the active or passive support of African states, including ICC signatories. Two cases stand out in this regard.

First, Sudanese President Bashir is subject to an arrest warrant in respect of alleged genocide, war crimes and crimes against humanity committed in Darfur.¹¹ Since a warrant for his arrest and surrender to the ICC was issued in 2009, Bashir has visited Kenya, Chad, Malawi and Djibouti (sometimes repeatedly), all of which have ratified the Rome Statute.

Rebel leader Bosco Ntaganda, who had evaded capture (allegedly with the support of Rwanda and Uganda – a Rome Statute state party) since the ICC issued an arrest warrant in August 2006, surprisingly handed himself over to the United States Embassy in Rwanda in March 2013, and appeared before the ICC later that month.¹² Ntaganda is accused of seven counts of war crimes (including the enlistment or conscription of children under the age of fifteen, murder, attacks against the civilian population, rape and sexual slavery, and pillaging) and three counts of crimes against humanity (including murder, rape and sexual slavery, and persecution).

The Role of Civil Society: The Bashir Example

On 1 March 2009, Pre-Trial Chamber I issued an arrest warrant for Bashir in relation to war crimes and crimes against humanity committed in Darfur. Following a successful appeal, genocide counts were added to the list of crimes for which the prosecutor alleges Bashir bears individual criminal responsibility.¹⁴ Bashir thus became the first sitting head of state to be indicted by the ICC since its establishment in 2002. The Bashir case presents a number of difficulties for the ICC.

First, the difficulty with the arrest warrant is that Sudan is not a state party to the Rome Statute but was brought within the remit of the ICC by way of the Security Council. While the Council decided that “the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court”, it did not extend that obligation to other states, merely urging them to do so.¹⁵ What is more, the Council has not followed up on its edict that Sudan must cooperate with the ICC.

Second, and related, is the question of immunity Bashir as a head of state has under customary international law. The Rome Statute has prima facie conflicting provisions on immunity. Article 27(2) states: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” The difficulty comes in trying to reconcile article 27(2) with article 98(1), which states that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”. A number of approaches have been adopted in an attempt to reconcile this contradiction, with varying consequences for the integrity of the two provisions.¹⁶ While the Pre-Trial Chamber of the ICC finally pronounced on this question in its non-cooperation decision in respect of Chad and Malawi – finding that head of state immunity was not applicable in the case of Bashir – its reasoning has been heavily criticised. Following the decision, the AU launched an initiative seeking an advisory opinion from the ICJ on this question. Needless to say, this uncertainty complicates the issue of Bashir’s apprehension, and African states (and the AU) continue to raise Bashir’s immunity as the basis for non-cooperation.

Third and perhaps most difficult to resolve, is the question of the effect the arrest warrant for Bashir could have on the on-going, fragile peace processes in Darfur and with the newly established Republic of South Sudan. This has raised the “peace versus justice dilemma”, as Bashir is integral to both processes and his arrest could throw the already delicate negotiations off course.

These first three challenges – to varying degrees – have culminated in the fourth challenge: the AU backlash against the arrest warrant. (See Textbox.)

These challenges have made cooperation in the case of Bashir difficult, with states taking differing and sometimes contradictory positions when Bashir has visited their territory, or planned to do so. There are both positive and negative examples of behaviour by African ICC states parties in this regard, and the distinguishing factor appears to be the involvement of CSOs which disseminated information about the travel plans of Bashir, and put legal and political pressure on their governments to comply with their obligations under the Rome Statute to arrest him.

Addressing Non-Compliance

Article 87(7) of the Rome Statute provides that where a:

“State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [ASP] or, where the Security Council referred the matter to the Court, to the Security Council.”²⁹

The ICC can therefore refer a recalcitrant state’s non-cooperation to the ASP or the Security Council (where it referred a matter to the ICC in the first place). The Security Council and the ASP can then take any “any measure they deem appropriate”. The Rome Statute unfortunately does not go any further than this.

Chad, Djibouti and Kenya have all been referred to the ASP and the Security Council. However, these institutions did not take the non-compliance any further.

The inability of the ICC to enforce compliance with arrest warrants is one of its biggest challenges and underscores the importance of securing cooperation at the domestic level, as evidenced in South Africa and Kenya.

The AU Non-Cooperation Decisions

From the outset, the majority of African states, acting primarily through the AU, have opposed the ICC proceedings in respect of Bashir. Only one week after the prosecutor requested that the Pre-Trial Chamber issue an arrest warrant for Bashir in July 2008, the regional body's Peace and Security Council requested that the ICC proceedings in respect of Bashir be suspended under article 16 of the Rome Statute. Thereafter, in what was undoubtedly the low-point in ICC-Africa relations, South Africa joined ranks with others at an AU meeting in Sirte, Libya in July 2009, to support an AU resolution calling on its members to defy the international arrest warrant issued by the ICC for Bashir. This position has been repeated by the AU – in modified forms – on a number of occasions since then.

Merits aside, this position places African ICC states parties in a difficult position as they are under competing (and apparently equal) international obligations in respect of Bashir: the obligation to cooperate under Part 9 of the Rome Statute, and the obligation to abide by the AU's decision not to cooperate under article 23 of the AU Constitutive Act. In its ruling on the non-cooperation decisions of Chad and Malawi, the Pre-Trial Chamber addressed the AU decisions but its reasons were less than compelling, nor is it clear that it even has the mandate to pronounce on these competing obligations. For its part, the AU has welcomed the decisions by African states not to arrest Bashir pursuant to its non-cooperation decisions.

Notably, the Security Council could break the deadlock in respect of these obligations, as the basis for the ICC's investigations and prosecutions in Darfur was a Security Council resolution (SCR 1593). However, the Council has elected not to upgrade the obligations on states to cooperate with the ICC – simply “urging them to do so”. Furthermore, despite the referral of instances of non-cooperation by Chad and Kenya by the Pre-Trial Chamber, and the ICC prosecutor's exhortations, the Council is yet to use its powers to force states to cooperate with the ICC where Bashir is concerned. As such, for the time being the ICC has to secure the presence of Bashir using the “normal” cooperation procedures.¹⁶

BASHIR TRAVEL MAP THE BAD



CHAD

In July 2010, Chad earned the “shameful distinction”¹⁸ of being the first ICC state party to host Bashir on its territory without arresting him pursuant to the 2009 warrant. The Sudanese president was attending a meeting of the Community of Sahel-Saharan States.¹⁹ There was little doubt that Bashir would be permitted to attend the meeting unchecked as Chad’s interior minister declared beforehand that “Bashir will not be arrested in Chad”.²⁰ According to the interior minister, Chad was “not obliged to arrest ... al-Bashir” as he “is a sitting president”²¹ – ostensibly raising Bashir’s immunity as a bar to cooperating with the Court. Notably, at this point the ICC had not issued a decision on the question of immunity.

In August 2011, Bashir again visited Chad, and again was not arrested. A third visit to Chad in February 2013 has been reported.²²

KENYA 2010 VISIT

In August 2010, Bashir was invited by the government of Kenya to attend the celebrations for the promulgation of the new Kenyan Constitution. Bashir attended despite an outcry from local and international CSOs. The Kenyan government was unrepentant; Foreign Minister Moses Wetangula stated that Kenya had “no apologies to make about anybody we invited to this function”.²³ According to the minister, “[Bashir] was here today because we invited all neighbours and he is a neighbour”.²⁴

Bashir’s visit to Kenya was all the more disappointing as it was the first to an ICC State Party that had adopted domestic legislation to give effect to its obligations to cooperate with the ICC in these exact circumstances. That legislation, the International Crimes Act (2008), specifically addresses the relevance of immunity in relation to cooperation requests. Section 27(1) thereof – titled “Official capacity of person no bar to request” – states that “[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC”. The Kenyan government did not offer an explanation for its refusal to arrest Bashir, and it appears that its own implementing legislation would preclude it from raising immunity as a reason in any event.

DJIBOUTI 2011 VISIT

In May 2011, Djibouti became the third African ICC State Party to violate its obligations under the Rome Statute by allowing Bashir to attend the inauguration of Ismail Omar Guelleh as its president.²⁵

MALAWI 2011 VISIT

Bashir visited Malawi in October 2011 to attend a summit of the Common Market for Eastern and Southern Africa. As noted above, in December 2011 Pre-Trial Chamber I rendered its decision on the refusal of Malawi to arrest Bashir. The Chamber found that Malawi failed to comply with its obligations to consult with the Chamber by not bringing the issue of Bashir’s immunity to it for its determination, and failed to cooperate with the ICC by not arresting and surrendering Bashir to the Court, which prevented it from exercising its functions and powers.

BASHIR TRAVEL MAP THE GOOD



SOUTH AFRICA ARREST WARRANT

In May 2009, it was reported that Bashir – then sought by the ICC – had been invited to President Jacob Zuma’s inauguration. CSOs quickly mobilised in an attempt to prevent Bashir’s attendance and advocates were briefed to prepare urgent court papers to compel the South African authorities to arrest Bashir in the event of his attending the inauguration. On the eve of the inauguration, the government clarified that although the Sudanese government had been invited, Bashir had not. Ultimately, Bashir chose not to visit South Africa at that time.

But the full extent of South Africa’s manoeuvring to ensure Bashir’s non-attendance was not disclosed until South Africa was seen to support the AU’s Sirte resolution of non-cooperation with the ICC. South Africa was quickly singled out for severe criticism both at home and abroad. Virtually all of its leading human rights organisations, including the South African Human Rights Commission, united around the call for the country to respect its own law and Constitution and to disassociate itself from the AU decision. On 31 July 2009, Dr Ayanda Ntsaluba, the director general of the Department of International Relations and Cooperation (DIRCO) disclosed at a press conference that an international arrest warrant for Bashir had “been received” (presumably from the ICC) and “endorsed by a [South African] magistrate”. Ntsaluba explained that “[t]his means that if President El Bashir arrives on South African territory, he will be liable for arrest”. In an unprecedented disclosure, DIRCO published together with the press statement, a legal opinion it had obtained making it clear its obligations to arrest and surrender Bashir.²⁶

KENYA ARREST WARRANT

See Case Study 1 below: Cooperation in the Court Room.

MALAWI, BOTSWANA AND THE AU SUMMIT

A second example of good practice – and an indication of how quickly progress might be made given that Malawi also inhabits the “bad” column – is Malawi’s decision to refuse to host the recent AU Summit in July 2012 after the body insisted that Bashir be invited. As noted above, following his visit in October 2011, Malawi was found to have violated its obligations under the Rome Statute by failing to arrest him. The AU Commission had instructed the Malawian government that as host it was required to invite all sitting African heads of state and government. In response, Vice-President Khumbo Kachali announced that “[a]fter considering the interests of Malawians, I want to inform Malawians that the cabinet met today and decided it was not interested to accept the conditions by the African Union, therefore Malawi is not hosting the summit”.²⁷ The push-back against the AU Commission was led by newly elected Malawian President Joyce Banda.

Even more encouraging in this instance was the show of support Malawi received from the government of Botswana in a public statement applauding Malawi’s decision and condemning the move of the summit to Ethiopia.

“Botswana therefore condemns this action as it is inconsistent with the very fundamental principles of democracy, human rights and good governance espoused by the AU, and which Malawi upholds. It is our considered view that Malawi as a sovereign state has the right to make decisions it may deem necessary, in fulfilment of her obligations under both the Rome Statute and the AU.”²⁸

CASE STUDY 1: KENYA – THE BASHIR ARREST WARRANT: COOPERATION IN THE COURT ROOM

Organisation: International Commission of Jurists – Kenya Section (ICJ - Kenya)

Country: Kenya

Initiative:
Approach to the Kenya High Court to issue a provisional arrest warrant for Bashir

Issues Addressed:
Kenya's obligation to cooperate with the ICC in respect of the arrest of indicted suspects

Status:
The case has been taken on appeal

Background

Following the ignominious appearance of Bashir at Kenya's constitutional celebrations in August 2010, the Sudanese president was again scheduled to visit the country in October to attend an Inter-Governmental Authority on Development (IGAD) summit. This time Kenyan civil society was prepared and wrote to President Mwai Kibaki and Prime Minister Raila Odinga demanding that Kenya make good on its obligations to the ICC by arresting Bashir should he visit Kenya.³⁰

In addition to publically calling on the government of Kenya to live up to its obligations under the Rome Statute, civil society organisations also decided to approach the courts for legal relief compelling the state to do so. To this end, on 18 October 2010, ICJ-Kenya

asked the Nairobi High Court to issue a provisional warrant of arrest against Bashir, and to order the minister of state for provincial administration to effect the warrant of arrest if and when Bashir set foot in the territory of the Republic of Kenya.

At the same time, the ICC itself was putting pressure on the Kenyan government to arrest Bashir if he attended the IGAD summit. On 25 October, Pre-Trial Chamber 1 of the ICC sent a request to the Kenyan government that it inform the Chamber, not later than 29 October, of any problem that would impede or prevent the arrest and surrender of Bashir in the event that he attended the summit.

This multi-pronged strategy was successful as just days before the IGAD summit was scheduled to start it was hastily moved to Addis Ababa.

Furthermore, although the Kenyan High Court was slow in ruling, in November 2011 it issued an order to the attorney general to secure an arrest warrant for Bashir under the International Crimes Act.³¹ The High Court decision is important in a number of respects.

Kenya Section of The International Commission of Jurists v Attorney General & Another:³² The Judgment's Significance and Key Findings

The Rome Statute is Part of Kenyan Law

First and foremost, the judgment is an endorsement of international criminal justice generally and the ICC in particular. Before the judge addressed the arguments raised for and against the issuing of the arrest warrant, Judge Ombija undertook a general discussion of the applicable international and domestic law. In so doing he found that under the new Constitution of Kenya, "[t]he general rules of international law ... [are] part of the law of Kenya",³³ and this included the Rome Statute. He concluded that, "the Constitution of Kenya, 2010 does not in any way reject the role of the International Institutions such as the ICC".³⁴

"[T]he Constitution ... requires those exercising Judicial authority or functions to be guided inter-alia, by the principles of the Constitution ... [h]uman-dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

Such values, I am persuaded, cannot be given fulfillment by Kenya acting in isolation of the community of nations. I am convinced that it is essential to recognize and facilitate the role of the International Criminal Court [ICC] operating within the frame-work of the Rome-Statute in the framework of the Kenyan Legal System."³⁵

The Court's endorsement of the Rome Statute and very progressive interpretation of the reach of its obligations may well prove significant for litigation in respect of Kenya's obligations under the Statute.

The Court went even further, addressing the principle of universal jurisdiction in some detail. It found that "under the principle of universality, any State is empowered to bring to trial persons accused of international crimes regardless of the place of the commission of the crime, or the nationality of the offender".³⁶ In such circumstances, "any State is authorised to substitute itself for the national judicial forum, namely the territorial or national States, should neither of them bring proceedings against the alleged author of an international crime".³⁷ What is more, according to the Court, the principle of universal jurisdiction is a jus cogens obligation "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".³⁸ Furthermore, prosecution of "international crimes has developed into jus-cogens and customary international law, thus delegating States to prosecute perpetrators wherever they may be found".³⁹

These findings, while not immediately relevant for the case at hand, certainly (if unchallenged) lay the foundation for future prosecutions of international crimes in Kenya, or CSO litigation if none are forthcoming.

In addition to these general findings, the Court made the following specific findings:

Civil Society may Apply for a Provisional Arrest Warrant under the International Crimes Act

The Kenyan government's primary argument was that the ICJ-Kenya did not have standing under the International Crimes Act to bring the application for a provisional arrest warrant. ICJ-Kenya based its application on section 32 of the International Crimes Act which, it argued, empowered private persons or CSOs to approach a High Court directly to issue a domestic provisional arrest warrant for a person wanted by the ICC when the government reneged on its duty to do so. This procedure, ICJ-Kenya argued, would serve the purpose of "reminding the Government of its international and domestic obligations ... and demanding that the Government honours its obligations".

Section 32 (1) of the International Crimes Act states:

"A Judge of the High Court may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him that—

- '(a) a warrant for the arrest of a person has been issued by the ICC or, in the case of a convicted person, a judgment of conviction has been given in relation to an international crime;*
- (b) the person named in the warrant or judgment is or is suspected of being in Kenya or may come to Kenya; and*
- (c) it is necessary or desirable for an arrest warrant to be issued urgently.'*

Notably, section 32(2) provides that a provisional warrant can be issued "even though no request for surrender has yet been made or received from the ICC".

Further, in terms of section 33 of the International Crimes Act, if a judge issues a provisional arrest warrant, the applicant has to inform the minister in charge of Internal Security, and provide him or her with supporting documents.

The Kenyan government disputed this interpretation. It argued that a request for a "provisional warrant" under the International Crimes Act could only be made by the ICC itself. In doing so it relied on the Rome Statute's article relating to provisional arrest (on which section 32 of the International Crimes Act is based), which provides that in urgent cases "the Court may request the provisional arrest of the person sought, pending presentations of the request for surrender and the documents supporting the request".⁴⁰ As the Rome Statute provision grants the ICC the exclusive power to request such an arrest it followed – according to the government – that only the ICC could request a provisional arrest under the International Crimes Act.⁴¹ What is more, the request must be directed to the Kenyan government – more specifically the minister in charge of internal security of the sovereign Republic of Kenya – who would then approach the High Court to issue the warrant. On this version, the reference to the "applicant" in

the International Crimes Act's provisions relating to arrest warrants refers to the state, and not a private individual or CSO. As a result, the government argued, not only did ICJ-Kenya lack locus standi to bring the case, but – in the absence of a request for a provisional warrant directed to the Kenyan government by the ICC – the High Court lacked jurisdiction to consider its application.

In considering the issue of standing, the Court held that “three aspects must be considered when public interest standing is sought: (i) is there a serious issues (sic) raised by the applicant? (ii) has it been established by evidence that the applicant is directly affected by the issue raised? In other words, is it within the mandate of the applicant?, (iii) does the applicant have a genuine interest in the matter at hand?”⁴² The Court found that ICJ-Kenya met these requirements and had “a genuine interest in the development, strengthening and protection of the rule of law and human rights”.⁴³

The Court went on to consider the approaches that other common law jurisdictions (namely the United Kingdom, Australia and Canada) have adopted to the question of standing in similar cases, concluding:

“In the disclosed circumstances of this case and having taken into consideration the various approaches taken in other common law jurisdictions to grant parties leave to bring action, I have decided to adopt the open ended approach. In my considered judgment based on the authorities, the ICJ – Kenya Chapter, the Applicant, has the necessary locus – standi to bring this application. In my judgment the matters raised by the Applicant and by extension the orders sought by the Applicant are justiciable. The application is thus tenable in law. The application thus succeeds to that extent.”⁴⁴

The Court proceeded to consider whether anyone other than the state could apply for an arrest warrant to be issued under the International Crimes Act when the ICC had issued a warrant and the minister for internal security failed, neglected or refused to execute it (that is, who could approach a High Court to issue a domestic arrest warrant). The Court found that “any legal person – ICJ Kenya Chapter included – who has the requisite mandate and capacity to enforce and/or to execute the warrant may be at liberty to do so”.⁴⁵

Thus the Court granted ICJ-Kenya's request to issue a provisional arrest warrant for Bashir, and ordered the minister of state for provincial administration to arrest Bashir if he set foot within the territory of the Republic of Kenya. Notably, the Court added that even if ICJ-Kenya was not able to apply for an arrest warrant directly, it could nevertheless approach the Court to order the minister in charge of Internal Security to arrest Bashir should he be present in Kenya in future.

Although the Court did not consider their merits in detail, it also rejected three further arguments raised by the government and an intervening party.

The Relevance of Immunity

The Court accepted ICJ-Kenya's submission that “the International Crimes Act 2008, like the Rome Statute, does not recognise immunity on the basis of official capacity”. In doing so, the Judge decided that “the High Court in Kenya clearly has jurisdiction not only to issue warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction, but also to enforce the warrants should the Registrar of the International Criminal Court issue one”.⁴⁶

This finding is relevant not only to future requests for cooperation with the ICC in respect of someone who lays claim to immunity, but also to prosecution brought in Kenya under the International Crimes Act where immunity is raised.

The Relevance of the AU Decisions and Regional Stability

During the course of the proceedings a CSO – Kenyans for Justice and Development (KJD) – joined the proceedings on the side of the government of Kenya. KJD argued that the AU’s non-cooperation decision of July 2009, which directed all AU member states to withhold cooperation with the ICC in respect of the arrest and surrender of Bashir, was binding on Kenya and its people. Furthermore, as Sudan had labeled the warrant of arrest against Bashir an act of aggression, “the execution of the warrants ... [would] jeopardise or risk the lives and property of an estimated 500 000 Kenyans in the Sudan”.⁴⁷ Finally, given Kenya’s role in the 2005 Comprehensive Peace Agreement that ended the civil war in Sudan, Kenya “should not take action that will precipitate instability in Sudan”.

While the Court did not deem it necessary to address these arguments directly, by implication it was not persuaded that they were relevant to the issuing of the arrest warrant.

LESSONS LEARNT

Information sharing is crucial. Civil society was successfully mobilised in Kenya and South Africa in advance of Bashir’s proposed visits to those countries based on information that was not within the public sphere. The ANICJ was crucial to this process.

Domestic courts can be useful allies in ensuring that local authorities respect their obligations under the Rome Statute.

- This is particularly true when states have adopted implementing legislation as this creates an additional, domestic obligation to comply with requests. It also means that there are political consequences of non-compliance.
- While litigation can be costly and lengthy, and (as was the case in Kenya) decisions might be rendered “after the fact”, the authoritative determination of domestic obligations is itself an important exercise.
- The next time a suspect wanted by the ICC visits Kenya the government will have fewer opportunities for justifying its non-compliance and the process to be followed has been clarified.
- This is highlighted by the fact that because the matter was settled before litigation was launched in South Africa such clarity remains elusive insofar as the procedure to be followed is concerned.

More broadly, these instances underline the importance of getting implementing legislation adopted in other African states parties.

Raising public awareness of and support for the Court within African states is the best means of guaranteeing cooperation in the long term. In 2010, as part of a stocktaking exercise, the president of the ICC set out areas where cooperation could be improved through increasing knowledge, awareness and support for the Court, noting:

“[I]ncreasing knowledge, awareness and support would, in the long term, contribute to building a culture of respect for the Court and its decisions and requests.”⁴⁸

Endnotes

1. R Goldstone "The Role of the United Nations in the Prosecution of International War Criminals" (2001) *Journal of Law & Policy* vol. 5:119, 124.
2. G Ruxton "Present and Future Record of Arrest War Criminals: the View of the Public Prosecutor of the ICTY" in WAM van Dijk & JL Hovens (eds) *Arresting War Criminals* (2001) 19.
3. A Cassese "On Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) *European Journal of International Law* I, 13.
4. *Id.* The Judge continued: "And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force states to cooperate with it."
5. The issue of state cooperation was a controversial one when the Court's statute was drafted in Rome in 1998, the final text striking a delicate balance that both recognises the constraints of the Court as a treaty-based mechanism (contra ICTY/R) but also creates a progressive cooperation regime that enables the Court to operate effectively. The resultant cooperation regime, contained in Part 9 of the Rome Statute, is a hybrid between a horizontal model and a vertical model of cooperation: the former involving the relatively weaker form of inter-state cooperation, the latter used to describe the "supra-State model" which is a more robust system of cooperation between the ad hoc Tribunals and states. This classification was noted by the ICTY Appeals Chamber in *Prosecutor v Blaskic*, UIT-95-14-T (3 March 2000), and further developed by Cassese. It has been generally accepted by other scholars since. See A Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" 10 *EJIL* (1999) 144, 164-165 and B Swart, "General Problems" in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary Vol. II*, (2002), 1590 and 1594-1598.
6. Article 88, Rome Statute.
7. Article 89(1), Rome Statute.
8. See article 103(3)(a), Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence.
9. Article 87(7), Rome Statute.
10. Bahar Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I on 18 May 2009, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus appeared voluntarily before the Court on 17 June 2010.
11. The ICC was seized with the Darfur situation by UN Security Council Resolution 1593 (2005).
12. See "DR Congo: Bosco Ntaganda appears before ICC" *BBC News* (26 March 2013) available at <http://www.bbc.co.uk/news/world-africa-21933569>.
13. Further charges were added in July 2012.
14. In their original ruling, the judges of the ICC's Pre-Trial Chamber I issued an arrest warrant against Bashir for a total of five counts of war crimes and crimes against humanity, but the panel threw out charges of genocide that had also been requested by prosecutor Luis Moreno-Ocampo. The prosecutor appealed this decision, and on 3 February 2010, the Appeals Chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.
15. UN Security Council Resolution 1593 (2005) referring situation in Darfur to the ICC, at para. 2.
16. Prosaically, this apparent contradiction can be explained by the fact that article 27 and article 98 were drafted by different committees in Rome. O Triffterer "Article 27" in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999).
17. For more information see E Keppler "Managing Setbacks for the International Criminal Court in Africa" (2011) *Journal of African Law, 1* and Human Rights Watch "Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court" (November 2010).
18. "Human Rights Watch Calls on Chad to Arrest Sudan's President" *Globe and Mail* (21 July 2010) available at <http://www.theglobeandmail.com/news/world/human-rights-watch-calls-on-chad-to-arrest-sudan-president/article1387444/>.
19. "Sudan's President Bashir Defies Arrest Warrant in Chad" *BBC News* (21 July 2010) available at www.bbc.co.uk/news/world-africa-10718399.
20. *Id.*
21. Moumine Ngarmbassa "Sudan's al-Bashir Defies ICC with Chad Trip" *Mail and Guardian* (22 July 2010) available at <http://mg.co.za/print/2010-07-22-sudans-albashir-defies-icc-with-chad-trip>.
22. S Lamoney "Chad Hosts Wanted Al-Bashir as Côte d'Ivoire Joins ICC" *African Arguments* (20 February 2013) available at <http://africanarguments.org/2013/02/20/chad-hosts-wanted-al-bashir-as-cote-d%E2%80%99ivoire-joins-icc-%E2%80%93-by-stephen-lamoney/>.

23. X Rice "Omar al-Bashir Tarnishes Kenya's Landmark Day" *The Guardian* (27 August 2010) available at <http://www.guardian.co.uk/world/2010/aug/27/omar-al-bashir-war-crimes-kenya>.
24. *Id.*
25. "Sudan's Bashir Attends Djibouti President's Inauguration" *VOA News* (7 May 2011) available at <http://www.voanews.com/content/sudans-bashir-attends-djibouti-presidents-inauguration-121463729/139121.html>.
26. Notes following the briefing of Department of International Relations and Cooperation's Director General, Ayanda Ntsaluba (31 July 2009) available at <http://www.info.gov.za/speeches/2009/09073110451001.htm>.
27. "Malawi Cancels AU Summit over Sudan's Bashir" *Al-Jazeera* (9 June 2012), available at <http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>.
28. Botswana Ministry of Foreign Affairs Press Statement (13 June 2012).
29. Pre-trial Chamber decisions in: *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Recent Visit to Chad ICC-02/05-01/09 (27 August 2010)*; *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Presence in the Republic of Kenya ICC-02/05-01/09 (27 August 2010)*; *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Recent Visit to Djibouti ICC-02/05-01/09 (12 May 2011)*; *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (13 December 2011)*; *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (11 December 2012)*; *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad ICC-02/05-01/09 (22 February 2013)*. All decisions are available on the ICC website <http://www.icc-cpi.int>.
30. "Kenyan Government Bows To Pressure As IGAD Summit Is Moved" *ICJ-Kenya Press Release* (29 October 2010) available at <http://www.icj-kenya.org/index.php/media-centre/news/329-kenyan-government-bows-to-pressure-as-igad-summit-is-moved>.
31. "Sudan's Omar al-Bashir: Kenya Issues Arrest Warrant" *BBC News* (28 November 2011) available at <http://www.bbc.co.uk/news/world-africa-15918027>.
32. *Kenya Section of The International Commission of Jurists v Attorney General & Another* [2011] eKLR (ICJ-Kenya v Attorney General).
33. This is established in article 2(5) of the Constitution of Kenya, 2010. The Judge noted that this "position is further fortified by the enactment of the International Crimes Act, 2008 [Act No. 16 of 2008], Section 4[1] of which provides; "The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya." See further Article 2(6) of the Constitution of Kenya.
34. *ICJ-Kenya v Attorney General supra note 32, 14.*
35. *Id.* 15.
36. *Id.* 16.
37. *Id.* 16.
38. *Id.* 17.
39. *Id.*
40. Article 92(1), Rome Statute.
41. The government argued that "Section 32 and 33 of the International Crimes Act, 2008 derive directly from Article 92 of the Rome Statute. Hence section 32 and 33 of the International Crimes Act, 2008, should be read together with Article 92 of the Rome Statute for their full tenor and effect. A reading of the aforesaid Sections and the said Article leaves no doubt that the request can only be made by the ICC in urgent cases." *ICJ-Kenya v Attorney General, supra note 32, 11.*
42. *Id.* 21.
43. *Id.*
44. *Id.* 24.
45. *Id.* 24.
46. *Id.* 19.
47. *Id.* 12.
48. Statement made at "Roundtable on Stocktaking of International Criminal Justice" at the 8th Assembly of States Parties to the ICC, RC/ST/CP/1/Rev.1. para 24.

CHAPTER 8: BRINGING JUSTICE HOME: COMPLEMENTARITY AND CAPACITY BUILDING – CIVIL SOCIETY IN ACTION

The most important question is whether we are going to continue to maintain a dividing wall between international criminal justice and domestic criminal justice. I think it is time that we bring down this wall when it comes to international crimes. We are now dealing with the phenomenon as if they are two completely separate systems. We need to make it into a single system. It does not make a difference whether the perpetrator is prosecuted before a domestic, regional or international court. The basis has to be that everyone is subject to justice and that we have a shared commitment to fighting impunity and providing accountability. The principle of accountability should not be limited by a jurisdictional battle over the appropriate forum for holding perpetrators accountable.

We should not allow jurisdictional barriers to stand in the way of accountability, and the pursuit of international justice should be a collaborative national and international effort. We should make sure that all States have incorporated in their domestic laws the crimes of genocide, crimes against humanity, war crimes and other international crimes.

We should also make sure that we push all States not only to incorporate these crimes in their civilian and military laws, but to make sure that they enforce them and to cooperate with each other in their enforcement. We need to have effective rule of law assistance training programs for all governments so that prosecutors, senior police officers and judges are trained in these international crimes.

CHERIF BASSIOUNI¹

The Rome Statute's principle of complementarity places the primary responsibility of prosecuting crimes against humanity, genocide and war crimes on states, recognising that their "effective prosecution ... must be ensured by taking measures at the national level".² This principle is given effect in articles 1 and 17 of the Rome Statute. Article 1 states that the ICC "shall be complementary to national criminal jurisdictions" and article 17 sets out how this principle operates in practice by applying the "willing and able" test to determine when the Court must defer to national proceedings.

A solid legal case can shape jurisprudence and set a precedent applicable to hundreds of other cases; a thorough investigation may result in the arrest of a war criminal; an informed and educated population can make demands on their governments; well-trained lawyers and CSOs can effectively protect victims in their home countries; and capacitated judiciaries, prosecuting and investigating authorities ensure that international criminal justice is more than an ideal, but a tangible, realistic and desirable objective.

Civil society must play a major role in ensuring that states live up to their end of the bargain. In carrying out this task, CSOs are faced with a number of diverse and context-specific challenges, as well as opportunities. As already noted, an important part of this process is ensuring that the necessary legal frameworks exist for the domestic prosecution of these crimes, and that the institutional and human capacity exists to do so effectively. Although civil society can encounter unforeseen obstacles even when there is an institutional foundation, the significant results of CSOs' work far outweigh the possible difficulties.

In this respect, four case studies will be used to demonstrate the role civil society can play in promoting complementarity.

The Obligation to Investigate and Prosecute in South Africa

This is an example of justice taking place in a conventional, domestic courtroom, but in a somewhat hostile and inert political-institutional environment. In this example, the role of CSOs was to ensure that the South African organs of states mandated to prosecute international offences were accountable for their decisions and, where necessary, reproached when they made incorrect decisions.

Civil Society and Government Working Together: Mobile Courts in the Democratic Republic of Congo

This case study examines the cooperative relationship between CSOs and the government to ensure justice is secured for victims of sexual abuse through unconventional courtrooms established in remote areas of the DRC.

Empowering the People: Outreach in Kenya

This case study demonstrates the need to educate citizens on the processes and benefits of international criminal justice.

The Prosecution of Hissène Habré – A Prosecution on the Horizon

The fourth involves a combination of domestic and international CSO pressure, as well as international judicial intervention, to ensure that Senegal fulfils its responsibility to prosecute international crimes when circumstances allow. Here the mechanism is a hybrid of domestic and regional justice.

CASE STUDY 2: SOUTH AFRICA – COMPLEMENTARITY IN THE COURT ROOM: THE ZIMBABWE TORTURE DOCKET

South Africa was the first African country to adopt implementing legislation in respect of the Rome Statute when it passed the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act). In addition to this, specialised units were established within the NPA and the police service to investigate and prosecute these crimes. However, it took ten years and significant CSO pressure culminating in a court order before South African authorities opened their first investigation into crimes under the ICC Act.

South Africa can be characterised as a country that is able to dispense international criminal justice. It has

- A suitable legislative framework;
- Specialised prosecuting and investigating units; and
- An experienced and established judiciary that enjoys safeguards to protect its independence.

In light of the domestic regime for the prosecution of international crimes under South Africa's ICC Act, and the specialised units established to implement it, CSOs were rightly eager to assist the government in its aim to bring "persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic law where possible".³ This is not just limited to acts committed in South Africa or by its citizens, as the object of the ICC Act included enabling the prosecution of any person accused of having committed a crime in the Republic and beyond its borders in certain circumstances. To this end, section 4 of the ICC Act provided for the exercise of universal jurisdiction by South African courts under certain circumstances.

Background

In March 2008 SALC **compiled and hand-delivered a docket containing evidence of acts of torture committed in Zimbabwe** to the PCLU, the unit in the NPA responsible for direction and management of investigations in terms of the ICC Act.⁴ The alleged torture occurred on 28 March 2007 following a raid on Harvest House, the headquarters of the opposition Movement for Democratic Change. SALC alleged that the torture was systematic, and took place as part of an attack against the civilian population, pursuant to a state policy: the hallmarks of crimes against humanity.⁵ The docket named senior security and government officials that it alleged bore individual criminal responsibility for these crimes under the doctrine of superior responsibility.⁶ According to the docket, these individuals frequented South Africa regularly on official and on personal business. On this basis SALC requested the National Director of Public Prosecutions (NDPP) to investigate, and if necessary prosecute, these crimes under section 4 of the ICC Act on the basis of limited universal jurisdiction.⁷

The response from the NPA was initially constructive. Upon receiving the docket, the head of the PCLU alerted the acting NDPP, who is given the power to decide whether or not to institute prosecutions for international crimes by the ICC Act. Following an initial assessment of the docket, the PCLU raised concerns regarding the issue of "gravity". Once again SALC intervened, providing an expert legal opinion on the issue to assuage the PCLU's concerns. As a result, the PCLU recommended that an investigation be undertaken into the allegations presented by SALC, and suggested that the police service be contacted in order to do so.

Organisations: Southern Africa Litigation Centre; Zimbabwe Exiles Forum; Lawyers for Human Rights

Countries: South Africa; Zimbabwe

Initiative: Challenging the decision of South Africa's investigating and prosecuting authorities not to investigate crimes against humanity committed in Zimbabwe

Issues Addressed: South Africa's obligation to investigate and prosecute international crimes; the threshold for triggering investigations; overcoming political unwillingness through litigation; providing practical and substantive content to the obligation to investigate and prosecute

Status: The case has been taken on appeal to the Supreme Court of Appeal; however, argument will be limited to narrow grounds relating to the interpretation of specific provisions of the ICC Act

However, the NDPP stalled and in June 2009, after eventually consulting the police, informed SALC that an investigation would not be undertaken. In reaching this decision, the NDPP accepted the police's reasons for not initiating an investigation: that there were difficulties in ascertaining the identity of the deponents and verifying the content of their statements; that there were questions around the legality of witness cooperation procedures involving SALC; that evidence could only be obtained using espionage in violation of Zimbabwe's sovereignty; that the docket relied on mere allegations; and, finally and instructively, that the proposed investigation had implications for relations with Zimbabwe.

It is the first time a South African court has considered the ICC Act and, although it did not involve a prosecution under the ICC Act, it nonetheless will significantly alter the international criminal justice landscape in South Africa. In fact, the decision may well overshadow the inaugural prosecution under the ICC Act (when it takes place) as it sets out in detail how the ICC Act operates.

The refusal by the NDPP to open an investigation meant that **South Africa was able but unwilling** to launch a domestic prosecution. Unsatisfied with the NDPP's decision, SALC launched a legal challenge in the North Gauteng High Court in December 2009 on the grounds that the decision not to pursue the matter was irregular and unlawful under South Africa's administrative justice principles and contrary to the rule of law.

In its application, SALC asked the Court to set aside the decision not to open an investigation and to order that the matter be remitted to the authorities for them to reconsider the decision. They were joined, as second applicant, by another CSO, the Zimbabwe Exiles Forum

(ZEF). The respondents cited in the matter were the NDPP (First Respondent), the director of the PCLU (Second Respondent), the director general of Justice and Constitutional Development (Third Respondent) and the National Commissioner of Police (Fourth Respondent).

Asked why SALC and ZEF decided to pursue this case, and specifically litigate the issues, Nicole Fritz, the executive director of SALC said:

"International criminal justice is best pursued at the national level. South Africa's adherence to its international obligation to investigate and prosecute persons accused of international crimes is an essential component of responsible and good governance and respect for the rule of law. It serves to ensure that perpetrators of international crimes committed in South Africa and abroad will face justice and that South Africa will not be a safe haven for perpetrators of these crimes."

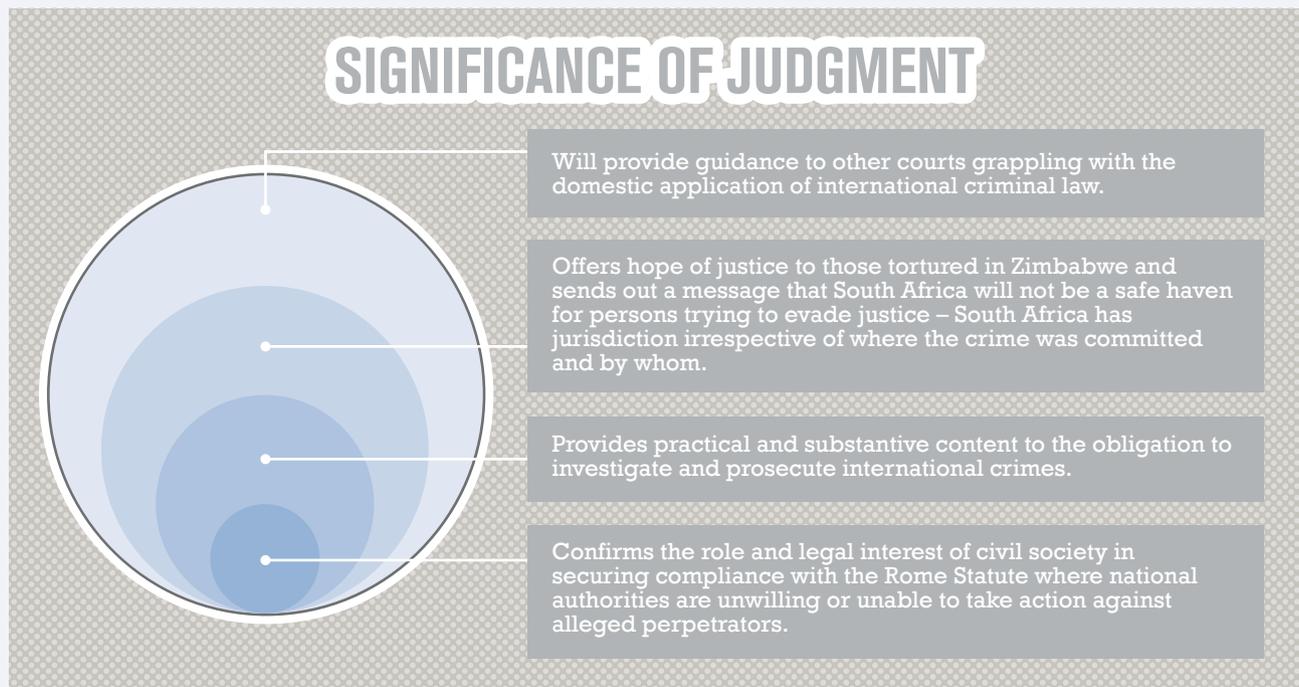
Strategic litigation is a tool that can shape jurisprudence and set a precedent applicable to hundreds of other cases, both in South Africa and beyond. It can provide practical and substantive content to international obligations, ensure respect for the rule of law, test the independence of courts and ultimately, contribute to the creation and maintenance of an environment conducive to the promotion, protection and realisation of human rights within a variety of contexts.

Fritz believes that this case raised:

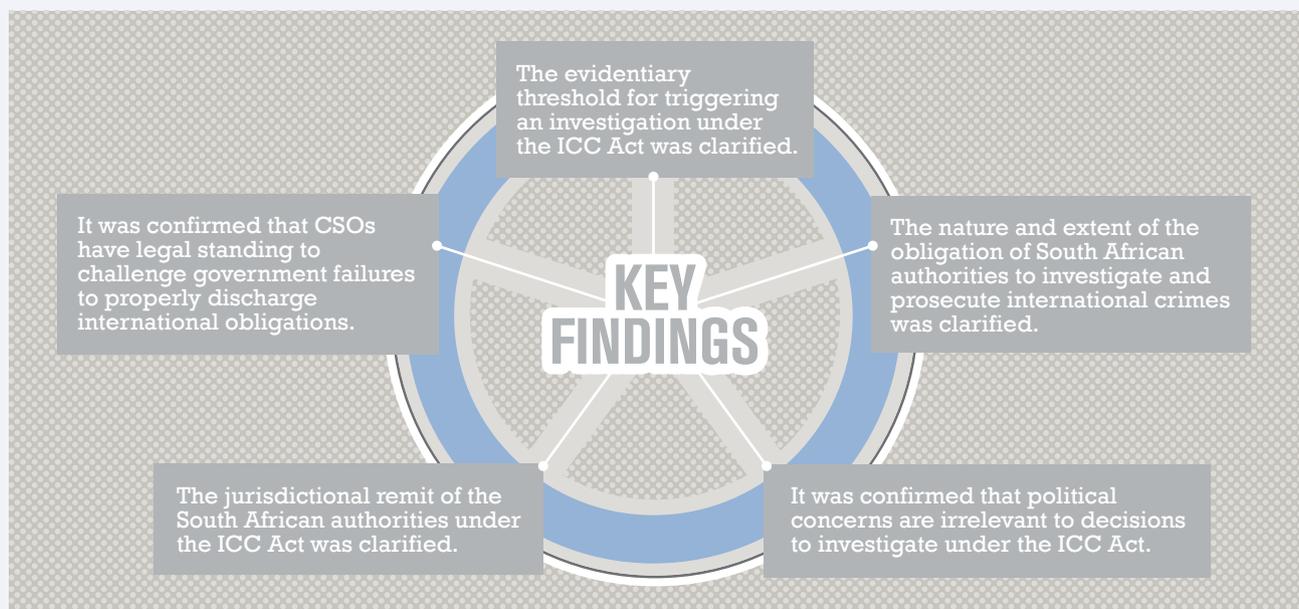
"critical issues that South African courts had, for the most part, not yet had the opportunity to engage with. Expert, skilled and considered litigation will enable Southern Africa not only to join other jurisdictions globally that are also grappling with issues around the domestic prosecution of international crimes, but will place Southern Africa at the helm of such efforts. This litigation and the accompanying advocacy will also provide guidance to other civil society [organisations] seeking to promote international criminal justice in the region."

SALC & Another v NDPP & Others⁸ : The Judgment's Significance and Key Findings

The North Gauteng High Court handed down judgment on 8 May 2012, finding that the decision taken by the NDPP to refuse SALC's request for an investigation was unlawful and inconsistent with the Constitution, and therefore invalid. In light of South Africa's international law obligations as recognised by the Constitution, the Court ordered the police's Priority Investigation Unit (in cooperation with the NPA) to "do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket".⁹ Having done so, the NPA must then decide whether or not to institute a prosecution.



This is a landmark decision. It is the first time a South African court has considered the ICC Act and, although it did not involve prosecution under the ICC Act, it nonetheless will significantly alter the international criminal justice landscape in South Africa. In fact, the decision may well overshadow the inaugural prosecution under the ICC Act (when it takes place) as it sets out in detail how the ICC Act operates.



The Legal Standing of Civil Society to Bring Challenges of this Nature

The respondents argued that SALC and ZEF did not have sufficient interest to bring this matter before a court and lacked locus standi (standing).

Under South African law an individual organisation can bring a matter before a South Africa court – even if they are not directly affected by the issue at hand – provided that the determination of the issue would be in the public interest and the matter is being brought on behalf of persons that cannot act in their own name.

The Judge was unequivocal in his ruling. He held that SALC and ZEF:

“[D]o not have to be the ‘holders’ of any human rights themselves. They certainly have the right, given their attributes, to request the state, in the present context, to comply with its international obligations on behalf of those who cannot do so, and who are the victims of crimes against humanity.”¹⁰

The Court appreciated that international crimes invoked unique considerations and an understanding of the context in which the crimes were being considered:

“The magnitude of the crisis in Zimbabwe and the failure on the part of Zimbabwean authorities to introduce any ameliorating or reforming measures has required that SALC consider a variety of initiatives in support of human rights and public interest law defenders.”¹¹

The Judge further noted that to deny SALC and ZEF standing would:

“[L]ead to the untenable situation that it would deny victims of international crimes standing in South African proceedings, and would shield decision-makers, like the Respondents, from accountability when faced with making decisions regarding prosecutions of international crimes that had occurred outside South Africa. This would make a mockery both of the universal jurisdiction principle endorsed by Parliament when enacting the ICC Act, as it would render the legislative provisions redundant, as well as the principle of accountable governance to which the Constitution commits South Africa. This could not have been the intention of the legislators or of the Constitution drafters.”¹²

The Judge ultimately concluded that:

“[A] number of groups are affected by the impugned decision nl. the Applicants’ rights to have the decision made lawfully and in accordance with constitutional and statutory obligations has been infringed, the victims of the torture who had been denied the opportunity to see justice done, and the general South African public who deserve to be served by a public administration that abides by its national and international obligations. The public clearly has an interest in a challenge to the manner in which public officials discharge their duties under the relevant legislation.”¹³

The Nature and Extent of the Obligation on the South African Authorities to Investigate and Prosecute International Crimes

The Court was keen to underscore South Africa’s obligations in respect of prosecuting international crimes, under both national and international law:

“The ICC Act ... goes beyond ‘normal’ jurisdictional requirements. In the context of the purpose of that Act, the Act requires that a prosecution be enabled as far as possible. Seen holistically therefore, all the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute, crimes against humanity ... and it is in the public interest that the State does so. In the context of the Act it is not decisive that the crimes contemplated by that Act were not committed in South Africa.”¹⁴

There is no suggestion that this obligation is limited to crimes that took place on a state’s territory. Rather, the **duty** is to exercise jurisdiction **where possible** when the jurisdictional requirements are met.

This is not the first time South African courts have considered the international obligation to prosecute such crimes under certain circumstances¹⁵; it is, however, the first time a South Africa court considered South Africa's obligations under the Rome Statute. This decision represents the boldest and broadest statement in respect international criminal law obligations to date.

The Threshold for Investigations

The Court also clarified the requisite threshold for the initiation of an investigation under the ICC Act, namely whether "a reasonable basis exists" for opening an investigation. This is the same threshold that applies to an initiation of an investigation by the prosecutor of the ICC. In doing so the court distinguished between the various processes and legal thresholds relevant to investigations and prosecutions.

The South African prosecuting authority persistently maintained that the evidence SALC and ZEF submitted was not sufficient for a prosecution. The CSOs, however, were asking for an investigation.

The ICC Act, like many domestic Acts, is silent on investigations, and in the course of oral argument SALC relied on the ICC's Kenya Authorisation Decision in which the ICC highlighted the different evidentiary burdens relevant to different stages of the investigatory and prosecutorial process. In terms of article 53 of the Rome Statute, an investigation should proceed if there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".

Finding that the respondents "had confused different thresholds for different steps that had to be taken in terms of the Statute",¹⁶ the Court gave substance to an aspect that the ICC Act was silent on but that is essential to its efficacy and fulfilling the purpose and object of the ICC Act:

"Article 53 of the Rome Statute only required that a reasonable basis existed for the decision whether or not to initiate an investigation. It was common cause in the present proceedings that the standard was met ... The sufficiency of material for prosecution purposes was therefore not the proper threshold that was required, and accordingly, the question ought to have been: Is there enough information to warrant an investigation in terms of the applicable law? The answer has to be, yes, and First Respondents have conceded that [the] Respondents had therefore laboured under an error of law in that context."¹⁷

More broadly, this finding is significant in that it brings clarity to the process of triggering an investigation under the ICC Act in the future, clarity that will be welcomed by other litigants looking to use the ICC Act.

The Jurisdictional Remit of South Africa's Investigating and Prosecuting Authorities

The most significant aspect of the decision was the Court's handling of the issue of jurisdiction, which formed a large part of the respondents' "defence". The fulcrum of the parties' jurisdiction submissions was the proper meaning to be ascribed to section 4(3)(c) of the ICC Act, which states that "[i]n order to secure the jurisdiction of a South African court ... any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if that person, after the commission of the crime, is present in the territory of the Republic".

The respondents argued that this provision established a so-called conditional universal jurisdiction regime in terms of which South Africa could not exercise jurisdiction in any form over crimes until the accused was present in the Republic, and that the absence of jurisdiction on the part of South African courts vitiated the jurisdiction of the police to investigate the torture docket, the two being co-extensive.

The applicants responded that section 4(3)(c) merely conditioned the exercise of enforcement jurisdiction¹⁸ by the courts on the presence of the accused. They argued that South Africa's prescriptive jurisdiction¹⁹ was provided for by section 4(1) of the ICC Act which states that "[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence" and so was not conditional on the presence of the

accused. This reading of the two provisions meant that South African courts did have jurisdiction over the offence. Furthermore, and in any event, the competence of the police to investigate crime was not territorially limited.

Although the point could have been made more clearly, the Court in substance accepted the applicants' submission that section 4(3)(c) of the ICC Act relates to the exercise of enforcement jurisdiction, noting:

*"[The Applicants' Counsel was] ... correct in submitting that s4 (3) of the ICC Act dealt with the jurisdiction of the court to try someone after an investigation. [Counsel for the applicants] submitted that Fourth Respondent's argument was absurd: it would mean that if a suspect was physically present in South Africa then an investigation could continue. If they then left, even for a short period, the jurisdiction would then be lost. If they then re-entered South Africa, an investigation would continue. I agree that this does amount to an absurdity. One does not know what would have occurred if an investigation had been ordered, it was not simply an open and shut case. Section 4 (3) was concerned with a trial. The ICC Act was silent on an investigation, but in my view it is logical that an investigation would have to be held prior to a decision by the First Respondent whether or not to prosecute. I am therefore of the view that Fourth Respondent's argument on the meaning of s4 (3) of the ICC Act cannot be upheld."*²⁰

Through this passage the Court put paid to the argument that the universal jurisdiction regime under the ICC Act is "conditional". In doing so it arguably accepted in substance the distinction made in the applicants' papers between prescriptive and enforcement jurisdiction. In form the Court accepted (and conflated) elements of the applicants' two arguments, drawing a distinction between the investigation of crimes and the trial proper and noting that the former is not limited by the requirement of presence while the latter is.

*"Chapter 2 of this Act deals with jurisdiction of South African courts in respect of crimes, and makes a crime against humanity a crime under South African domestic law. Section 4(1) has no requirement of presence."*²¹

Looking forward, irrespective of which interpretation one adopts, the decision does provide the South African police with extensive power to investigate international crimes the world over, without setting out any mechanism for determining which crimes should be selected (hence the suggestion of the "anticipated presence" standard by the applicants). In this regard it is worth mentioning that the effect of this construction of section 4 of the ICC Act will not only be felt in South Africa as Mauritius recently adopted implementing legislation in respect of the Rome Statute that contains a very similar provision on universal jurisdiction.²²

The Relevance of Political Concerns

The Court was unmoved by the respondents' argument regarding the political implications of the proposed investigation for relations between South Africa and Zimbabwe and between their respective security clusters. While it did not go so far as to rule that such considerations were wholly irrelevant to prosecutions under the ICC Act, it agreed with the applicants that they were premature at the investigatory phase.

*"In my view it is clear that when an investigation under the ICC Act is requested, and a reasonable basis exists for doing an investigation, political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act."*²³

Beyond the value of the decision for the Zimbabwe Torture Docket Case, these aspects of the decision will contribute significantly to the prosecution of international crimes under the ICC Act in the future. What is more, the Court praised the CSOs' efforts in preparing the torture docket and defended them against the unfortunate attacks levelled against them by the State.

*"[The] Applicants' bona fides were attacked, they were accused of publicity seeking, and almost reprimanded for daring to place an undue burden, which was an obvious waste of time, on them. These attacks herein were in my view unfortunate and unjustified, as they did not address the real crux of the case nl. whether the Respondents' response to the torture docket had been performed with due respect for the enabling law applicable to the functions, and with the respect for the values of the Constitution and South Africa's international law obligations."*²⁴

On this basis, the Court ordered the State to pay the costs of the court application. This support – both in principle and practice – for coordinated CSO litigation of this nature will encourage similar actions in the future.

The Significance and Impact of the Decision

- It underlines that South Africa's adherence to its international criminal law obligations is in the public interest.
- It provides content to South Africa's obligations in relation to international crimes in terms of the Rome Statute and ICC Act.
- It affirms that South Africa will not be a safe haven for perpetrators of international crimes irrespective of where the crime is committed or the nationality of the perpetrator .
- It holds out the strongest prospect yet of Zimbabwean officials having to account for their crimes, given the culture of impunity that prevails in Zimbabwe.

The impact of the Zimbabwe decision was almost immediate. In August 2012, South Africa opened its first investigation into international crimes under the ICC Act. What is more, it did so on the basis of universal jurisdiction, in respect of a former head of state, former Madagascan president Marc Ravalomanana, who is currently in exile in South Africa. The investigation was opened following the submission of a docket by the Association of the Martyrs of Antananarivo Merrina Square in respect of alleged crimes against humanity committed in Madagascar in 2009. According to the NPA, the docket raised a reasonable suspicion that crimes against humanity may have been committed. This investigation will be managed and directed by the NPA's PCLU, but carried out by the police's Directorate for Priority Crimes Investigation.

The decision to initiate the investigation was clearly influenced by the Zimbabwe decision. The NPA's announcement makes it clear that the applicable standard for the opening of an investigation is whether there is "reasonable suspicion" that crimes against humanity have been committed. The use of a "reasonable suspicion" test rather than the "reasonable basis" test endorsed by the High Court in the Zimbabwe Torture Case – is regrettable, but it remains to be seen whether there is any practical difference between the two evidential standards.

South African Government Appeals Zimbabwe Torture Case

In 2013, the Supreme Court of Appeal will hear the NPA's application for leave to appeal the decision of the High Court. The appeal is, however, limited to specific questions relating to the issue of jurisdiction, and irrespective of the outcome most of the key findings of the High Court will remain intact.

Lessons Learnt

This initiative and the outcome (the judgment) demonstrate the different roles civil society can embrace (either individually or collectively). It shows that civil society can, through a variety of initiatives, bring about unprecedented results through the novel use of litigation.

LESSONS LEARNT

Collecting Evidence

CSOs are often witness to or are in the vicinity of the commission of human rights violations and are in a position to report on the situation by:

- Collecting information (speaking to witnesses and victims);
- Documenting events;
- Identifying perpetrators;
- Collecting and preserving evidence; and
- Obtaining corroborative testimony.

Monitoring Compliance with Rome Statute and International Law Obligations

- Even if litigation does not materialise, collecting evidence, engaging with law enforcement officials and following up on enquiries allows civil society to monitor compliance and assess the officials' appreciation and understanding of obligations assumed in terms of the Rome Statute and international customary law, and their ability to adhere to those obligations.

Approaching/Engaging with Relevant Government Officials

- Civil society can bring matters that trigger a country's international criminal law obligations to the attention of the authorities responsible for taking further action.
- Evidence of international crimes, especially those committed outside the country in question, may not have reached the relevant authorities. Civil society therefore plays an important reporting function by ensuring that national authorities are aware when persons accused of international crimes are within its jurisdiction.

Litigation as a Tool for Securing Principled Support for International Justice

Strategic litigation:

- Provides a legal avenue that allows civil society to address political unwillingness;
- Provides practical and legal content to obligations that are relatively new in most legal systems;
- Specifies the ambit of the duties of investigating and prosecuting authorities and identifies legal thresholds that trigger the exercise of these duties;
- Creates precedents that will contribute to and inform future investigations and prosecutions by creating certainty; and
- Provides the judiciary with an opportunity to engage with international criminal law and to determine how it should be applied domestically.

CHALLENGES

Litigation is Expensive and Time Consuming

- Litigation is a tool that can bring about meaningful results; however, it will not be appropriate in all situations. Litigation is also extremely costly and time consuming.
- Case selectivity is therefore important and identifying cases that will address issues that are relevant beyond an individual case is an important consideration.

A Decision Relevant Beyond South Africa?

Although legal systems and frameworks vary from country to country, an initiative of this nature would not be limited to South Africa. In a number of countries in Africa situations that invoke international criminal considerations could benefit from increased engagement and pressure by civil society, and litigation if viable. Below are some examples where similar initiatives could be launched to challenge government inaction:

Kenya

Following post-election violence in 2008, Kenya was referred to the ICC. But no domestic prosecutions in terms of Kenya's domestic Rome Statute Act have been undertaken yet against those responsible for the election violence. This failure places Kenya in breach of its obligations in terms of both its international and domestic law obligations. Although it has been reported that a specified war crimes division will be set up within the judiciary, the continued failure of Kenya to ensure justice is done may warrant the initiation of legal proceedings to ensure that investigations and prosecutions commence.

Nigeria

In November 2012, the ICC released a report detailing its findings regarding alleged crimes against humanity committed in Nigeria. The report concluded that a reasonable basis existed to believe that the Boko Haram had committed crimes against humanity. The ICC prosecutor, Fatou Bensouda, on a visit to Nigeria, indicated that she hoped the country would take domestic action against the perpetrators. Civil society has the potential to ensure that Nigeria abides by its obligations by putting pressure on the Nigerian authorities to initiate domestic prosecutions.²⁵

Zambia

A slightly different scenario is the recent refusal of the Zambian government to extradite a number of genocide suspects to Rwanda. The Zambia government justified this decision on the ground that Zambia did not have an extradition agreement with Rwanda. Zambia, however, is party to the Great Lakes Pact and its Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity which provides that in respect of war crimes, crimes against humanity and genocide and in the absence of an extradition agreement, the Protocol serves as a sufficient legal basis for extradition.²⁶

CASE STUDY 3: DRC – COMPLEMENTARITY IN ACTION: THE MOBILE GENDER COURTS

Organisations: American Bar Association, Open Society Justice Initiative, Open Society Initiative for Southern Africa

Country: DRC (South Kivu)

Issues Addressed: Serious crimes, with an emphasis on gender-based violence and sexual crimes, including rape as a crime against humanity

Status: The mobile courts continue to operate, and the model has been replicated in the CAR, Sierra Leone, Guinea-Bissau, Somalia, and East Timor

Background

The eastern part of the DRC has one of the highest incidences of rape and sexual assault in the world. According to one report,²⁷ at this unprecedented level of gender-based violence a woman is assaulted every minute. This is due partly to the almost constant conflict in the eastern DRC over the last few decades as many sexual crimes are committed by armed forces. However, the combination of the incredibly regular occurrence of conflict-related rapes and the culture of impunity that permeates through the region has led to an increase of rapes committed by civilians as sexual violence becomes normalised and commonplace. The consequence is that victims of these crimes are not only victimised by the crime itself; the stigma that wrongly attaches to sexual crimes results in many of them being ostracised by their

family and they then have to suffer in the knowledge that the perpetrators will likely never be brought to justice.²⁸

There are two main reasons perpetrators escape accountability for these crimes: many of the rapes take place in remote, rural communities where there is seldom access to formal courtrooms and judicial structures, and (as a result) there is an overwhelming culture of impunity in which perpetrators are safe in the knowledge that their actions will not have consequences, and that they are unlikely to be prosecuted.

“The courts have brought a measure of justice – and dignity – to victims and demonstrate that, with modest support, local institutions can respond even under the most challenging circumstances.”

Open Society Foundation

It was in response to this utter lack of accountability for perpetrators and protection for victims that the mobile gender courts project was established. Mobile courts have been used in the DRC judicial system as a way to reach remote communities that have no formal courtrooms and are located far from the urban centres. Over the past few years, mobile courts have been established in a number of regions (including Bandundu, Katanga, Maniema, North Kivu, South Kivu, Ituri, Kasai

Occidental and Equateur) with the support of the government and inter-governmental organisations.²⁹ There was a hope that this model could be replicated to target sexual crimes in particular and so in October 2009 the American Bar Association / Rule of Law Initiative (ABA/ROLI) helped to establish an itinerant court to hear primarily but not exclusively cases of gender-based violence and sexual crimes in South Kivu, a project funded and designed by the Open Society Justice Initiative (OSJI) and the Open Society Initiative for Southern Africa (OSISA).

How Do they Work?

The mobile courts are created within the structure of the DRC justice system and are staffed solely by Congolese officials. Mobile courts have long been a feature of the DRC’s judiciary, but the ABA and OSJI courts are unique in that they focus specifically on gender-based violence and sexual crimes. The courts have discretion to hear other serious crimes, but their priority is to address the long ignored sexual offences.

“The gender justice mobile courts operated by ABA/ROLI have unquestionably delivered on their undertaking to bring justice to the remote reaches of the Eastern Congo”

ABA Report

What Were the Project's Goals?

There were three broad aims:

- To increase access to justice by holding judicial sessions in remote areas of South Kivu where traditional judicial structures were not present;
- To train judges, lawyers and police officers in international criminal law and the application of the Rome Statute as well as the domestic laws proscribing rape and other forms of sexual violence. In light of the history of sexual violence and the stigma attached

to the crimes and the victims there was also a need to train officials on how to approach these cases in a gender-sensitive manner. The long-term effect of this training would be to increase the capacity of officials working within the DRC judicial sector to effectively prosecute gender-based crime; and,

- To sensitise communities to the realities of sexual violence and to raise public awareness of the new sexual violence laws, the importance of reporting sexual violence and “emphasising that the shame and stigma of sexual assault should be upon those who perpetrate, and not upon those who suffer from, such crimes”.³⁰

What Jurisdiction Do they Have?

The courts have civil and criminal jurisdiction over military and civilian matters. The courts' focus is on conflict-related sexual violence, but can consider “women's issues more generally – including topics related to family law, property rights, and inheritance laws”.³¹ Importantly, however, the courts are flexible and can hear other serious crimes such as murder and theft.

Have There Been Many Prosecutions?

In less than three years of operation, 20 traveling courts heard 382 cases, with 204 rape convictions, 82 convictions for other crimes and 67 acquittals (29 decisions are pending).³²

Are the Courts Empowered to Apply International Law?

Yes! Significant efforts were made to ensure that the judges, lawyers, police investigators and court personnel were familiar with both domestic and international criminal law (including the Rome Statute), and as a result some accused persons have been charged with crimes against humanity.

What Aspects of the DRC Legal System Enable these Courts to Prosecute International Crimes?

The DRC has ratified the Rome Statute which, as the DRC is a monist country, is directly applicable in national courts. In addition there is domestic legislation criminalising genocide, war crimes and crimes against humanity. Article 28 of the 2006 Constitution is important as it excludes a defence of “following orders”. Civil courts in the DRC are not empowered to prosecute international crimes (as those prosecutions are reserved for military courts), but the mobile courts structure has gone some way to remedy this for the communities they serve.

A Case that Stands Out: Fizi³³

On New Year's Day in 2011, more than 60 women were raped by government soldiers in a horrific spree of violence and looting.

The commanding officer, Lieutenant Colonel Kibibi Mutuara, and ten of his subordinates were charged with crimes against humanity as a result of the systematic nature of their acts of rape and imprisonment. The court tried the accused, convicted nine of them, acquitted one and transferred one determined to be a minor to another court for trial.

There were a number of landmark features of this trial:

- The accused were charged with, and convicted of, crimes against humanity;
- The trial took place less than two months after the crimes were committed;
- For the first time a senior military official was put on trial – helping to remove the veil of impunity covering senior officials;
- Because the trial was held in the neighbouring village of Baraka, the community affected by the crimes was able to observe and participate in the trial – bringing justice home for this community; and
- This trial was a joint effort between ABA/ROLI, MONUSCO (the UN Stabilisation Mission in the DRC) and local NGOs.

What Other Impact – Beyond Prosecutions – Has the Project Had?

The officials involved in the trials were trained in victim and gender-sensitive approaches to criminal justice. Furthermore, the project undertook efforts to attract female personnel to the courts and to the legal profession more generally.

The sensitisation element involved a media campaign to decrease the stigma attached to victims of sexual crimes and to raise public awareness about the new domestic sexual violence law and the importance of reporting crimes.

The ABA/ROLI is also involved in the establishment of two pro bono legal aid clinics – in Bukavu and Uvira. These clinics will assist victims, referred to them by hospitals, during preparation for trial, as well as assisting them in obtaining any reparations that may have been awarded to them by the courts.

What Makes These Courts So Ground-Breaking?

The courts are domestic mechanisms, operating within the DRC's existing judicial structure. They reach communities that have little access to traditional judicial processes. They have the ability to apply international law, and so hold those responsible for atrocity crimes to account, and are an illustration of a novel approach to positive complementarity.

What Are the Tangible Consequences and Successes of the Courts?

- Victims in rural, previously inaccessible areas are given access to justice and, because they have a varied jurisdiction – being empowered to hear civil and criminal matters, against civilians and military personal, and can hear non-gender crimes – the courts are able to reach a vast number of victims.
- The courts illustrate how positive complementarity can be implemented in states and demonstrate how, with the right political will, international crimes can be tried in domestic settings without significant upheaval of the judicial system and without massive financial input. This aspect is vital because the ICC simply does not have the capacity to prosecute all perpetrators of international crimes: these courts provide the DRC with the opportunity to prosecute perpetrators the ICC cannot, such as lower-ranking soldiers.
- The willingness of the court to try the commander responsible for orchestrating the rapes at Fizi, Lieutenant Colonel Kibibi Mutuara, demonstrates a possible change in attitude in holding senior officials accountable.
- The training in international law provided to the officials is vital in ensuring continued “complementarity” projects and to ensure that the DRC is “willing and able” to prosecute international criminals.

“Quite apart from the innovative mobile gender court, it is the [DRC] government's cooperation in the process — aimed at holding its own troops to account — that makes these trials so remarkable. Typically, government actors, when accused of grave human rights violations, use state machinery not to secure accountability but to avoid it. It is why international criminal justice often happens only outside the country where the crimes were committed. In this instance, in the arrest and prosecution of Kibibi, the [DRC's] government is making good on its promise of a ‘zero tolerance policy will be enforced on the spot in Fizi’.”

**Nicole Fritz, “Congo Provides Justice Without Theatrics”
Business Day, 22 February 2011**

- The communities' exposure to the trials has unquestionably raised their awareness and understanding of the issues.
- Microphones are used to broadcast the proceedings to the hundreds of spectators, who have never seen a legitimate court process. Many are astonished to find that accused have free counsel and a right to a fair trial.
- The sensitisation element of the project is also exceptionally valuable. Through this the communities are taught about the devastating impact of sexual violence, which helps erode the stigma attaching to these crimes. This means that victims are given the confidence to come forward, and to get help. In a region where sexual violence is so prevalent this is a vital development.
- When the stigmas of sex crimes are finally reversed – with perpetrators regarded as weak and cowardly, while no shame attaches to victims – we will see a lessening of these horrific crimes.

Can This be Replicated for Other International Crimes in the Region?

Khan and Worthington are of the view that;

“Arguably the greatest strength of ABA/ROLI’s mobile court programmes is the extent to which they are genuinely oriented towards local ownership, both in terms of the structures within which they exist, and the personnel upon which they depend ... [The courts] are established under existing Congolese law, and are entirely staffed by Congolese judges, lawyers and court personnel. While the mobile courts are necessarily a temporary measure, the objective of building sustainable local capacity within the Congolese justice sector has overwhelmingly informed the justice sector-related strategies implemented by ABA/ROLI and its partners. These include the operation of legal clinics; training legal, law enforcement, and judicial personnel; supporting local bar associations; and supporting legal internships and scholarships for female students.”³⁵

Although these mobile courts have the ability to try crimes against humanity and the Fizi case was a landmark one, most cases have not involved rape as a crime against humanity but have prosecuted the suspects under domestic sexual violence law.

However, the success of the model – and the use of international law in the Fizi case – indicates that there is potential for similar models to be used as “complementarity” mechanisms.

LESSONS LEARNT

RESOURCES REQUIRED BY THE COURTS

- Salaries / stipends for the judges, lawyers and security personnel;
- Tents (easily constructed) and other equipment (such as microphones) to house the court;
- Computers, printers, and writing paper for the judges and court officials;
- Transportation for the court officials while on circuit, as well as for witnesses to attend the trial;
- Accommodation (often in monasteries) for the court officials while on circuit; and
- Security arrangements need to be made, and personnel sourced and appointed.

CHALLENGES

- The roads in rural DRC are often inadequate and hinder travelling for the court and for potential witnesses.
- Most of the remote towns have no running water or electricity, so generators must be used.
- Time constraints on the court hearings have a number of implications:
 - An emphasis on “streamlining” the proceedings risks rushing them, and risks putting the lawyers under too-tight time constraints.
 - The limited time periods also can place restrictions on which witnesses can be called – a crucial witness who is out of the area or ill may not be able to participate in the case at all, unlike in a fixed court.
 - This can all lead to injustice (for victims and accused alike).
- The ultimate responsibility for the success of these courts rests on the DRC’s legal system. Although the funders and facilitators are invested in the project it is Congolese judicial officials who are needed to make the project work – without their will and willingness the courts cannot function and cannot achieve their goals. Unfortunately, it may not be the fault of the individual officials but rather a general lack of capacity, resources and political will in the judicial system.
- For cases involving international law and international crimes there is a need to train the officials on how to correctly interpret and apply the law.

POSITIVE ELEMENTS

- The fact that the courts are wholly domestic and are staffed solely by Congolese officials – judges, prosecutors, defense counsel and civil party lawyers – has greatly helped their acceptance by communities.
- It is the travelling to the communities that is so important – the courts would not have had the same impact if the trials were held in the major urban centres far from the crime sites. It is the sense that justice is coming to them that is so important for the victims, and it is necessary for the officials to experience the same conditions as the community. It also makes the sensitisation project much easier if the cases are heard in the communities.

SUGGESTIONS

- The period that the court stays in each location should not be inflexible – it is impossible to predict the amount of business the courts have deal with, and so with experience the project should be prepared to adapt its length.
- The nature of the courts – that the lawyers and judges are taking time out of their regular jobs in provincial capitals – means that there must be structure, predictability and forward planning. These officials need to be able to coordinate their mobile court duties, which take them far from home for weeks at a time, with their other work.

CASE STUDY 4: KENYA – OUTREACH: TAKING INTERNATIONAL CRIMINAL JUSTICE TO THE PEOPLE³⁶

Background

In the short and turbulent history of the Rome Statute and the ICC, Kenya has proved to be a test-case for a number of the challenges and successes the international criminal law project has encountered.

As already mentioned, Kenya was at the centre of a storm of controversy when it hosted Sudanese President Bashir in August 2010, and then again when, under immense pressure from CSOs, the government cancelled a second planned visit by Bashir. These events were a good illustration of the practical implications for states with legislation domesticating their Rome Statute obligations, and of the role CSOs can play in ensuring adherence to those obligations.

After the Presidential Election held on 27 December 2007, the Kenyan Electoral Commission declared incumbent President Mwai Kibaki the victor. His political opponent, Raila Odinga, rejected the results, accusing the ruling party of electoral fraud. Widespread violence followed, mainly along ethnic lines, as Kibaki is Kikuyu and Odinga Luo. About 1 200 people were killed, and 500 000 people were displaced. Former UN secretary-general Kofi Annan was called in to mediate and a peace deal was reached in which the parties agreed to establish a Commission of Inquiry. The commission, chaired by Judge Philip Waki, released a report and recommended that a domestic tribunal be established to try those responsible in Kenya. The Waki Report was also given to Annan, who was instructed to forward it to the ICC if the Kenyan tribunal was not established.

The ICC opened investigations once it was satisfied that no genuine attempt at local accountability was being undertaken. This ICC investigation into the violence that followed the Kenyan elections in 2007 illustrates the manner in which the ICC Office of the Prosecutor will initiate an investigation into a situation in a state party. The investigations began only after the prosecutor determined that the Kenyan government was unwilling to prosecute the perpetrators domestically.

Today Kenya has to balance domestic and international prosecutions of perpetrators: there is pressure on the director of public prosecutions to institute domestic prosecutions for the post-election violence, in addition there are on-going ICC cases concerned with the same events. As in all situations before the ICC only those deemed to be most responsible have been indicted by the ICC. This means that the burden for prosecuting the “foot soldiers” and the lower ranking officials involved in the post-election violence will have to fall on the domestic mechanisms.

The situation in Kenya has also been the setting for two of the more novel aspects of an ICC prosecution: **outreach and victim participation.**

“Outreach is a process of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC. Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.”³⁷

For the first time in international criminal justice the ICC process affords **victims** a number of rights. Ordinarily in criminal cases victims are seen merely as witnesses for the prosecution, but in the ICC they are to be treated as a specific party to the case. Victims are afforded the opportunity to participate in the hearings and are provided with their own legal representative. The ICC is also empowered to grant reparations to the victims following a successful prosecution – this is in line with the goal of restorative justice and is an attempt to assist in rebuilding the victims’ lives. The difficulty faced by the ICC is that many of those affected by the crimes are in rural, inaccessible areas and often have no knowledge of the process or the purpose of the ICC. CSOs have a vital role to play in outreach as the resources of the ICC simply do not extend to providing all countries with outreach officials, and so simply cannot reach all victims and potential participants in the trials.

Organisation: Kituo Cha Sheria

Countries: Kenya

Issues Addressed: Outreach and awareness of the ICC and international criminal justice processes

Kituo Cha Sheria's Outreach

Kituo Cha Sheria is a CSO based in Nairobi that designed a project aimed at facilitating effective community participation in the domestic Truth Justice and Reconciliation Process in Kenya, as well as victims' participation in the ICC process in the wake of the post-election violence. The programme has two broad aims: to educate Kenyans about the processes and how the ICC and international criminal law can create justice for the post-election violence; and to collect victim testimony and assist victims in appearing before the ICC.³⁸

Members of the organisation travel to rural communities that were affected by the 2007/2008 post-election violence in all eight provinces and host forums in public places such as churches and social halls. Here they provide the communities with information about the ICC, its jurisdiction and rules and procedures. They have also developed materials with information and frequently asked questions about the ICC. Providing these communities with information is vital in a country where the ICC process has become politicised and where there has been a general lack of knowledge of and of trust in the international process. There is a need to ensure that knowledge of the ICC is spread accurately and comprehensively.

LESSONS LEARNT

SUCCESSSES

- The organisation has been granted permission by the ICC's Trial Chamber V to file amicus observations, which will help to ensure that the victims' participation is both meaningful and beneficial.
- Kituo has also directly assisted victims in submitting victim participation and reparation application forms to the ICC. The programme has reached 6 000 victims and has submitted over 2 000 applications, some of which have resulted in victims being admitted as participants in the cases. Kituo's involvement has been invaluable as the application process is cumbersome for the victims. The forms require detailed information from the victims and many of the required documents were lost or misplaced when the victims fled during the violence. Additionally, some of the information is sensitive and revisiting it for these applications traumatised the victims.
- The vast number of victims and communities and that Kituo has been able to reach has allowed the spread of knowledge and understanding of ICC processes. This has allowed many victims who would not otherwise have had the requisite knowledge or resources to participate, to do so.

CHALLENGES

- It is clear that the ICC does not have the capacity to conduct thorough and widespread outreach activities and so the burden of this will often fall on CSOs.
- It is often citizens in rural areas who are most in need of outreach activities as they have the least access to more general information. This places financial and logistical burdens on organisations undertaking outreach activity.
- Outreach needs to extend to a wide range of communities with different levels of knowledge and awareness of international criminal law. This can require that a variety of different materials are prepared which can be time consuming and logistically difficult.

BENEFITS OF EFFECTIVE OUTREACH

- Without outreach programmes many victims of international crimes would remain unaware of their rights and the extent to which possibilities of achieving justice exist.
- The ICC has emphasised the need for victim participation in the trials but without outreach many victims remain unaware of this possibility and of how to approach the Court.
- The high volume of negative coverage of the ICC can be counteracted by outreach programmes that can dispel myths about the ICC and provide comprehensive information about the Court and international criminal justice more generally.

CASE STUDY 5: SENEGAL – THE TRIAL OF HISSÈNE HABRÉ: A PROSECUTION ON THE HORIZON

The case of Hissène Habré has been pushed from domestic to regional to international courts and back, but the former president of Chad is yet to answer the serious allegations that have been levelled against him. However, after concerted efforts by a number of actors – not least civil society which has refused to relent in its call for justice – it appears that the victims of Habré’s alleged crimes will soon finally have their day in court.

Background

The case has been before a variety of forums.

Senegal

Habré is alleged to have ordered large-scale violations of human rights during his eight years in power, which ended in 1990, including arrests of political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. He was granted political asylum by Senegal, and has been living in exile there for the last two decades. Attempts to bring him to justice began in 2000, when victims of his past crimes lodged a complaint against him with a senior investigating judge in Senegal, who swiftly indicted Habré for having aided and abetted crimes against humanity and acts of torture and barbarity and placed him under house arrest. However, Habré successfully appealed the decision to indict him on the basis that the courts of Senegal had no jurisdiction over crimes committed outside the territory of Senegal by a foreign national against foreign nationals. Notably the Court found that the Senegalese Code of Criminal Procedure did not provide for universal jurisdiction.³⁹

Belgium

Around the same time, a Belgian national of Chadian origin lodged a complaint with a Belgian investigating judge against Habré accusing him of *inter alia*, serious violations of international humanitarian law, torture and genocide. A number of other individuals lodged similar complaints before the same judge. The complaints were based on Belgium’s universal jurisdiction law and the Convention Against Torture. As a result, the Belgian judge contacted Chad requesting mutual legal assistance in his investigation, with which Chad duly complied, further stating that it had waived Habré’s immunity in 1993. The Judge also contacted Senegal requesting information regarding the on-going proceedings against Habré. Based on his investigations, the Belgian judge issued an international warrant for Habré in September 2005 for serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes. That same month Belgium formally requested the extradition of Habré by Senegal to Belgium.

AU

A Senegalese court, however, refused the request for extradition on the basis that Habré enjoyed permanent functional immunity in respect of acts committed while he was in office, and Senegal referred the issue to the AU. In July 2006, the AU decided that Habré’s prosecution fell “within the competence of the African Union, ... mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial”.⁴⁰ Furthermore, the AU mandated the AU chairperson to “provide Senegal with the necessary assistance for the effective conduct of the trial”.⁴¹

The Standoff between Belgium and Senegal

A dispute then ensued between Belgium and Senegal over the effect of the AU’s decision on Belgium’s extradition request and Senegal’s obligation to extradite or prosecute Habré under the Torture Convention. Notably, in 2006 the UN Committee Against Torture found that Senegal had violated the Torture Convention by not adopting such “measures as may be necessary”⁴² to establish its jurisdiction over the crimes listed in the Convention, and failing to submit Habré’s case to its competent authorities for prosecution or, in the alternative, complying with Belgium’s extradition request.

In response, Senegal repudiated its previous position that Habré enjoyed immunity and in 2007 implemented a number of legislative reforms related to the prosecution of international crimes in order to comply with the Torture Convention, as well as to give effect to its obligations under the Rome Statute (see Chapter 5). Notably, the legislation provided for the prosecution of crimes which “at the time and place where they were committed, were regarded as a criminal offence according to the general principles of law recognised by the community of nations, whether or not they constituted a legal transgression in force at that time and in that place”.⁴³ Furthermore, it empowered Senegalese courts to prosecute a foreigner accused of committing acts outside its territory “if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal [or of Senegalese nationality at the time the acts are committed], or if the Government obtains his extradition”.⁴⁴ In other words, it empowered them to exercise universal jurisdiction.⁴⁵

Senegal informed Belgium of these measures and repeated the AU’s call for states and international donors to “mobilise all the resources, especially financial resources, required”⁴⁶ for the trial. In response, Belgium reiterated its request for judicial cooperation. As a result of the standoff, in February 2009, Belgium instituted proceedings before the ICJ, claiming that Senegal was obliged to bring criminal proceedings against Habré for acts including crimes of torture and crimes against humanity, failing which Senegal was obliged to extradite him to Belgium so that he could answer for these crimes before the Belgian courts.⁴⁷

African Regional Courts

At this stage regional courts became involved in the matter. First, the newly established African Court on Human and Peoples Rights, in its first decision rendered on 15 December 2009, refused to hear a case brought against Senegal that sought the withdrawal of the case against Habré. The African Court did so on the basis that Senegal had not made a declaration accepting its jurisdiction to entertain such applications in terms of the Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court of Human and Peoples Rights.⁴⁸ Then, in November 2010, the Court of Justice of the Economic Community of West African States (ECOWAS) found that “the mandate which Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Mr Habré to take place, within the strict framework of special ad hoc international proceedings”.⁴⁹

In July 2010, 117 African CSOs joined Nobel Peace Prize winners Archbishop Desmond Tutu and Shirin Ebadi and other activists in calling on Senegal and the AU to move forward with the trial of Habré, noting:

“The victims of Mr Habré’s regime have been working tirelessly for 20 years to bring him to justice, and many of the survivors have already died. Instead of justice, the victims have been treated to an interminable political and legal soap opera.”⁵⁰

The AU has made a number of pronouncements in respect of Habré. In January 2011, it “request[ed] the Commission [on the Implementation of Decision Assembly/AU/Dec.297 (XV) on the Hissène Habré Case] to undertake consultations with the Government of Senegal in order to finalise the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision”,⁵¹ and then in July 2011 it urged Senegal “to carry out its legal responsibility in accordance with the United Nations Convention against Torture[,] the decision of the United Nations ... Committee against Torture[,] as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial”.⁵² In January 2012, the AU “request[ed] the Commission ... to continue consultations with partner countries and institutions and the Republic of Senegal[,] and subsequently with the Republic of Rwanda[,] with a view to ensuring the expeditious trial of Hissène Habré and to consider the practical modalities as well as the legal and financial implications of the trial”.⁵³

The ICJ

The ICJ heard arguments in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* in March 2012, and rendered its decision that July. The ICJ found that Senegal breached its obligations under the Torture Convention, which requires states parties within whose territorial jurisdiction the alleged torturer is found to “if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.⁵⁴ The Court concluded, unanimously, that Senegal “must ... take without further delay the necessary measure to submit the case [of Mr Hissène Habré] to its competent authorities for the purpose of prosecution, if it does not extradite ... [him]”.⁵⁵

The response from Senegal to the ruling was better than expected. The government first welcomed the decision then, in August 2012, signed an agreement with the AU to set up a special tribunal to try Habré.⁵⁶

The Structure of the Court

In terms of the agreement negotiated with the AU, an extraordinary chamber will be established within the existing Senegalese judicial system, specifically the Dakar District Court and the Appeals Court in Dakar, to prosecute Habré.⁵⁷ The Court will be a hybrid, staffed by national and international judges. More specifically, the Chamber will be made up of an investigative section of four Senegalese judges, an indicting chamber of three Senegalese judges, and a trial chamber and an appeals chamber each with two Senegalese judges and a judge president from another African state.⁵⁸ The prosecutor and his or her three deputies will be Senegalese. In appointing the prosecutors and judges, the candidates' high moral character, impartiality and integrity will be determinative. They will be nominated by Senegal's justice minister and appointed by the AU Commission chairperson.⁵⁹ This structure was devised in response to the ECOWAS Court ruling that called for the creation of a special ad hoc procedure of an international character,⁶⁰ which is binding on Senegal.

As far as jurisdiction is concerned, the Chamber will be empowered to prosecute those most responsible for international crimes committed in Chad between 1982 and 1990 generally, although it is not likely to prosecute anyone other than Habré.⁶¹ In doing so the Chamber will apply substantive international criminal law; however, it will rely on the procedural law of Senegal.⁶²

Another interesting aspect of the Chamber will be the role given to victims in proceedings, who will be able to apply to participate in proceedings and may be entitled to reparations from a special victims' fund.

It remains to be seen how the trial will be funded, but it is expected that significant foreign support will be forthcoming.

Pre-Trial Phase

The Senegalese Court was inaugurated in February 2013 with the commencement of a pre-trial phase. This phase is expected to last 15 months with the hope that the trial will begin sometime in 2014.⁶³

Opportunities for Civil Society

To date, civil society has been key in ensuring that Senegal does not shirk its responsibility to prosecute the crimes alleged to have been committed by Habré. While the creation of a Special Court is a milestone, civil society must continue to monitor developments to ensure that the final product meets the requirements of international justice, is sensitive to the needs of victims of the violations concerned and respects the fair trial rights of the accused.

More broadly, this trial represents a prototype for future national-regional hybrid tribunals that, if successful, will be unique mechanisms for meeting the demands of complementarity domestically while sharing the financial responsibility regionally.

Endnotes

1. International Criminal Law Network "Perspectives on International Criminal Law" Amicus (December 2012) 20.
2. Preamble, Rome Statute.
3. Preamble, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act).
4. Presidential Proclamation made in terms of section 13(1)(c) of the National Prosecuting Act 32 of 1998 (24 March 2003). A copy of the Proclamation is on file with the author.
5. See article 7, Rome Statute.
6. See article 28(b), Rome Statute.
7. Section 4(3)(c), ICC Act: "In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (l) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if ... that person, after the commission of the crime, is present in the territory of the Republic."
8. SALC and Another v NDPP and Others 2012 (3) SA 198 (GNP) (SALC v NDPP).
9. Id at para. 33.5.
10. Id at para. 13.4.
11. Id at para. 12.
12. Id at para. 13.
13. Id at para. 13.3.
14. Id at para. 13.4.
15. The South African Constitutional Court touched on the issue of whether there was an obligation to prosecute international crimes under international law. See in this regard *S v Basson* 2005 (1) SA 171 (CC) and *S v Basson* 2007 (3) SA 582 (CC).
16. SALC v NDPP supra note 8 at para. 28.
17. Id.
18. Namely, a state's power to "apply or enforce the rules that it has previously prescribed". From M Milanovic "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties" 8 Human Rights Law Review (2008), 411.
19. Namely, being the power to make laws. Id.
20. SALC v NDPP supra note 8 at para. 32.
21. Id at para. 21.
22. See section 4(3)(c), The International Criminal Court Act 27 of 2011.
23. SALC v NDPP supra note 8 at para. 31.
24. Id at para. 20.
25. The ICC Report can be found here: <http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>.
26. Southern Africa Litigation Centre "Closing the Impunity Gap: Southern Africa's Role in Securing Justice for the 1994 Rwanda Genocide" (2011) available at <http://www.southernafricalitigationcentre.org/2011/12/15/closing-the-impunity-gap-southern-africas-role-in-securing-justice-for-the-1994-rwanda-genocide/>.
27. "Congo Study Sets Estimate for Rapes Much Higher" NY Times (11 May 2011) available at <http://www.nytimes.com/2011/05/12/world/africa/12cong.html>.
28. OHCHR, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (Unofficial translation from the French original) (August 2010), 318.
29. Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice Courts (2012) OSISA, 14. available at http://www.osisa.org/sites/default/files/open_learning-drc-web.pdf.
30. Id.
31. Id.
32. Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo, <http://www.opensocietyfoundations.org/publications/justice-drc-mobile-courts-combat-rape-and-impunity-eastern-congo>.
33. A number of international organisations and news agencies highlighted the ground-breaking nature of this case: See "Congo Army Colonel Guilty of Ordering Mass Rape on New Year's Day" The Guardian (21 February 2011) available at <http://www.guardian.co.uk/society/2011/feb/21/congo-rape-trial>; "DR Congo Mass Rape Verdicts Send Strong Signal to Perpetrators – UN" UN News Centre (21 February 2011) available at <http://www.un.org/apps/news/story.asp?NewsID=37580&Cr=sexual#UTnhTtZHLIU>; "DR Congo Colonel's Rape Conviction is First Step on Road to Justice" Amnesty International (23 February 2011) available at <http://www.amnesty.org/en/news-and-updates/dr-congo-colonels-rape-conviction-first-step-road-justice-2011-02-23>.
34. For a more in-depth discussion about the challenges and success of these courts see "Helping to combat impunity for sexual crimes in DRC: An evaluation of the mobile gender justice

- courts” supra note 29.
35. T Khan & J Wormington “Mobile Courts in the DRC: Lessons from Development For International Criminal Justice” Centre for Socio-Legal Studies-University of Oxford, available at <http://www.csls.ox.ac.uk/documents/OTJR-KhanandWormington-MOBILECOURTSINTHE DRC-LESSONSFROMDEVELOPMENTFORINTERNATIONALCRIMINALJU.pdf>.
 36. Based on an interview with Edigah Kavulavu, former Kituo officer, transcript on file with the author.
 37. Outreach available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx.
 38. More information on Kituo’s activities can be found on its website at <http://www.kituoacharia.or.ke/>.
 39. See *Chambre d’accusation de la Cour d’appel de Dakar, Sénégal, Ministère Public et Francois Diouf Contre Hissène Habré*. (arre“t no 135) (4 July 2000).
 40. Decision on the Hissène Habré Case and the African Union, Assembly of the Union Seventh Ordinary Session 1-2 July 2006 at Banjul, The Gambia, Decision 127 (VII) available at http://www.africa-union.org/root/au/Conferences/Past/2006/july/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf.
 41. Id.
 42. Decisions of the Committee against Torture, Thirty-sixth Session 19 May 2006, Communication Number 181/2001, available at <http://www.unhchr.ch/tbs/doc.nsf/0/aafdd8e81a424894c125718c004490f6?Opendocument>.
 43. Article 431-6, Senegalese Penal Code.
 44. Article 669, Senegalese Code of Criminal Procedure.
 45. *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) [ICJ No. 144] (20 July 2012) (Belgium v Senegal).
 46. Decision on the Trial of Mr Hissène Habré and the African Union, Assembly of the Union Eighth Ordinary Session, 29-30 January 2007 at Addis Ababa, Ethiopia, Assembly/AU/Dec.157 (VIII), available at <http://www.africa-union.org/root/AU/Conferences/Past/2007/January/summit/doc/Decisions%20and%20Declarations%20-%208th%20Ordinary%20Session%20of%20the%20Assembly.pdf> Belgium v Senegal supra note 45 at para. 28.
 47. *Belgium v Senegal* supra note 45 at para. 12.
 48. African Court of Human and Peoples’ Rights, *Michelot Yogogombaye v. Republic of Senegal*, Application No. 001/2008 (15 December 2009).
 49. ECOWAS Court of Justice, *Hissein Habré v. Republic of Senegal*, ECW/CCJ/JUD/06/10 (18 November 2010), cited in judgment, 35.
 50. “Senegal/Chad: Nobel Winners, African Activists Seek Progress in Habré Trial”, Human Rights Watch (21 July 2010), available at <http://www.hrw.org/news/2010/07/20/senegalchad-nobel-winners-african-activists-seek-progress-habr-trial>.
 51. Decision on Hissène Habré Case, Assembly of the Union, Sixteenth Ordinary Session, 30-31 January 2011, Addis Ababa, Ethiopia, Assembly/AU/Dec.340(XVI), available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf.
 52. Decision on Hissène Habré Case, Assembly of the Union, Seventeenth Ordinary Session, 30 June – 1 July 2011, Malabo, Equatorial Guinea, Assembly/AU/Dec.371(XVII), available at [http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_\(XVII\)_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)_E.pdf).
 53. Decision on Hissène Habré Case, Assembly of the Union, Eighteenth Ordinary Session, 29-30 January 2012, Addis Ababa, Ehtiopia, Assembly/AU/Dec.401(XVIII), available at [http://summits.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20\(XVIII\)%20_E_0.pdf](http://summits.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20(XVIII)%20_E_0.pdf).
 54. Article 7(1), Convention against Torture.
 55. *Belgium v Senegal* supra note 45 at para. 121.
 56. “Hissène Habré: Senegal and AU agree on special tribunal” BBC News (23 August 2012) available at <http://www.bbc.co.uk/news/world-africa-19351938>.
 57. “Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal” Human Rights Watch (12 September 2012) available at <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal> (Habré Q&A).
 58. Id.
 59. Id.
 60. ECOWAS Court of Justice, *Hissein Habré v Republic of Senegal*, Judgment No. ECW/CCJ/JUD/06/10 (18 November 2010) at para. 59.
 61. Habré Q&A supra note 57.
 62. Id.
 63. Human Rights Watch “Hissène Habré Court Opens” (2013) available at <http://www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens>.

CHAPTER 9: MOVING FORWARD

Parties and other stakeholders, including international organisations and civil society, need to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern. As the above examples demonstrate, civil society has been at the forefront of this endeavour by not only encouraging and assisting states that decide to prosecute these crimes, but also by holding them to account using domestic courts when they fail to do so. Moving forward, civil society must continue and expand its efforts in this regard, bearing in mind some of the unexpected challenges that have emerged thus far.

One concrete measure that will enable civil society to better assist prosecutions of international crimes is to increase the capacity of organisations to collect and analyse information regarding international crimes. As Sidorenko notes:

“Civil society and other non-State actors within a State are able to play an important role in collecting and disseminating information about international crimes which may be used in future investigations and prosecutions, thus creating internal pressure within a State to treat allegations of human rights violations seriously. NGOs are likely to be closest to the area where atrocities occur and are arguably free from State-centric bias. A legal empowerment approach to positive complementarity should include the provision of technical expertise to NGOs so as to enable them to collect evidence that may be used in the prosecution of core international crimes.”¹

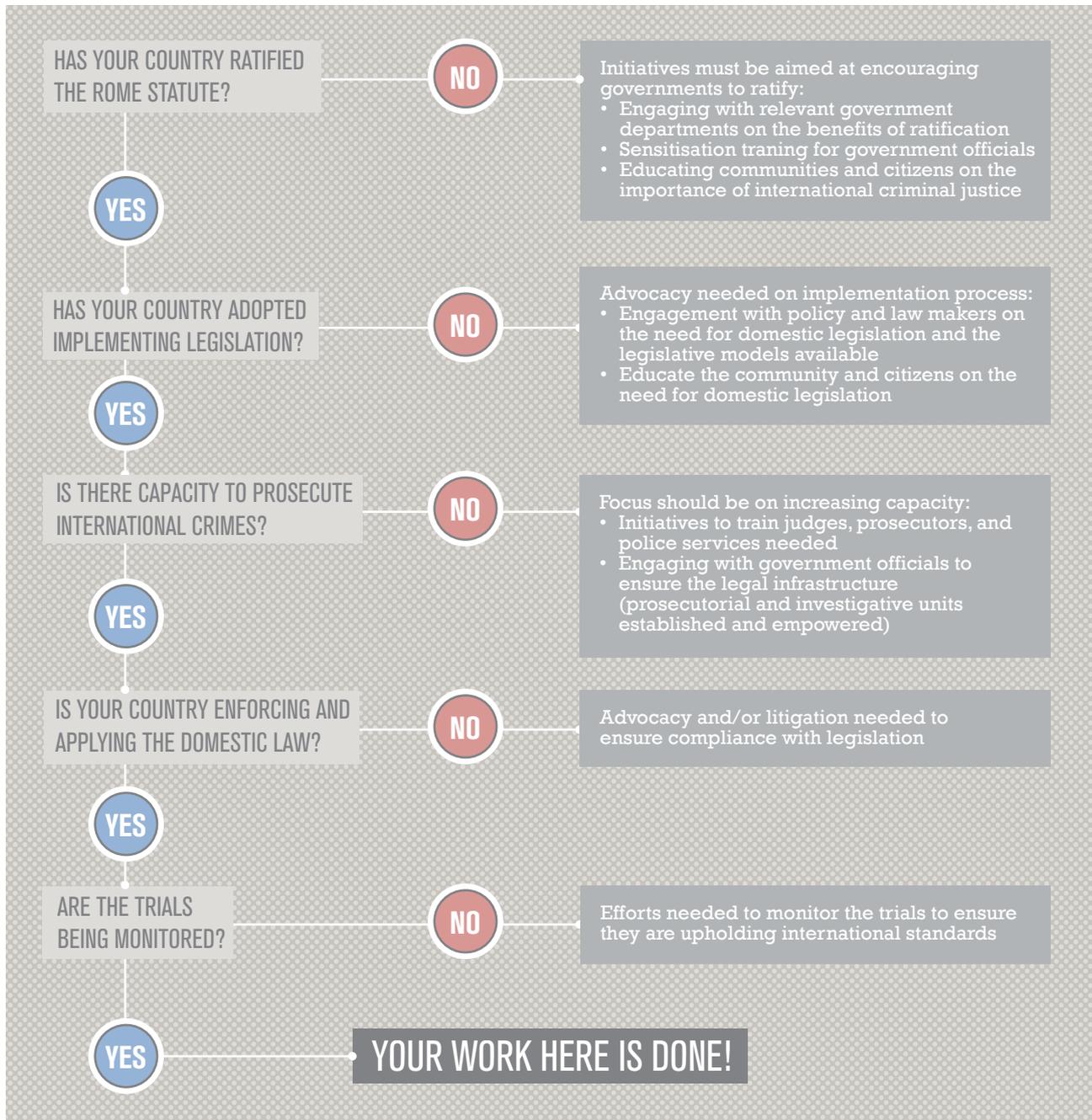
Not only can such information be vital to future domestic prosecutions, it can also be submitted to the prosecutor of the ICC with a view to instigating an investigation where the ICC has jurisdiction and when the national authorities are not fulfilling their role. The Zimbabwe Torture Docket was an example of the former, where information collected by CSOs was handed over to South Africa’s NPA for the purposes of prosecution. Training for civil society organisations in terms of relevant information, as well as domestic legal requirements for evidence-collection, will assist future efforts of a similar nature.

Endnotes

1. A Sidorenko “Legal Empowerment: Capacity Building in Core International Crimes Prosecutions through Technology Applications” FICL, 113-114.

Civil Society: The Possibilities are Endless

Every country is different and depending on the context civil society initiatives will vary. Below is an overview of where civil society assistance may be of value.



CHAPTER 10: CONCLUDING REMARKS AND RECOMMENDATIONS

The international criminal justice project is at a critical moment in its history. Over the past ten years the ICC has established itself both as a significant role player in the international legal order, and as a mechanism capable of delivering justice for victims of crimes of significant gravity, committed by powerful actors. The states parties to the Rome Statute – whose number continues to grow – have taken important steps both towards supporting the ICC in its work, and assuming their own responsibility for combatting impunity through positive complementarity. What is more, CSOs (at all levels, from grassroots to global) have made themselves indispensable to both the ICC and states in this process. At the same time, new challenges have emerged both to the ICC and the international criminal justice project. CSOs will have to redouble their efforts, and develop new approaches, to meet these challenges.

This Report has attempted to highlight the numerous important contributions made by CSOs in the pursuit of international criminal justice in Africa.

Recommendations

CSOs must continue to work to ensure that all African states parties to the ICC adopt ICC implementing legislation that enables them to cooperate with the ICC and comply with the obligations under the principle of positive complementarity whenever possible. In particular:

- Where states have committed to adopting **ICC implementing legislation** but are yet to do so, CSOs must provide technical support and expertise, as well as ensure that priority is given to these efforts;
- Where states have indicated their reluctance or unwillingness to adopt such legislation, CSOs should identify the reasons for this position and work towards reversing it through strategic lobbying and public awareness;
- In drafting future implementing legislation, CSOs should encourage the development of a standardised approach – drawing on the experience of existing legislation (particularly from African states) and international best-practice; and
- In respect of those states that already have implementing legislation, CSOs should work to ensure that the necessary institutional architecture, human capacity and political will exists to give full-effect to such legislation whenever possible.

CSOs must work to ensure that all African states parties comply fully with their **cooperation** obligations when called upon to do so by the ICC. In particular:

- Where cooperation requires implementing legislation under domestic law, CSOs must work to ensure this is promulgated;
- Insofar as instances of on-going or anticipated non-cooperation with requests for arrest are concerned, CSOs must work with domestic and regional partners to ensure cooperation is forthcoming, including using domestic legal avenues where available to force the relevant authorities to cooperate;
- CSOs should continue to work (through networks such as the ANICJ) to share information about the movements of persons wanted by the ICC; and
- Beyond cooperation requests for surrender, CSOs should encourage states to voluntarily assume other cooperation responsibilities, such as the relocation of witnesses and incarceration of convicted persons.

CSOs must continue to ensure that the principle of **positive complementarity** is given effect to within and among African states parties. In particular:

- CSOs must ensure that states have the necessary legal and institutional frameworks, as well as capacity and political will, to prosecute international crimes within their domestic legal systems;
- CSOs must develop relationships with domestic prosecution authorities in order to assess their needs and, where appropriate, undertake supportive or partnering roles in this regard; and
- CSOs should ensure that they have the necessary expertise and capacity to collect and receive information that can later be used in domestic prosecutions.

Finally, insofar as redressing the **relationship between African states and the ICC** is concerned, CSOs must:

- Encourage and support the new ICC prosecutor's efforts to improve relations with African states and the African Union;
- Engage with the new AU chairperson on issues of international criminal justice;
- Work with the AU Commission and other regional legal bodies on the proposed expansion of the ACJHR to include jurisdiction over international crimes, with a view to assessing its feasibility and possible positive contribution to the prosecution of international crimes in Africa; and
- Consider supporting the AU's proposal to take the question of immunity of certain officials to the ICJ, through the UN General Assembly.

FURTHER READING

General Readings

- R Cryer et al *An Introduction to International Criminal Law and Procedure* 2 ed (2010).
- A Cassese *International Criminal Law* 2 ed (2008).
- Curriculum on International Criminal Justice Institute for Security Studies (2012)
[available at http://www.issafrica.org/pubs/Other/ICJ_Curriculum29March12.pdf]
- G Werle *Principles of International Criminal Law* 2 ed (2009).
- CM Bassiouni *International Criminal Law* 3 ed (2008).
- A Cassese (ed) *The Oxford Companion to International Criminal Justice* (2009).
- A Zahar & G Sluiter *International Criminal Law: A Critical Introduction* (2008).
- I Bantekas *International Criminal Law* 4 ed (2010).
- M Drumbl *Atrocity, Punishment, and International Law* (2007).
- G Simpson *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (2007).

International Crimes

- W Schabas *Genocide in International Law* 2 ed (2009).
- Y Dinstein & M Tabory (eds.) *War Crimes in International Law* (1996).
- TLH McCormack & G J Simpson *The Law of War Crimes: National and International Approaches*. (1997).
- KD Askin *War Crimes against Women: Prosecution in International War Crimes Tribunals* (1997).
- CM Bassiouni *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011).
- LN Sadat (ed) *Forging a Convention for Crimes Against Humanity* (2011).
- M Lattimer & P Sands (eds) *Justice for Crimes Against Humanity* (2003).

The International Criminal Court

- W Schabas *An Introduction to the International Criminal Court* 3 ed (2007).
- A Cassese et al *The Rome Statute of the International Criminal Court: A Commentary* (2002).
- W Schabas *Unimaginable Atrocities : Justice, Politics, and Rights at the War Crimes Tribunals* (2012).

Online Resources:

African International Courts and Tribunals

<http://www.aict-ctia.org>

African Network on International Criminal Justice

<http://www.issafrica.org/anij/>

Coalition for the International Criminal Court

<http://www.iccnw.org>

Human Rights Watch, Genocide, War Crimes and Crimes Against Humanity Case Digest

<http://www.hrw.org/reports/2010/01/12/genocide-war-crimes-and-crimes-against-humanity>

Institute for Security Studies – International Crime in Africa Programme

http://www.issafrica.org/programme_item.php?PID=7

Institute for War & Peace Reporting

<http://www.iwpr.net>

International Criminal Court

<http://www.icc-cpi.int/Menus/ICC/Home>

International Criminal Law Network

<http://www.icln.net>

United Nations Crime and Justice Information Network

<http://www.uncjin.org>

If you have any questions about any aspect of this report, or wish to share an experience with SALC regarding your work please do not hesitate to contact us. SALC has no doubt that many more initiatives are underway across the continent, and SALC would love to hear about them.